

Signed : Aug 27, 2001

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)
Plaintiff,)

and)

Civil No. 98-3034-HO

WATERWATCH OF OREGON, INC.,)
TROUT UNLIMITED, PACIFIC COAST)
FEDERATION OF FISHERMEN)
ASSOCIATION, INSTITUTE OF)
FISHERIES RESOURCES, KLAMATH)
FOREST ALLIANCE, OREGON)
NATURAL RESOURCES COUNCIL,)
SISKIYOU REGIONAL EDUCATION)
PROJECT, SIERRA CLUB,)
NORTHCOAST ENVIRONMENTAL)
CENTER, ENVIRONMENTAL)
PROTECTION INFORMATION CENTER)
CURRY COUNTY GUIDES)
ASSOCIATION, NORTHWEST)
SPORTFISHING INDUSTRIES)
ASSOCIATION,)
Plaintiff-Intervenors,)

CONSENT DECREE

and)

STATE OF OREGON by and through the)
STATE OF OREGON WATER)
RESOURCES COMMISSION)
Plaintiff-Intervenor-Applicant,)

v.)

GRANTS PASS IRRIGATION)
DISTRICT,)
Defendant.)

1 **I. Recitals**

2 WHEREAS, continuing disputes over interim and long-term fish passage
3 measures at the Savage Rapids Dam (Dam) have resulted in this pending federal court
4 case under the Endangered Species Act and a water right cancellation case now pending
5 in the Supreme Court of the State of Oregon, No. CA A104117 (the State Case);

6 WHEREAS, the parties to the State Case include the District, the Water
7 Resources Department of the State of Oregon, the Water Resources Commission of the
8 State of Oregon, and WaterWatch of Oregon, Inc.;

9 WHEREAS, the State of Oregon wishes to intervene in this action to facilitate a
10 settlement in this case and the State Case, and the existing parties consent to the State's
11 intervention;

12 WHEREAS, the Grants Pass Irrigation District (the District) acknowledges that it
13 has a legal duty to refrain from incidental take of Southern Oregon/Northern California
14 coastal (SONC) coho salmon, and such other anadromous species inhabiting the Rogue
15 River as may be listed under the Endangered Species Act (ESA) and subject to the take
16 prohibition, without an incidental take permit (ITP).

17 WHEREAS, in the State Case, the State of Oregon has canceled a temporary
18 water use permit, permit number 50957, representing approximately one-third of the
19 District's water needs as a result of the District failing to exercise due diligence in
20 removing the Dam;

21 WHEREAS, the District appealed the cancellation order to the Oregon Court of
22 Appeals, which appeal has been dismissed by the Court of Appeals;

23 WHEREAS, the District has petitioned the Supreme Court of the State of Oregon
24 for review of the State Case;

25 WHEREAS, the parties to the State Case have agreed to hold consideration of the
26 petition for review of the State Case in abeyance to work out a global settlement;

1 WHEREAS, the District desires to obtain an incidental take permit for its water
2 diversion operations;

3 WHEREAS, the District desires to prevent the order canceling water use permit
4 number 50957 from becoming final, and to have the permit extended and certificated so
5 that the District shall have a reliable and secure source of irrigation water for its patrons
6 in the total amount of up to 149.26 cubic feet per second,

7 WHEREAS, the Plaintiff and Plaintiff-Intervenors desire the District to end water
8 diversions at the Dam and allow for the Dam's removal by a date certain;

9 WHEREAS, the parties desire an opportunity to obtain federal, state, and/or other
10 funding to implement a Pumping/Dam Removal Plan, as defined in paragraph II;

11 WHEREAS, the parties believe that a negotiated settlement of all outstanding
12 disputes is in the best interest of all concerned; and

13 WHEREAS, the parties recognize that the success of this settlement depends upon
14 the continuing jurisdiction of the District Court for implementation and enforcement;

15 THEREFORE, the parties have voluntarily entered into the following agreement
16 with the understanding that it will be entered as a judicial order by this Court.

