

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Water Right Application)	
S 84222 in the Name of the United)	
States Fish and Wildlife Service)	SETTLEMENT AGREEMENT
<i>Applicant</i>)	BETWEEN THE UNITED
)	STATES FISH AND WILDLIFE
Harney County)	SERVICE, HARNEY COUNTY,
<i>Protestant</i>)	AND OREGON WATER
)	RESOURCES DEPARTMENT
Harney County Soil & Water Conservation)	
District)	
<i>Protestant</i>)	
)	
Water for Life, Inc.)	
<i>Protestant</i>)	
)	
WaterWatch of Oregon)	
<i>Protestant</i>)	
)	
Oregon Department of Fish & Wildlife)	
<i>Intervenor</i>)	

The Oregon Water Resources Department (“OWRD” or “Department”), the United States Fish and Wildlife Service (“USFWS”), and Harney County enter into this Settlement Agreement (“Agreement”) and do hereby stipulate and agree as follows.

(1) Background of This Agreement

- (a) On July 28, 1999, the USFWS filed application S-84222 with OWRD, proposing to divert up to 820.4 cubic feet per second from the Donner und Blitzen River and tributaries for use in wildlife refuge management from October 1 through March 15. Protests to the application were timely files by Harney County, Harney County Soil & Water Conservation District, Water for Life, and WaterWatch of Oregon (WaterWatch).
- (b) A contested case hearing was held in this matter at the Harney County Courthouse, Burns, Oregon on April 30 and May 1, 2002.
- (c) On October 27, 2003, the Office of Administrative Hearings issued its Proposed Order on contested case hearing. Exceptions to the proposed order were filed by Harney County and Water for Life. Responses to the exceptions were filed by USFWS and WaterWatch.

- (d) On March 11, 2004, Harney County, Water for Life, WaterWatch, and USFWS presented oral arguments on the application and exceptions before the Water Resources Commission (“WRC”). Subsequently, the WRC appointed a subcommittee of two Commission members to review the contested case record and report back to the whole WRC. The WRC also urged the parties to further pursue settlement discussions, and continued the matter until the October 2004, WRC meeting.
- (e) At its October 22, 2004, meeting, the WRC received a status report from staff on the matter. Subsequent to this report, the WRC directed the subcommittee to complete review and report back to the WRC by the scheduled January 2005 WRC meeting. The WRC also once again urged the parties to pursue pending settlement discussions stemming from an offer made by the USFWS in a letter dated August 10, 2004. The WRC tabled the matter until their January 2005 meeting.
- (f) Based on numerous meetings between the parties and the Diamond Valley community; the USFWS, Harney County, and OWRD stipulate and agree on the following terms.

(2) Terms of the Agreement

(a) Definition of Terms Used in this Agreement

(A) “**Bypass Flow(s)**” for the purposes of this Agreement means a specific amount of water expressed in cubic feet per second that must flow past a particular point of diversion.

For the purposes of this Agreement, the quantity assigned to the bypass flows for the Donner und Blitzen River, Bridge Creek, and McCoy Creek is either the specific quantities stipulated to in the agreement between the Oregon Department of Fish and Wildlife, the United States Fish and Wildlife Service, the Oregon Department of Water Resources and WaterWatch of Oregon on February 21, 2001, or are the flow levels to be determined by the peak flow study to be conducted pursuant to the February 21, 2001, agreement between these parties.

(B) “**Diamond Valley**” for the purposes of this Agreement means that portion of the Donner und Blitzen subbasin of the Malheur Lake basin that includes Kiger Creek, McCoy Creek, Swamp Creek, and Cucamonga Creek and their tributaries.

(C) “**Diamond Tributaries**” for the purposes of this Agreement means Kiger Creek, McCoy Creek, Swamp Creek, and Cucamonga Creek and their tributaries.

(D) “**Donner und Blitzen Subbasin**” for the purposes of this Agreement means that portion of the Malheur Lake Basin consisting of the Donner und Blitzen River and its tributaries.

(E) **“This Right”** for the purposes of this Agreement means any permit and subsequent certificate(s) issued for Application S 84222.

(b) Amendment of the Period of Use

The USFWS agrees, upon the WRC’s approval of the extension of the irrigation season in the Donner und Blitzen subbasin to March 1 of each year, to amend the period of use for its application S 84222 as follows:

PERIOD OF USE: OCTOBER 1 THROUGH MARCH 1.

