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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE STATE OF OREGON
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath
River a Tributary of the Pacific Ocean

United States of America and The Klamath Tribes; **STIPULATION TO RESOLVE CONTESTS**

Contestants,

Case No. 169

vs.

Claim No. 22

Donal Dean;

Claimant.

Contests 3724 and 4080

The Oregon Water Resources Department (hereinafter "OWRD"), Claimant Donal Dean (hereinafter "Claimant"), Contestant the United States of America (hereinafter "United States"), and Contestant the Klamath Tribes (hereinafter "Tribes") hereby agree and stipulate as follows:

A. STIPULATED FACTS

1. On November 30, 1990, the Claimant filed Claim 22 with OWRD.
2. On October 4, 1999, the Adjudicator issued his Preliminary Evaluation of Claim 22.
3. The following contests were filed to Claim 22: Contest 3438, filed by the Klamath Project Water Users, was voluntarily withdrawn on April 1, 2004; Contest 3724 was filed by the United States; and Contest 4080 was filed by the Tribes (the United States and the Tribes are hereinafter collectively referred to as "Contestants").
4. Claimant, Contestants, and OWRD agree that Contests 3724 and 4080 can be resolved without the need for further proceedings, pursuant to the terms set forth below.

B. TERMS AND PROVISIONS

1. Claimants, Contestants, and OWRD agree that Claim 22 should be approved by the Adjudicator as described below:

ACREAGE SERVED BY ASPEN CREEK #1, ASPEN CREEK #2, and DEEP CREEK #3

a. POINT OF DIVERSION LOCATIONS:

Aspen Creek #1: NE ¼ SE ¼, Section 20, Township 31 South, Range 11 East,

W.M.

Aspen Creek #2: SE ¼ SW ¼, Section 20, Township 31 South, Range 11 East,

W.M.

Deep Creek #3: NW ¼ SW ¼, Section 22, Township 31 South, Range 11 East,

W.M.

- b. SOURCE: Aspen Creek and Deep Creek, tributary to the Williamson River.
- c. USE: Irrigation of 123.1 acres and stock watering incidental to irrigation.
- d. DIVERSION RATE: A maximum of 3.08 cubic feet per second (c.f.s.) total for all three points of diversion, with the following maximum rates at each point of diversion:

Aspen Creek #1: 1.59 c.f.s.

Aspen Creek #2: 3.08 c.f.s.

Deep Creek #3: 3.08 c.f.s.

- e. DUTY: The cumulative diversions from these points of diversion shall not exceed 2.40 acre-feet/acre/year.
- f. PERIOD OF USE: April 15 through October 1.
- g. PRIORITY DATE: October 14, 1864.
- h. PLACE OF USE:
1. Lands served from Aspen Creek #1, Aspen Creek #2, and Deep Creek #3
(63.5 acres):

SE $\frac{1}{4}$ NW $\frac{1}{4}$ -- 0.8 acres

NW $\frac{1}{4}$ SW $\frac{1}{4}$ -- 26.9 acres

SW $\frac{1}{4}$ SW $\frac{1}{4}$ -- 0.7 acres

Section 29, Township 31 South, Range 11 East, W.M.

SW $\frac{1}{4}$ SE $\frac{1}{4}$ -- 8.3 acres

LOT 3 NE $\frac{1}{4}$ SW $\frac{1}{4}$ -- 1.1 acres

LOT 4 SE $\frac{1}{4}$ SW $\frac{1}{4}$ -- 19.8 acres

Section 30, Township 31 South, Range 11 East, W.M.

NW $\frac{1}{4}$ NE $\frac{1}{4}$ -- 5.8 acres

LOT 1 NE $\frac{1}{4}$ NW $\frac{1}{4}$ -- 0.1 acres

Section 31, Township 31 South, Range 11 East, W.M.

2. Lands served from Aspen Creek #2 and Deep Creek #3 only (59.6 acres):

SW $\frac{1}{4}$ SW $\frac{1}{4}$ -- 6.5 acres

SE $\frac{1}{4}$ SW $\frac{1}{4}$ -- 14.6 acres

Section 20, Township 31 South, Range 11 East, W.M.

NE $\frac{1}{4}$ NW $\frac{1}{4}$ -- 3.4 acres

NW $\frac{1}{4}$ NW $\frac{1}{4}$ -- 11.2 acres

SW $\frac{1}{4}$ NW $\frac{1}{4}$ -- 23.9 acres

Section 29, Township 31 South, Range 11 East, W.M.

ACREAGE SERVED BY DEEP CREEK #5

a. POINT OF DIVERSION LOCATION:

Deep Creek #5: NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 31, Township 31 South, Range 11 East,

W.M.

