THIRD AMENDED CIVIL PENALTY SETTLEMENT AGREEMENT

The undersigned parties to this civil penalty proceeding hereby enter into this THIRD amended agreement ("Agreement") as a complete and binding resolution of any civil penalty liability in this matter. Pursuant to paragraphs 4 and 5 of the August 4, 2003, settlement agreement between the parties, the parties hereby voluntarily enter into this Agreement. This Agreement supersedes the June 9, 2000, June 27, 2001, and August 4, 2003, settlement agreements.

The United States Fish and Wildlife Service (Service) contends that Respondents Hudson Bay District Improvement Company and the Walla Walla Irrigation District knowingly diverted flows of the Walla Walla River during the summers of 1998 and 1999 at or near the Cemetery Bridge Dam in Umatilla County, Oregon, and Respondent Gardena Farms Irrigation District #13 (Gardena Farms) knowingly diverted flows from the Walla Walla River during the summers of 1998 and 1999 at or near the Burlingame Dam in Walla Walla County, Washington.

The Service further contends that the foregoing diversion of water flows of the Walla Walla River by Respondents caused the take of bull trout during both 1998 and 1999. The bull trout (Salvelinus confluentus) is a species of wildlife which is listed in 50 CFR § 17.11 as a threatened species. A proposed rule to list the Columbia River distinct population segment of bull trout as a threatened species was published in the Federal Register on June 13, 1997. A final rule listing this bull trout population as a threatened species was published in the Federal Register on June 10, 1998, and became effective on July 10, 1998. Upon the listing effective date, the provisions of 50 CFR § 17.31(a) prohibited unauthorized taking of bull trout. The federal Endangered Species Act (ESA) makes it unlawful for any person to violate any regulation pertaining to any
threatened species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(G)

Respondents contend their activities did not cause a prohibited taking of bull trout.

The parties wish to resolve the current dispute over potential liability for a civil penalty under the ESA in a timely manner without litigation. The parties understand that this Agreement addresses only civil penalty liability for the alleged take of bull trout in 1998 and 1999 and any potential civil penalty liability for the take of bull trout in 2000, 2001, 2002, and 2003 that may have resulted from Respondents’ diversions at or near the Cemetery and Burlingame dams. This agreement does not constitute a Habitat Conservation Plan (HCP) or an Incidental Take Permit (ITP) under Section 10 of the ESA. An underlying basis of this agreement is the intention of the Respondents to develop an HCP or other basin wide conservation plan and to cooperate and work with other entities in the Walla Walla River Basin toward a conservation plan which leaves sufficient instream flows for the protection of bull trout, steelhead, and other species dependent on instream water flows.

COMMITMENTS OF RESPONDENTS

For and in consideration of the compromise of civil penalty liability herein:

A. Respondents hereby waive any right to a Notice of Violation, Notice of Assessment, the opportunity for a hearing, and attorney fees in this matter.

B. Respondents Hudson Bay District Improvement Company and Walla Walla River Irrigation District agree to ensure a minimum instream water flow of 27 cubic feet per second (cfs) through the month of June during 2004, 2005, and 2006, and then a minimum instream flow of 25 cfs during the remainder of 2004, 2005, and 2006 and every year thereafter at the Nursery Bridge Dam. To the extent legal protection of instream flows bypassed by Respondents is available, Respondents agree to obtain that legal protection so long as obtaining such legal protection does not involuntarily require lands to be left dry or prevent other district users from receiving their water. In the event that the total flow in the Walla Walla River before diversions by Respondents is less than the minimum instream flows specified above, Respondents agree that Walla Walla River water shall be bypassed by Respondents and their members. Respondents further agree that minimum water flows past the Nursery Bridge Dam required by this Agreement shall be obtained from the Respondents' water diversions to the extent necessary to secure the required minimum instream water flow. Actions by those other than the Respondents or their members that are recognized by State law as increasing instream flows at Nursery Bridge Dam shall not be used to replace water agreed to be provided by the Respondents as part of this agreement, but shall result in a net increase in minimum flows bypassed at Nursery Bridge Dam. Minimum instream flows shall be monitored multiple times daily below the Nursery Bridge Dam using the best available measurement techniques. Minimum instream flows shall be calculated through
measurements at a staff gage below Nursery Bridge Dam, unless the Service agrees otherwise in writing.

C. Respondents agree to submit, at the earliest possible date, complete applications to the Oregon Water Resources Department to ensure that minimum instream water flows are legally protected to the extent required in Paragraph B above. Copies of the applications and documentation of the legal protection of flows specified in Paragraph B above shall be provided to the Service in the monthly reports required by Paragraph M below. Respondents agree to provide annual reports documenting the bypass of the minimum instream flows and any legal protection of those flows. Nothing in this paragraph alters the responsibility of Respondents to bypass the flows required in Paragraph B.