(c) Volumetric Limit

(A) The USFWS agrees to amend its application S 84222 so that the use of water under this right in combination with USFWS’s water rights evidenced by certificates 28524, 15198, 15197, and 14367 (or subsequent orders or certificates evidencing these water rights) will not exceed an annual volume of one-hundred-forty-five-thousand (145,000) acre feet (“AF”). The 145,000 AF shall be calculated based on an annual water year of October 1 through September 30 of each year.

(B) The USFWS further agrees that it shall designate the acreage, annually, that will be irrigated, and that the USFWS’s use of the full irrigation duty of three-acre feet per acre for the designated irrigated acres will be assumed. The volume remaining will be available for other uses authorized under this right.

(C) The parties to this Agreement agree that the maximum rate/volume allowed for this water right will be as follows:

Maximum rate allowed: no more than 820.4 cubic feet per second.

The allowed rate being 820.4 from the Donner und Blitzen river (200.0 cfs from Page Springs dam, 20.0 cfs from New Buckaroo Dam, 10.0 cfs from Old Buckaroo Dam, 303.0 cfs from Grain Camp Dam, 166.0 cfs from Busse Dam, 84.0 cfs from Dunn Dam, and 37.0 cfs from Sodhouse Dam), 200 cfs from Bridge Creek, 188.0 cfs from Mud Creek, 50.0 cfs from Krumbo Creek, 200.0 cfs from McCoy Creek, and 250.0 cfs from Kiger Creek

Maximum volume allowed: The amount of water authorized under this permit, together with the amount of water authorized under the USFWS’s water rights evidenced by certificates 28524, 15198, 15197, and 14367 (or subsequent orders or certificates evidencing these water rights) is limited to a total volume of 145,000 AF annually (calculated on an annual water year of October 1 through September 30 of each year).

When water is being used for irrigation under this permit, the amount of water used for irrigation, together with the amount secured for irrigation under any other right

existing for the same lands, is limited to a diversion of one-fortieth of one cubic foot per second (or its equivalent) and 3.0 acre feet for each acre irrigated.

(d) Water Sharing/Subordination – Direct Diversion

(A) The USFWS agrees to the following subordination and distribution of water in the Diamond Valley as measured at the McCoy Creek gaging station.

As measured at the McCoy Creek gaging station, bypass flows shall be satisfied before USFWS may begin diverting water under this right. If bypass flows as measured at the McCoy Creek gaging station are met, then the USFWS may divert up to twenty (20) cfs from McCoy Creek. Thereafter, so long as at least the bypass flows plus 20 cfs is passing the McCoy Creek gaging station, the USFWS will subordinate the remaining Diamond Valley portion of this right, up to twenty (20) cfs, for the purposes of water regulation only, to other junior priority date water rights authorized by OWRD. Total volume subject to this subordination shall not exceed 6,000 AF per year. Once any junior rights subject to this subordination are satisfied, the USFWS may take the remaining water as it is entitled under the Diamond Valley portion of this right.

(B) The parties agree that any permit and subsequent certificate issuing from application S 84222 shall contain the following Specific Condition:

If bypass flows as measured at the McCoy Creek gaging station are met, then the USFWS may divert up to 20 cfs from McCoy Creek. Thereafter, for the purposes of water regulation, so long as at least the bypass flows plus 20 cfs is passing the McCoy Creek gaging station, the Diamond Valley portion of this right shall not have priority over water in excess of this amount up to 20 cfs, not to exceed 6,000 AF, of junior priority date water rights as may be authorized by OWRD. Thereafter, the USFWS may take the remaining water as it is entitled under this right.

(e) Large Storage Facility

(A) In addition to the subordination in (d) above, the USFWS agrees to subordinate this water right, for purposes of water regulation, to junior priority date water rights as may be authorized by OWRD to store water in reservoirs greater than 9.2 AF within the Diamond Valley, not to exceed a total of 600 AF for all reservoirs.

(B) The USFWS agrees to this subordination only if; (i) the junior priority date reservoir(s) will be on tributaries of the major streams (Kiger and McCoy Creeks) and/or on the minor tributaries of the Diamond Valley (Cucamonga and Swamp Creeks); and (ii) the applicant(s) and USFWS will coordinate to condition such a new reservoir permit to ensure the Refuge resources and obligations including the bypass flows are protected.

(f) Stockwater – Direct Diversions

(A) In addition to the subordination in (d) and (e) above, the USFWS agrees to subordinate this water right, for purposes of water regulation, to junior priority water rights as may be authorized by the OWRD to use direct flow diversions into existing ditches, for uses in existence as of December 31, 2004, for livestock purposes during the period October 1 to March 1 of each year.