- b. SOURCE: Deep Creek, tributary to the Williamson River
- c. USE: Irrigation of 54.8 acres and stock watering incidental to irrigation.
- d. DIVERSION RATE: A maximum of 1.37 c.f.s. measured at the point of diversion.
- e. DUTY: 2.40 acre-feet/acre/year.
- f. PERIOD OF USE: April 15 through October 1.
- g. PRIORITY DATE: October 14, 1864.
- h. PLACE OF USE:

LOT 4 SE ¼ SW ¼ -- 8.6 acres

Section 30, Township 31 South, Range 11 East, W.M.

LOT 1 NE ¼ NW ¼ -- 32.2 acres

NW ¼ NE ¼ -- 14.0 acres

Section 31, Township 31 South, Range 11 East, W.M.

ACREAGE SERVED BY DEEP CREEK #4

- a. POINT OF DIVERSION LOCATION:
Deep Creek #4: SW ¼ NW ¼ , Section 28, Township 31 South, Range 11 East,
W.M.
- b. SOURCE: Deep Creek, tributary to the Williamson River.
- c. USE: Irrigation of 112.4 acres and stock watering incidental to irrigation.
- d. DIVERSION RATE: A maximum of 2.81 c.f.s. measured at the point of diversion.
- e. DUTY: 2.40 acre-feet/acre/year.
- f. PERIOD OF USE: April 15 through October 1.

g. PRIORITY DATE: October 14, 1864.

h. PLACE OF USE:

NE ¼ NE ¼ -- 20.4 acres

NE ¼ SE ¼ -- 10.4 acres

NW ¼ SE ¼ -- 28.0 acres

Section 31, Township 31 South, Range 11 East, W.M.

NE ¼ NW ¼ -- 11.2 acres irrigation

NW ¼ NW ¼ -- 20.8 acres irrigation

SW ¼ NW ¼ -- 21.6 acres irrigation

Section 32, Township 31 South, Range 11 East, W.M.

The places of use for all points of diversion are shown more particularly on the map attached hereto as Exhibit 1, which is incorporated by reference. The parties agree and stipulate that the United States and HKM Engineering, Inc. shall be released and held harmless from loss, injury, damage, and/or reduction in value of land and/or the associated water rights that may in any way be connected to the attached map.

2. Claimant agrees to enter into a Stream Restoration Agreement with the Klamath Tribes, contemplating future ecosystem restoration activities on his land. A copy of the Stream Restoration Agreement is attached hereto as Exhibit 2. The Parties agree that should any dispute arise regarding the Stream Restoration Agreement, they will use their best efforts to reach resolution outside the Klamath Basin Adjudication processes and to avoid filing exceptions in the Circuit Court to the Adjudicator's findings and determination.
3. Claimant, Contestants and OWRD agree that pursuant to the terms and provisions of this Stipulation, Contests 3724 and 4080 have been satisfactorily resolved, and such

resolution ends the need for further proceedings before the Administrative Law Judge on these contests to Claim 22.

4. Based on the Stipulation of Claimant, Contestants, and OWRD that Claim 22 and the Contests thereto can be resolved without the need for further proceedings, OWRD adjudication staff hereby recommends to the Adjudicator that Claim 22 be withdrawn from the Office of Administrative Hearings. OWRD adjudication staff further recommends that Claim 22 be approved in the Finding of Fact and Order of Determination issued by the Adjudicator in accordance with the terms of paragraph B.1., above.
5. If the Finding of Fact and Order of Determination issued by the Adjudicator for Claim 22 does not conform to the terms set forth in paragraph B.1., above, Claimant and Contestants reserve any rights they may have to file exceptions to the Finding of Fact and Order of Determination as to Claim 22 in the Circuit Court for Klamath County, and reserve any rights they may have to participate in any future proceedings authorized by law concerning Claim 22.
6. The Parties agree that this Stipulation has been reached through good faith negotiations for the purpose of resolving legal disputes, including pending litigation. The Parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest. The parties agree that this Stipulation shall not be offered as evidence or treated as an admission regarding any matter herein and may not be used in proceedings on any other claim or contest whatsoever, except that the Stipulation may be used in any future proceeding to interpret and/or enforce the terms of this Stipulation. Further, the parties agree that neither the Stipulation nor any of its terms shall be used to

establish precedent with respect to any other claim or contest in the Klamath Basin Water Rights Adjudication.