17
18 **II. DEFINITIONS**

19 For purposes of this Decree, all references to:

20 A. "Dam" mean Savage Rapids Dam.

21 B. "Pumping/Dam Removal Plan" mean a plan to replace Savage Rapids Dam
22 with pumps meeting NMFS screening criteria and remove the Dam, based on
23 Reclamation's Planning Report/Final Environmental Statement (PR/FES), entitled "Fish
24 Passage Improvements - Savage Rapids Dam," filed on August 30, 1995, or as modified
25 by Reclamation advance planning.

26 C. "District" mean Grants Pass Irrigation District.

 D. "ESA" mean the Endangered Species Act.

 E. "HCP" mean habitat conservation plan.

1 F. "ITP" mean incidental take permit.

2 G. "Parties" mean the Plaintiff, Plaintiff-Intervenors, and the Defendant.

3 H. "State of Oregon" mean the Oregon Water Resources Commission and the
4 Water Resources Department.

5 **III. GENERAL PURPOSE**

6 Savage Rapids Dam, located on Oregon's Rogue River, was constructed by the
7 Grants Pass Irrigation District in 1921. The Dam and the operation of the Dam cause
8 harm to five runs of anadromous fish, including SONC coho salmon listed as threatened
9 under the ESA. The sole function of the Dam is to divert water from the Rogue River to
10 meet the District's irrigation needs. Modern pumps with screens can be installed and the
11 Dam can be safely removed to better serve the District's water diversion needs.

12
13 The parties support the Pumping/Dam Removal Plan as the best and only
14 permanent solution to solving the fish passage problems at the Dam. This Decree gives
15 the parties an opportunity to obtain federal, state, and/or other funding to implement the
16 Pumping/Dam Removal Plan, while setting a date certain for cessation of diversion
17 operations at the Dam, and allowing for the Dam's ultimate removal.

18 This Decree establishes the District's commitments with respect to fish passage
19 measures for all anadromous fish at the dam until the dam is removed, and at the pumps
20 once installed. These commitments shall be the basis for an HCP and a new ITP
21 application.

22
23 Upon entry of this Decree, the District's obligations with respect to anadromous
24 fish runs in the Rogue River shall be governed by this Decree, the one-year ITP issued on
25 May 4, 2001, and after issuance of the new ITP referenced in paragraph VI, also by that
26 ITP and the Implementation Agreement that accompanies that ITP.

- This Decree also establishes the process by which the District's water use permit
50957 will be extended, amended and certificated, and by which the District's point of

1 diversion under water certificate 50650 will be transferred to a location downstream of
2 Savage Rapids Dam.

3 **IV. AUTHORIZING AND FUNDING LEGISLATION**

4 The non-federal parties have been seeking and agree to continue to seek
5 authorizing and funding legislation for implementing the Pumping/Dam Removal Plan.
6 As a result of these efforts, on October 23, 2000, United States Senators Smith and
7 Wyden of Oregon introduced the "Savage Rapids Dam Act of 2000", S. 3227. No action
8 was taken on this Act before the close of the 2000 Congressional Session, but it sets forth
9 the elements of a funding package that the non-federal parties have agreed to support.

10 Those elements include authorization and funding for installation of properly screened
11 pumps capable of diverting 150 cubic feet per second; dam removal; power assistance to
12 the District; sediment management; a five year warranty that the pumps will be free from
13 defects in design, specifications, and installation; riparian and fishery enhancements; and
14 recreational enhancements. The non-federal parties agree to continue to support
15 introduction and passage of legislation similar to the "Savage Rapids Dam Act of 2000".
16

17 The parties recognize that the exact terms of any federal funding package are
18 subject to Congressional action and that certain elements of the funding package may not
19 be obtained, may not be fully funded, or may require local cost-share. The parties
20 recognize that some elements of the funding package such as those for riparian, fishery,
21 and recreational enhancements are not essential to the District, but these elements of the
22 funding package are important for community support of the legislation. The parties
23 agree that failure to obtain authorization or funding for elements of the funding package
24 shall not constitute grounds for withdrawing support for the Pumping/Dam Removal
25 Plan.
26

The parties also agree to seek and support funding from other federal, state, local,
or private funding sources and programs to implement the Pumping/Dam Removal Plan.