D. Respondent Gardena Farms agrees to ensure a minimum instream water flow of 19 cfs through the month of June during 2004, 2005, and 2006, and then a minimum instream flow of 18 cfs during the remainder of 2004, 2005, and 2006 and every year thereafter at just below the Burlingame Diversion. To the extent legal protection of instream flows bypassed by Respondent is available, Respondent agrees to obtain that legal protection so long as obtaining such legal protection does not involuntarily require lands to be left dry or prevent other district users from receiving their water. In the event that the total flow in the Walla Walla River before diversions by Respondent is less than the minimum instream flows specified above, Respondent agrees that Walla Walla River water shall be bypassed by Respondent and its members. Respondent further agrees that minimum water flows past the Burlingame Diversion required by this Agreement shall be obtained from the Respondent's water diversions to the extent necessary to secure the required minimum instream water flow. Actions by those other than the Respondent or its members that are recognized by State law as increasing flows at the Burlingame Diversion shall not be used to replace water agreed to be provided by the Respondent as part of this agreement, but shall result in a net increase in minimum flows bypassed at the Burlingame Diversion. Minimum instream flows shall be monitored multiple times daily at or below the Burlingame Dam using the best available measurement techniques. Minimum instream flows shall be calculated through measurements at a staff gage below Burlingame Diversion, unless the Service agrees otherwise in writing.

E. Respondent agrees to submit, at the earliest possible date, complete applications to the Washington Department of Ecology to ensure that minimum instream water flows are legally protected to the extent required in Paragraph D above. Copies of the applications and documentation of the legal protection of flows specified in Paragraph D above shall be provided to the Service in the monthly reports required by Paragraph M below. Respondent agrees to provide annual reports documenting the bypass of the minimum instream flows and any legal protection of those flows. Nothing in this paragraph alters the responsibility of Respondent to bypass the flows required in Paragraph D.

F. When water flows in the Walla Walla River at the Burlingame Diversion and Nursery Bridge
Dam decrease to 75 cfs, it is agreed that additional diversion rates shall be limited to a 10 cfs change over 24 hours. Ramping trigger flows shall be measured immediately below the Nursery Bridge Dam and immediately below the Burlingame Diversion using the best available measurement techniques. Measurement techniques shall include using staff gages at the dams, flows through the ladders, and flows through rated bypasses, unless otherwise approved by the Service in writing. In the event of sudden high water, if the Respondents maintain the required minimum instream flows, or 10 cfs or less above the minimum flows, then ramping rates shall not apply. If water 10 cfs above the minimum instream flows required in Paragraphs B and D of the Agreement go past the Burlingame Diversion or Nursery Bridge Dam, then the ramping rates and triggers shall apply.

G. Respondents agree not to move or relocate diversions in a manner that reduces existing water flows between Cemetery Bridge and Nursery Bridge.

H. It is further agreed that the Hudson Bay District Improvement Company Point of Diversion #1 canal shall not be used unless a fish screen meeting NOAA Fisheries screening criteria is constructed and a flow gage is installed. All other diversions operated or otherwise controlled by Respondents in listed fish streams shall be screened, operated, and maintained in accordance with NOAA Fisheries criteria to avoid listed fish impingement or entrainment. The existing screen at Smith Ditch may be operated and maintained in its present form, provided there is no impingement or entrainment of bull trout or steelhead. If changing or removing gravel berms (for example, at Eastside diversion or Smith Ditch), Respondents shall monitor for fish strandings or entrainment at the time the berm is changed or moved and as water recedes, as described in Attachment 1. Respondents shall notify the Service and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in writing and by telephone within one working day if bull trout are killed, isolated, stranded, or entrained; and shall notify NOAA Fisheries and CTUIR in writing and by telephone within one working day if steelhead or Chinook salmon are killed, isolated, stranded, or entrained.

I. Respondents agree to participate and coordinate with the CTUIR in implementing the CTUIR Annual Operation Procedures plan for the Walla Walla Basin.

J. Respondents agree to cooperate in fish salvage operations on the Walla Walla River or within diversion screens or canals within their irrigation districts. Respondents shall cooperate with the CTUIR, Oregon Department of Fish and Wildlife (ODFW), Washington Department of Fish and Wildlife (WDFW), or Service as described in Attachment 1.

K. Respondents shall contact the WDOE and OWRD to determine how much water has been legally protected in stream by those other than the Respondents and their members. As agreed in Paragraphs B and D above, the Respondents shall increase minimum instream flows past Nursery Bridge Dam or the Burlingame diversion by the amount of water the appropriate state has calculated as reaching the Respondents' diversions. Respondents agree to report how actions by
those other than the Respondents or their members influence instream flows at Respondents' diversions in monthly reports. These reports shall be provided through July 15, 2007.