7. This Stipulation shall be binding upon and shall inure to the benefit of the Parties and their respective heirs, executors, administrators, trustors, trustees, beneficiaries, predecessors, successors, affiliated and related entities, officers, directors, principals, agents, employees, assigns, representatives and all persons, firms, associations, and/or corporations connected with them.
8. Each Party to this Stipulation represents, warrants, and agrees that the person who executed this Stipulation on its behalf has the full right and authority to enter into this Stipulation on behalf of that party and bind that party to the terms of the Stipulation.
9. The terms, provisions, conditions, and covenants of this Stipulation are not severable, except, if any term, provision, condition, or covenant of this Stipulation is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the terms, provisions, conditions, and covenants shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.
10. This Stipulation may be executed in several counterparts and all documents so executed shall constitute one Stipulation, binding on the Parties, notwithstanding that the Parties did not sign the same original or the same counterparts. Delivery of an executed signature page to this Stipulation by facsimile transmission shall be as effective as delivery of an original signed counterpart of this Stipulation.
11. This Stipulation comprises the entire agreement and no promise, inducement, or representation other than herein set forth has been made, offered, and/or agreed upon, and the terms of this Stipulation are contractual and not merely a recital.

12. The Parties agree to bear their own costs and attorney fees.
13. This Stipulation shall be effective as of the date of the last signature hereto.

STIPULATED, AGREED AND APPROVED:

FOR CLAIMANT DONAL DEAN:

Dated: December 15, 2004



STEVEN L. SHROPSHIRE

Jordan Schrader PC

P.O. Box 230669

Portland, OR 97281

Phone: (503) 598-5583

Fax: (503) 598-7373

e-mail: steve.shropshire@jordanschrader.com

FOR CONTESTANT, THE UNITED STATES OF AMERICA:

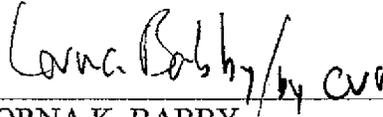
Dated: December 14th, 2004



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FOR CONTESTANT, THE KLAMATH TRIBES:

Dated: December 13, 2004



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WALTER ECHO-HAWK
Native American Rights Fund
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Phone: (303) 447-8760
Fax: (303) 447-7776
e-mail: babby@narf.org
wechohawk@narf.org

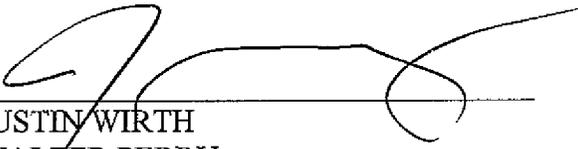


CARL V. ULLMAN
Water Adjudication Project
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FOR THE OREGON WATER RESOURCES DEPARTMENT:

HARDY MEYERS
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Dated: December 16, 2004



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Dated: December 16, 2004



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**STREAM RESTORATION AGREEMENT
DONAL DEAN PROPERTY**

The undersigned Parties, being Donal Dean (the "Landowner"), and the Klamath Tribes, agree to this Stream Restoration Agreement as part of the settlement of the Landowner's water rights claim in the Klamath Basin Adjudication. The Parties agree that the settlement of that claim, and settlement of the contests to that claim, constitute good and adequate consideration for the mutual promises made herein.

Whereas, the Parties agree to pursue the goals of continuing the Landowner's ability to make all or a portion of his livelihood from the lands under consideration (that is, the lands involved in Klamath Basin Adjudication Claim Number 22), while at the same time improving water quality, riparian vegetation, and stream conditions in the Williamson River and its tributaries,

Therefore, the Parties agree as follows:

1. **Site-specific planning.** When funding for the activities described herein becomes available, or it appears that such funding can become available through reasonable efforts of the Parties, the Parties agree to enter into good faith discussions to develop, fund and implement a site-specific, written Stream Restoration Plan (the "Plan") designed to pursue the goals described in this Agreement. In addition to the livelihood goals described above, the restoration goals will include the following:

A. *Riparian management.* The Plan will provide for active management of the riparian area on the Landowner's property, for the long term encouragement and perpetuation of growth of riparian plants like rushes, sedges, and willows. More specifically, it will provide for active management of grazing on the property to protect the growth of riparian vegetation. This will include construction and maintenance of fencing along the riparian area to allow for exclusion of cattle and other stock during all or part of the year, and allowing grazing within the fenced area only as consistent with encouraging and perpetuating the growth of riparian plants.

B. *Return flows.* The Plan will be designed to work toward elimination of irrigation water surface return flow from the Landowner's irrigated lands to the Williamson River and its tributaries. This will be done by improving mechanisms for application of irrigation water to eliminate runoff, and/or by development of small wetlands or similar areas to capture runoff before it reaches a stream.