1 In pursuing funding options, the parties shall cooperate with each other and act in
2 good faith.

3 **V. DISTRICT'S DUTIES AND OBLIGATIONS**

4 **A. General Duties**

5 1. The District shall use its best efforts to obtain federal and/or state
6 authorizing legislation and funding for the Pumping/Dam Removal Plan, and to
7 implement the Pumping/Dam Removal Plan as soon as possible. The District shall
8 cooperate fully in the preparation of all plans and studies concerning the Pumping/Dam
9 Removal Plan.
10

11 2. The District shall make District rights-of-way available as needed and
12 assist with securing other needed rights-of-way and permits necessary for implementing
13 the Pumping/Dam Removal Plan.
14

15 3. The District shall comply with all terms and conditions of this Decree, the
16 one-year ITP issued on May 4, 2001, the new ITP and accompanying Implementation
17 Agreement once issued, and its water right certificates.
18

19 **B. Duties with Respect to Securing Authorizing and Funding Legislation**

20 1. The District shall continue to engage and fund a lobbyist who is mutually
21 acceptable to the parties (the firm of Ball Janik LLP is acceptable), to assist the parties on
22 a continuing basis in obtaining authorization and funding for implementation of the
23 Pumping/Dam Removal Plan. The District shall commit up to \$50,000 for lobbying
24 expenses in 2001 and for each year thereafter until authorization and funding is achieved
25 or until the District ceases diversion operations at the Dam as provided in paragraph
26 V.C.3 below.

1 2. The District shall send to its patrons timely action alerts prepared in
2 consultation with the lobbyist, which seek patron support for federal and state funding for
3 the Pumping/Dam Removal Plan and give direction to the patrons as to how they can
4 assist.

5 3. Under the direction of the lobbyist, the District shall testify in support of
6 the Pumping/Dam Removal Plan and the elements of the funding package before such
7 public and private bodies as may be required.

8 4. The District shall cooperate fully with the lobbyist in all aspects of
9 promoting and obtaining funding for, and implementation of, the Pumping/Dam Removal
10 Plan, making it clear at all times to all persons that the District fully supports funding for
11 and implementation of the Pumping/Dam Removal Plan and the elements of the funding
12 package.

13 **C. The District's Obligations with Respect to Operation and Removal of**
14 **Savage Rapids Dam.**

15 1. With respect to operations of the Dam from the date of this Decree
16 through May 4, 2002 the District shall implement and perform all measures and meet all
17 conditions and obligations set forth in the one-year ITP attached as Exhibit 1 to this
18 Decree.

19 2. With respect to operations of the Dam from the expiration of the one-year
20 ITP until diversion operations at the Dam cease as provided in paragraph V.C.3 below,
21 the District shall continue to implement and perform all measures and meet all conditions
22 and obligations set forth in the one-year ITP attached as Exhibit 1 to this Decree and in the
23 Habitat Conservation Plan on which the one-year ITP is based or in subsequent ITP's.
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1 3. The District shall facilitate and allow installation of pumping plants as
2 described in this Decree to replace the Dam, and shall cease operating the Dam as its
3 diversion facility at such time as fully operational and properly screened pumping plants
4 capable of diverting 150 cubic feet per second have been installed. If the pumps are
5 installed by the Bureau of Reclamation they shall be deemed fully operational at the time
6 the Bureau declares them to be operational. Regardless whether or not operational
7 pumping facilities have been installed, the District shall cease operating the Dam as its
8 diversion facility by November 1, 2005. This deadline may be extended up to but not
9 beyond November 1, 2006 on account of force majeure as provided in paragraph X. B.
10 below.

11
12 4. At such time as fully operational and properly screened pumping plants
13 capable of diverting 150 cubic feet per second have been installed, but no later than
14 November 1, 2005 (this date may be extended up to but not beyond November 1, 2006 on
15 account of force majeure as provided in paragraph X.B. below):

16 a. The District shall no longer use Savage Rapids Dam for diverting
17 water, or for any other purpose.

18
19 b. The District shall transfer its 800 cfs power right, or so much thereof as
20 is transferable, to an instream water right to be held by the State of Oregon. This will
21 assure adequate natural flow water is available at the District's new pumping plants for
22 operation of the pumps, and will provide instream flow fishery benefits.

23 c. The Dam shall thereafter be managed as a non-operating facility in a
24 manner that is most beneficial to fish. It shall be managed without a reservoir pool
25 except to the extent needed to operate the south fish ladder and as otherwise would prove
26 most beneficial to fish as determined by the National Marine Fisheries Service in
- coordination with the Oregon Department of Fish and Wildlife.