L. Respondents agree to daily monitor and track the water flows that are released below the Nursery Bridge and Burlingame Dams, and provide this information in the monthly reports. In addition, hydrologic monitoring of temperature and discharge shall be conducted from just above Cemetery Bridge downstream to just below the Burlingame Dam. Monitoring shall include transects with standard measurements to USGS criteria (Attachment 2). Stream temperatures, flows, and diversions shall be monitored at the Washington and Oregon locations as described in Attachment 3. Stage discharge curves shall be developed at each site. Monitoring shall continue between May 1 and November 30, 2004, 2005, and 2006; and between May 1 and June 30, 2007, provided it is safe to do so at those times. Another entity or agency may conduct or contribute to this monitoring, but Respondents shall ensure that the monitoring is conducted pursuant to Attachment 3 to this Agreement.

M. Monthly reports shall be submitted no later than the 15th day of each month until July 15, 2007, and shall include data gathered the previous month pursuant to this Agreement. The monthly reports shall include all data referred to in the paragraphs above, including all fish and salvage data; instream flow quantities below Nursery Bridge Dam and Burlingame Diversion; summaries of Respondents' activities in support of this Agreement; steps taken to ensure that the minimum instream water flows required in Paragraphs B and D are legally protected; and diversion quantities and hydrological monitoring data as described in attachment 3. An annual monitoring report summarizing all of the data obtained from January 31, 2004 through January 31, 2005, shall be provided to the Service by no later than February 28, 2005, with subsequent annual reports due on February 28, 2006, and February 28, 2007. The annual report shall include, but is not limited to: a comparison of fish salvage results from previous years; summaries of Respondents' activities in support of this Agreement; results of steps taken to ensure that the minimum instream water flows required in Paragraphs B and D are legally protected; and diversion quantities and hydrologic monitoring data not previously provided in monthly reports per Attachment 3. All monitoring data required by this Agreement not otherwise required in the August 4, 2003, settlement agreement shall be collected beginning within one week of the effective date of this Agreement and provided to the Service through July 15, 2007, unless otherwise specified by the Service in writing. The Respondents may provide the reports via a link to a website or other system, providing that the Service can easily access, utilize, and reproduce the information. Otherwise, five copies of each report with a supplemental CD or disk of spreadsheets and other data tables shall be sent to: Susan Martin, Supervisor, U.S. Fish and Wildlife Service, Upper Columbia River Basin Field Office, 11103 E. Montgomery Drive, Spokane, Washington 99206. Fax: (509) 891-6748; Phone: (509) 891-6839. All notifications and reports required by this Agreement shall be made to the above contact unless otherwise specified in writing by the Service.
GENERAL PROVISIONS

1. The effective date of this Agreement shall be the date on which all parties have signed the Agreement.

2. If Respondents fail to fully perform their commitments under this Agreement, the Service may institute a formal civil penalty proceeding against Respondents or seek enforcement of the terms of this Agreement and other appropriate remedies. In the event the Service institutes any civil penalty proceeding by reason of breach of this Agreement, Respondents shall be entitled to any required notices and opportunities to petition for relief or request a hearing. The Service is satisfied with Respondents’ compliance with the minimum instream flow required by Paragraphs B and D in the June 9, 2000, June 27, 2001, and August 4, 2003, settlement agreements and based on available information agrees not to pursue enforcement actions with respect to flow diversions by Respondents between 1998 and 2003.

3. The provisions of this Agreement shall apply to and be binding upon the parties hereto, their members, and their respective successors and assigns.

4. This written Agreement (and the documents incorporated by reference hereto) is the final and sole agreement between the parties. This Agreement may be modified. Any modifications of this Agreement shall be in writing and executed by the parties.

5. Pursuant to Paragraph 4 above, the parties may extend the duration of the Agreement after necessary modifications are made based on monitoring data required by this Agreement, other appropriate information is considered, and satisfactory progress is made toward completing a basin wide conservation plan. Renewal of this Agreement prior to the completion of an approved long term HCP under Section 10 of the ESA or other binding long term agreement approved by the Service may require instream flows in addition to the minimum flows required by this Agreement. The increased flows may come from sources other than the Respondents. It is agreed that any commitments made by Respondents addressing instream flows at the Respondents’ diversions in an approved long term HCP under Section 10 of the ESA or other binding long term agreement between the Respondents and the Service will supersede the commitments made by Respondents in this Agreement.

THE UNITED STATES FISH AND WILDLIFE SERVICE hereby agrees that full compliance with this Agreement will satisfy any civil penalty liability Respondents may have for the alleged ESA violations cited herein and shall not attempt to institute any civil penalty proceeding or require any further mitigation from Respondents or their agents with respect to flow diversions by Respondents at the Nursery Bridge Dam and Burlingame Dam in the Walla Walla River during 1998, 1999, or Respondents’ diversions in compliance with the June 9, 2000, June 27, 2001, and August 4, 2003, settlements; and this Agreement through January 31, 2007.
JON BROUGH
Hudson Bay District Improvement Company

BRENT STEVENSON
Walla Walla River Irrigation District

STUART A. DURFEE
Gardena Farms Irrigation District #13

SUSAN MARTIN
Representative of the Complainant
Supervisor
Upper Columbia Fish and Wildlife Office
U.S. Fish and Wildlife Service

Date

6-24-04
Date

Date

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