C. *Ground Water Use.* The Plan will consider the relative benefit of ground water and surface water to the quality and quantity of stream flows in the Williamson River and its tributaries, and will set out means for meeting the Landowner's irrigation needs, consistent with water rights determined in the Klamath Basin Adjudication and any other applicable law, in a way that best improves that quality and quantity.

2. **Measurement and monitoring.** The Plan will provide for measurement and monitoring of the work to determine its efficacy. Modification of the original Plan, to respond to what is learned from monitoring and measurement, will be undertaken as mutually agreed to.

3. **Parties' access.** The Landowner will work with the Tribes to permit reasonable access to the areas subject to the Plan to enable them to carry out such work as is required by the Plan. Access arrangements will be structured to minimize impacts on the Landowner's operations on his land, while allowing the necessary work to be done to meet the goals described in this section as set out in the Plan.

4. **No public access.** No right of access by the general public to any portion of the Landowner's property is conveyed by this Agreement.

5. **Permits Needed for Restoration Work.** If any permits or other authorizations are required for the restoration work undertaken pursuant to this Agreement, responsibility for obtaining such permits or authorizations will be allocated in the Plan or as otherwise agreed to by the Parties.

6. **Control.** The Landowner will retain complete possession and control of his lands as fee simple owner. Nevertheless, the Landowner shall fully cooperate with the Tribes as necessary to implement the restoration Plan.

7. **Assignment and Transfer.** The Tribes may transfer their interests in, and responsibilities under, this Agreement to another person or entity, but only with the consent of the Landowner. The Landowner may transfer his interest in, and responsibilities under, this Agreement to successors in interest to the land described herein without the Tribes' consent. The Landowner may also transfer his interest in, and responsibilities under, this Agreement to a non-successor person or entity, but only with the consent of the Tribes.

8. **Successors.** This Agreement shall be binding upon, and inure to the benefit of, the Parties, and their successors, heirs, or assigns regarding the property described herein.

9. **Notice.** Any notice, notification or other communication that any party desires or is required to give the other Parties shall be sent by first class mail, postage prepaid, and addressed as follows:

To the Landowner: Donal Dean, P.O. Drawer F, Merrill, OR 97633

To the Tribes: The Klamath Tribes, Box 436, Chiloquin, OR 97624

10. **Entire Agreement.** This document sets forth the entire agreement of the Parties regarding this Stream Restoration Agreement and supercedes all prior discussions, negotiations, understandings, or agreements, except those embodied in the settlement documents resolving the Landowner's Claim 22 in the Klamath Basin Adjudication.

11. **Liberal Construction.** Any general rule of construction to the contrary notwithstanding, this Agreement shall be liberally construed in favor of interpretations that will effect the purpose of the Agreement.

12. **Jointly Drafted.** The Parties agree and acknowledge that this Agreement has been drafted and reviewed through joint efforts of their respective legal counsel after full and arms-length negotiations; therefore the usual rule of contractual construction that all ambiguities shall be construed against the drafting party shall not apply to the interpretation of this Agreement.

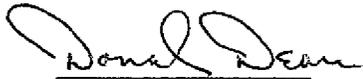
13. **Not an Admission; Limited Use.** This Agreement is part of the resolution of a disputed claim in the Klamath Basin Adjudication. The signatories to this Agreement agree that the Agreement shall not be offered as evidence or treated as an admission regarding any matter herein and may not be used in proceedings on any other claim or contest whatsoever, except that the Agreement may be used in any future proceeding to interpret and/or enforce the terms of this Agreement.

14. **Severability.** If any provision of this Agreement is found to be invalid, the remainder of the provisions shall not be affected thereby.

15. **Counterparts.** The Parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by all Parties and deemed an original instrument thereby.

IN WITNESS WHEREOF the Parties have hereunto set their hands on the day and year below written.

For the Landowner:



12-11-04

Date

For the Klamath Tribes:

Date

11. **Liberal Construction.** Any general rule of construction to the contrary notwithstanding, this Agreement shall be liberally construed in favor of interpretations that will effect the purpose of the Agreement.

12. **Jointly Drafted.** The Parties agree and acknowledge that this Agreement has been drafted and reviewed through joint efforts of their respective legal counsel after full and arms-length negotiations; therefore the usual rule of contractual construction that all ambiguities shall be construed against the drafting party shall not apply to the interpretation of this Agreement.

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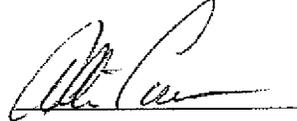
15. **Counterparts.** The Parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by all Parties and deemed an original instrument thereby.

IN WITNESS WHEREOF the Parties have hereunto set their hands on the day and year below written.

For the Landowner:

Date

For the Klamath Tribes:



12-10-04
Date