1 d. Unless purchased by a party for removal as authorized in any
2 legislation passed to implement the Pumping/Dam Removal Plan, the District shall
3 remain the owner of the Dam until it is removed, but shall only be obligated to maintain it
4 as it is currently maintained between irrigation seasons. In this regard the District shall
5 still be required to maintain the fish ladders and insure that they are operating correctly,
6 to maintain the fencing along the fish ladders, to monitor fish daily during high water for
7 possible stranding, and to rescue and return stranded fish to the river throughout the year.
8

9 e. The Dam shall be removed as soon thereafter as funding, project
10 planning and construction allow. All parties or their designated representatives shall
11 thereafter have the right to remove the Dam, and the District shall fully cooperate with all
12 removal efforts. The District shall allow full access to the dam site and allow use of its
13 adjacent property as needed for implementation of dam removal. The District shall not
14 be required to make any financial contribution toward removal of the Dam.

15 5. The parties acknowledge that circumstances may arise that would make it
16 desirable to the parties to modify the deadlines stated in subparagraph V.C. 3 and 4
17 above, and therefore the parties may by mutual agreement and consent extend these
18 deadlines.
19

20 **D. The District's Obligations with Respect to Operation of Pumps.**

21 1. Once pumping facilities that are screened to National Marine Fisheries Service
22 standards have been installed, the District may operate the pumping facilities throughout
23 the entire irrigation season. Once the screens have been shown to be operating properly,
24 no ongoing monitoring measures shall be required.
25

26 2. The District shall keep the screens, screen seals, and any associated trash racks
and bypass systems in good operating condition and repair. Any gaps in the screens or

1 seals shall be immediately eliminated, and debris shall be removed from the screens,
2 trash racks, and bypass on a daily basis.

3 **VI. INCIDENTAL TAKE PERMIT/HABITAT CONSERVATION PLAN**

4 **A. Incidental Take Permit (ITP) Application**

5 Within thirty days after execution of this Decree the District shall submit a new
6 application for a new ITP consistent with this Decree. This application shall include a
7 habitat conservation plan (HCP) that provides for measures, conditions, and duties as
8 provided in paragraphs III, IV, and V of this Decree, and that is otherwise consistent with
9 this Decree.
10

11 **B. ITP**

12 1. NMFS will process the District's application for a new ITP expeditiously
13 and in good faith so that it can become effective upon the expiration of the one-year ITP
14 dated May 4, 2001.
15

16 2. The HCP for any new ITP issued by NMFS shall include those
17 requirements of Paragraphs III, IV, and V of this Decree that are appropriate for an HCP.

18 3. The non-federal parties shall support issuance of a new ITP that is
19 consistent with this Decree.

20 4. The approval of the new ITP application consistent with the terms of this
21 Decree and issuance of a new ITP that is consistent with the terms of this Decree is
22 anticipated by the parties, but the parties recognize that the permitting process must be
23 followed. If for some reason NMFS should determine that it cannot approve the new ITP
24 application consistent with this Decree, then any disputes concerning the denial of the
25 application shall be brought to this Court for determination.
26

- 5. The parties recognize that it may be necessary for NMFS to issue another
short-term permit or permits upon expiration of the 2001 permit to allow adequate time

1 for required analysis of the effects of issuing a long-term ITP consistent with this Decree.
2 NMFS shall have discretion to extend the deadline for submission of an application for a
3 long-term permit consistent with this Decree and to request instead an application for
4 another short-term permit or permits.

5
6 **VII. STATE CASE – RESOLUTION OF DISTRICT WATER RIGHT ISSUES**

7 **A. Extension, Amendment and Certification of Permit 50957.**

8 Upon entry of this Consent Decree, the Oregon Water Resources Commission
9 (OWRC) or the Oregon Water Resources Department (OWRD) shall issue an order
10 proposing to extend Permit 50957 to December 31, 2001, to amend the point of diversion
11 under Permit 50957 as described in paragraph VII.A.6, and proposing to issue a water
12 right certificate to the District consistent with the following requirements:

13
14 1. The certificate shall include all standard conditions for certificates issued
15 by the OWRD.