(B) The parties to this Agreement agree that this right does not take precedence over existing water rights for livestock purposes.

(g) Existing Stockwater Ponds/Reservoirs

In addition to the subordination in (d), (e) and (f) above, the USFWS agrees to subordinate this water right, for purposes of water regulation, to junior priority date water rights as may be authorized by the OWRD to store water for livestock or wildlife purposes so long as: the storage permit is for 9.2 AF or less; the pond/reservoir is an existing un-permitted use that is otherwise not authorized as an exempt use or pond, constructed prior to December 31, 2004; and the application for the livestock or wildlife pond/reservoir is submitted to OWRD prior to December 31, 2009.

(h) Future Stockwater Ponds/Reservoirs

(A) In addition to the subordination in (d), (e), (f) and (g) above, the USFWS agrees to subordinate this water right, for purposes of water regulation, to junior priority date water rights as may be authorized by OWRD to store water for livestock and wildlife purposes in storage facilities not to exceed 9.2 AF, up to a total of seven hundred acre feet (700 AF) of water.

(B) The USFWS agrees to this subordination to future stockwater ponds/reservoirs only if such water is distributed as follows:

- (i) Up to two hundred and twenty (220) AF from the Diamond Tributaries.
- (ii) Up to one hundred and fifty (150) AF from the Upper Donner und Blitzen River (above Page Springs Dam), Mud Creek, and Bridge Creek basins.
- (iii) Up to three hundred and thirty (330) AF from all other basins within the Donner und Blitzen subbasin.

(C) The parties agree that any permit and subsequent certificate issuing from application S 84222 shall contain the following Specific Condition:

For purposes of water regulation, this water right shall not have priority over junior priority date water rights as may be authorized by the OWRD to store water for livestock and wildlife purposes in storage facilities which are less than 9.2 AF in size, up to a total of 700 AF of water subject to the following limitations:

- (i) Up to two hundred and twenty (220) AF from the Diamond Tributaries.
- (ii) Up to one hundred and fifty (150) AF from the Upper Donner und Blitzen River (above Page Springs Dam), Mud Creek, and Bridge Creek basins.
- (iii) Up to three hundred and thirty (330) AF from all other basins within the Donner und Blitzen subbasin.

This being a combined total from all basins of 700 acre feet.

(D) USFWS agrees to this subordination to future stockwater ponds/reservoirs provided that such storage facilities will be widely distributed throughout each basin and the USFWS's ability to ensure protection of Malheur National Wildlife Refuge resources is maintained. The intent of this subordination is to ensure that the resources of the Malheur National Wildlife Refuge are protected while providing water users the opportunity to submit permit applications for new storage facilities.

General Provisions

(A) In signing this Agreement, the parties preserve any rights authorized by law not expressly waived by this Agreement.

(B) In signing this Agreement Harney County withdraws its contested case hearing exceptions to the Proposed Order on Application S 84222 and waives its right to seek judicial review on the final order and permit approving Application S 84222 in the name of the United States Fish and Wildlife Service.

(C) In signing this agreement Harney County and the USFWS do not oppose the request by the Department of Agriculture to extend the irrigation season in the Donner und Blitzen subbasin to March 1 of each year. The parties understand that in extending the irrigation season, the Water Resources Commission may impose a bypass flow requirement that applies to all extended irrigation water rights in the Donner und Blitzen Subbasin but only for the period of March 1 to March 15.

(D) The parties agree that this Agreement has been reached through good faith negotiations for the purpose of resolving legal disputes. The parties agree that no offers or compromises made in the course of negotiations shall be construed as admissions against interest. The parties agree that this Agreement shall not be offered as evidence or treated as an admission regarding any matter and may not be used in proceedings on any other protest whatsoever, except that this Agreement may be used in any future proceeding to interpret or enforce the terms of this Agreement.

(E) This Agreement 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 corporations connected with them.

(F) Each party to this Agreement represents, warrants, and agrees that the person who executed 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 the Agreement.

(G) The terms, provisions, conditions, and covenants of this Agreement are not severable, except, if any term, provision, condition, or covenant of this Agreement 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.

(H) This Agreement may be executed in several counterparts and all documents so executed shall constitute one Agreement, 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 Agreement by facsimile transmission shall be as effective as delivery of an original signed counterpart of this Agreement.

(I) This Agreement shall be effective as of the date of the last signature hereto.

Harney County Court

Date

Date

Date

United States Fish and Wildlife Service

Date

Date

Oregon Water Resources Department

Date