16 2. The certificate shall require the District to continue to implement the
17 conservation measures and plan described in Chapter 7 and 11, Grants Pass Irrigation
18 District Water Management Study, March, 1994 on an ongoing basis with an interim goal
19 of achieving a seasonal average rate of diversion of 130 cfs by November, 2005.

20
21 3. The certificate shall allow for the diversion of water to irrigate the lands
22 described in the permit not to exceed 52.32 CUBIC FEET PER SECOND or its
23 equivalent in case of rotation, measured at the point of diversion.

24 4. The right to use water under the certificate shall be in addition to that
25 described by Certificate recorded at page 50650, State Record of Water Right Certificates
26 for a total diversion amount not to exceed 149.26 CUBIC FEET PER SECOND.

5. The amount of water used for irrigation under the certificate, together with
the amount secured under any other right existing for the same lands, shall be limited to a

1 diversion of ONE FIFTY-SECOND (1/52) of one cubic foot per second (or its
2 equivalent) and 6 acre-feet per year for each acre irrigated during the irrigation season of
3 each year from live flow and storage.

4
5 6. The certificate shall contain conditions requiring the District to comply
6 with the terms and conditions of this decree. The certificate shall specifically prohibit
7 diversions at the Dam by November 1, 2005, unless extended up to but not beyond
8 November 1, 2006 on account of force majeure as provided in paragraph X.B of this
9 decree. The certificate shall authorize Savage Rapids Dam as the point of diversion only
10 until November 1, 2005, unless extended up to but not beyond November 1, 2006 on
11 account of force majeure as provided in paragraph X.B. of this decree, and shall authorize
12 a new point of diversion downstream from Savage Rapids Dam after November 1, 2005,
13 to accommodate pumps to be located downstream, or upon installation of pumps,
14 whichever is sooner.

15 **B. Issuance of Certificate**

16
17 Upon entry of this Consent Decree and issuance of a final order extending, amending
18 and certificating permit 50957 as described in paragraph VII. A above, the OWRD shall
19 issue a certificate of water right as described in paragraph VII. A above.

20 **C. Stipulated Amendment to Existing Certificate**

21 Upon entry of this Consent Decree and issuance of the certificate described in
22 paragraph VII.B above, the District shall apply for, and the OWRD shall process, a
23 transfer of the point of diversion under Certificate #50650 to specifically prohibit
24 diversions at the Dam after November 1, 2005, unless extended up to but not beyond
25 November 1, 2006 on account of force majeure as provided in paragraph X.B of this
26 decree, and to authorize a new point of diversion downstream from Savage Rapids Dam
after November 1, 2005, to accommodate pumps to be located downstream, or upon
installation of pumps, whichever is sooner. Upon issuance of a final order approving the

1 transfer, the OWRD shall issue an amended certificate showing the change in point of
2 diversion.

3 **D. Dismissal of the District's Petition for Review in the Oregon Supreme Court**
4 **and its Petition for Judicial Review in Jackson County Circuit Court.**

5 The District, the State of Oregon Water Resources Department and Commission, and
6 WaterWatch of Oregon, Inc. agree that they will file or support motions in the Oregon
7 Supreme Court to hold the District's pending petition for review in abeyance until the
8 order and certificates referred to in VII A, B, & C become final either by expiration of the
9 applicable appeal periods without appeal being filed or after final resolution of any
10 appeal filed by any person or entity. If no appeals are filed by any person or entity with
11 respect to the order or certificate referred to in VII A & B within the applicable appeal
12 periods, the order referred to in VII A will be deemed to be final. If an appeal is filed by
13 any person or entity, the parties agree to file or support motions in the Oregon Supreme
14 Court and in Jackson County Circuit Court to keep the respective cases in abeyance or
15 stayed until final resolution of the appeal or appeals. Within 14 days after the order
16 referred to in VII A and the certificates referred to in VII B & C have become final, the
17 Water Resources Commission agrees to withdraw the orders involved in the pending
18 judicial review cases. Within 14 days after withdrawal of the orders, the District agrees
19 to move to voluntarily dismiss its petition for review pending in the Oregon Supreme
20 Court and its petition for judicial review pending in Jackson County Circuit Court. The
21 parties will make all efforts to ensure that those cases are handled in a manner that allows
22 for implementation of the provisions in paragraphs VII A, B & C. No party will seek
23 costs or attorney fees to be awarded to any party.
24

25 **VIII. DUTIES OF THE UNITED STATES**

26 **A. General Duties of the United States**

Every federal agency involved in the implementation of the Pumping/Dam
Removal Plan shall cooperate in good faith to implement the provisions of this Decree

1 provided, however, that nothing in this Decree shall be construed to impose any
2 obligations upon the United States contrary to legal limitations on the ability of agents of
3 the United States to engage in lobbying.

4 **B. Duties of the National Marine Fisheries Service (NMFS)**

5 1. Assuming a new ITP is issued upon the expiration of the 2001 ITP, NMFS
6 agrees that it will not seek to enjoin water diversions at Savage Rapids Dam to prevent
7 incidental take of any ESA-listed anadromous fish species covered by this Decree, or
8 seek civil penalties for incidental take of all such listed species occurring after entry of
9 this Decree, provided that the District complies with the provisions of this Decree, the
10 one-year ITP issued on May 4, 2001, and the new ITP and accompanying
11 Implementation Agreement once issued.
12

13 2. Nothing herein shall prevent or limit NMFS from enforcing any provisions
14 of, or exercising any rights under, this Decree, the one-year ITP issued on May 4, 2001,
15 and the new ITP and accompanying Implementation Agreement after it is issued.

16 **IX. DUTIES OF THE INTERVENORS**

17 A. All intervening entities shall cooperate in good faith to implement the provisions
18 of this Decree. WaterWatch of Oregon, Inc. shall continue its efforts in working with the
19 District and its lobbyist to obtain authorization and funding at the federal and state levels
20 for implementing the Pumping/Dam Removal Plan.

21 B. The intervening entities agree that they will not seek to enjoin water diversions at
22 the Dam to prevent incidental take of all ESA-listed anadromous fish species covered by
23 this Decree, provided that the District complies with the provisions of this Decree, the
24 one-year ITP issued on May 4, 2001, and the new ITP and accompanying
25 Implementation Agreement once issued.
26

C. Each of the intervening entities specifically covenants that upon removal of
Savage Rapids Dam, it shall make no further challenges to the District's compliance with
the Endangered Species Act as it may apply to the District's new pumping plant

1 diversions, provided that the screens for the pumping plants meet NMFS standards in
2 effect at the time the pumping plants are built and have been shown to be operating
3 effectively, that such diversions do not exceed 149.26 cfs, and that the District complies
4 with all terms and conditions of the ITP, including all provisions relating to the operation
5 and maintenance of the pumping plants and screens.

6 D. Nothing herein shall prevent or limit the Intervenor from enforcing any
7 provisions of, or exercising any rights under this Decree, from enforcing the ITP
8 currently or hereinafter issued, or from enforcing the conditions in the District's water
9 right certificates.

10 **X. ONGOING SUPERVISION AND IMPLEMENTATION OF CONSENT**
11 **DECREE**

12 **A. Duty of Good Faith and Reasonable Cooperation**

13 All parties to this Decree shall be bound by the utmost duties of good faith and
14 cooperation to implement its provisions, and to pursue diligently the Pumping/Dam
15 Removal Plan. The United States and the State of Oregon shall cooperate to the extent
16 authorized by law with the District in securing permits necessary for implementation of
17 the Pumping/Dam Removal Plan.

18 **B. Force Majeure**

19 If the District has complied with the terms and conditions of this Decree, has
20 proceeded with due diligence to fund and implement the Pumping/Dam Removal Plan,
21 has made substantial progress in securing funding for or starting construction of the
22 pumping plants, but because of reasons beyond its reasonable control and without its fault
23 and negligence it has been unable to complete the installation of operational pumping
24 plants as contemplated in this Decree by November 1, 2005, then the Court may extend
25 the deadline for ceasing diversions at the Dam from November 1, 2005 up to but not
26 beyond November 1, 2006. The suspension of performance because of force majeure
shall be no greater in scope and no longer in duration than is required by the force

1 majeure and shall not extend beyond November 1, 2006. The District shall use its best
2 efforts to avoid and mitigate the effects of any delay from force majeure.

3
4 **C. Enforcement Rights**

5 1. Each and every party shall have the right to enforce all terms and
6 provisions of this Consent Decree.

7 2. This Court shall retain continuing jurisdiction over this
8 Decree to enforce its provisions and to resolve any and all disputes that arise concerning
9 its construction or implementation.

10 **D. Attorney Fees and Costs**

11 1. No attorney fees or costs shall be awarded to any party in respect to any
12 action taken before entry of this Decree.

13 2. In any legal action required to enforce this Decree, any request for
14 attorney's fees and costs, and any associated determination of "prevailing party" status,
15 shall be made under either the ESA, or the Equal Access to Justice Act (28 U.S.C. 2412),
16 as appropriate.

17
18 **E. Decree as Final Judgment and Termination.**

19 Upon entry of this Decree, the State of Oregon shall be granted party status and
20 this Decree shall be deemed a final judgement in respect to all claims and counterclaims
21 filed in this action.

22 **F. Modification and Amendment**

23 This Decree and agreement may only be amended or modified with the written
24 consent of all parties and approval of the court.

25 **G. Anti-Deficiency Act**

26 Nothing in this agreement shall be interpreted as, or shall constitute, a
commitment or requirement that any agency of the United States obligate or pay funds or

1 take any other action in contravention of the Anti-Deficiency Act, 31 U.S.C. Sec. 1341,
2 or any other applicable appropriations law.

3
4 **H. State Constitutional Limitation**

5 Nothing in this agreement shall be interpreted as, or shall constitute, a
6 commitment or requirement that the State of Oregon obligate or pay funds or take any
7 other action in contravention of Article XI, section 7 of the Oregon Constitution.

8 **I. Representative Authority**

9 Each undersigned representative of the parties to this Decree certifies that he/she
10 is fully authorized by the party to enter into and execute the terms and conditions of this
11 Decree and to legally bind such party to this Decree. By signature below, all of the
12 parties consent to the entry of this Decree.

13
14 **J. Mutual Drafting**

15 It is hereby expressly understood and agreed that this Decree was jointly drafted
16 by plaintiffs, plaintiffs-intervenors, and the defendant District. Accordingly, the parties
17 hereby agree that any and all rules of construction to the effect that ambiguity is
18 construed against the drafting party shall be inapplicable in any dispute concerning the
19 terms, meaning, or interpretation of this Decree.

20 **K. Third Party Beneficiaries**

21 Nothing in this Consent Decree shall be construed to make any other person or
22 entity not executing this Decree a third-party beneficiary to this Consent Decree.
23
24
25
26

1 STIPULATED AND AGREED TO BY:

2 Grants Pass Irrigation District
3

4 By _____
5 Dan Shepard, Manager
6

7 _____
8 Christopher Cauble
9 SCHULTZ SALISBURY CAUBLE & DOLE
10 111 se 6TH St
11 PO Box 398
12 Grants Pass, OR 97526

13 Counsel for the Grants Pass Irrigation District
14

15 _____
16 Sam Rauch
17 United States Department of Justice
18 Wildlife & Marine Resources Division, Suite 5000
19 601 Pennsylvania Ave. NW 20004
20 Benjamin Franklin Station
21 P.O. Box 7369
22 Washington, D.C. 20044-7369

23 Counsel for the United States
24

25 State of Oregon Water Resources Commission
26

27 By Nancy Leonard
28 Nancy Leonard, Chair
29

30 _____
31 Assistant Attorney General, Department of Justice
32

33 Counsel for the State of Oregon
34

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Michael Sherwood
Earthjustice Legal Defense Fund
180 Montgomery Street, #1725
San Francisco, CA 94104-4209

Counsel for WaterWatch of Oregon, *et al.*

Thane W. Tienson
Copeland, Landye, Bennett and Wolf, LLP
3500 Wells Fargo Center
Portland, Oregon 97201

Counsel for Curry Guides Association, *et al.*

SO ORDERED:

DATE: _____

Hon. Michael Hogan
United States District Judge

EXHIBIT 1

NATIONAL MARINE FISHERIES SERVICE PERMIT FOR INCIDENTAL TAKE OF THREATENED SPECIES

Permit Number: 1307

Expiration Date: May 4, 2002

Permit Holder:

Grants Pass Irrigation District (GPID)
200 Fruitvale Drive
Grants Pass, Oregon 97527-5268

Principal Officer and Contact:

Dan Shepard, General Manager
Phone: 541-476-2582
Fax: 541-479-9461

Reporting Requirements: As described in section 3.4 of the Habitat Conservation Plan.

Authorization:

Grants Pass Irrigation District (GPID) is hereby authorized incidental take of threatened Southern Oregon/Northern California (SONC) coho salmon (*Oncorhynchus kisutch*), associated with its irrigation diversion operations at Savage Rapids dam on the Rogue River, Oregon, subject to the provisions of its Habitat Conservation Plan (HCP), Section 10 of the Endangered Species Act of 1973 (ESA) (16 U.S.C. §§ 1531-1543), the National Marine Fisheries Service (NMFS) regulations governing ESA-listed species permits (50 CFR Parts 222/301-222.309), and the conditions hereinafter set forth.

Unlisted covered species include Klamath Mountains Province (KMP) steelhead (*O. mykiss*) and southern Oregon/California coastal chinook salmon (*O. tshawytscha*).

Abstract:

The GPID HCP utilizes a combination of conservation measures that are expected to minimize and mitigate, to the maximum extent practicable, the impacts of take of listed coho salmon during irrigation operations in 2001. The HCP also requires GPID to take certain steps during the time the permit is effective to secure authorization and funding for dam removal, in order to provide for the long-term conservation of the listed species. To ensure that the mitigation and minimization strategies are effective, the HCP incorporates a variety of monitoring components, and if needed, changes in the conservation measures set forth. A detailed monitoring and reporting schedule can be found in Section 3.4 of the HCP.

Incidental Take:

Covered activities that may cause incidental take of listed species will be conducted at the site of GPID's irrigation diversion at Savage Rapids dam on the Rogue River, Jackson and Josephine Counties, Oregon. These activities include irrigation diversion operations and associated maintenance activities.

The NMFS anticipates that an undetermined number of coho salmon may be taken as a result of covered activities during the effective period of the permit. Incidental take is expected to be in the form of harm, harassment, kill and injury.

Conditions:

1. GPID may not transfer or assign this permit to any other person(s), as person is defined in Section 3(12) of the ESA. This permit is not in force or effective if transferred or assigned to any other person.
2. A copy of this permit, including the accompanying HCP, must be available to GPID personnel at all GPID facilities. All applicable provisions of this permit must be presented and clearly explained to all authorized officers, employees, contractors, or agents of GPID conducting authorized activities.
3. GPID, in effecting the take authorized by this permit, is considered to have accepted the terms and conditions of this permit and to be prepared to comply with the provisions of this permit, the applicable regulations, and the ESA.
4. Upon request by NMFS, GPID must allow NMFS, or any other person(s) duly designated by NMFS, to inspect GPID's records and facilities if such records and facilities pertain to (i) activities for which take of listed species is authorized by this permit, (ii) ESA-listed species covered by this permit, or (iii) NMFS's responsibilities under the ESA.
5. This permit takes effect for listed covered species on the date of its issuance. For unlisted covered species, the permit will take effect upon the listing of a species as endangered, and for a species listed as threatened, on the effective date of a rule under Section 4(d) of the ESA prohibiting take of the species.
6. GPID is responsible for the activities of any individual who is operating under the authority of this permit. Such activities include capturing, handling, releasing, transporting, maintaining, and caring for any fish authorized to be taken by this permit.
7. Upon locating any dead, injured, or sick individuals of any listed species covered by this permit, GPID shall, within three working days, notify NMFS's Roseburg Field Office, Roseburg, Oregon, (541) 957-3383. Instructions for proper handling and disposition of such specimens will be issued at that time. Care must be taken in handling sick or injured specimens to ensure effective treatment and care, and in the handling of dead specimens to preserve biological

material in the best possible state. This condition does not apply to spawned-out carcasses.

8. The fee in 50 CFR Section 222.307(d)(5) to cover the cost of issuance of this permit has been waived.

Issued by: Donna Darn Date: 5/4/01
Donna Darn
Acting Regional Administrator
Northwest region

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