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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

UNITED STATES OF AMERICA, AND  
STATE OF OREGON

Plaintiffs,

v.

THATCHER COMPANY,

Defendant.

Civil Action Nos. 92-1187-JO  
92-1188-JO  
CONSENT DECREE  
(Settlement of Natural  
Resource Damage Under  
Comprehensive Environmental  
Response, Compensation  
and Liability Act -  
Environmental Regulation)

I. BACKGROUND

A. Plaintiffs, the United States of America and the State of Oregon, as or on behalf of trustees for certain natural resources, including the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), have filed complaints in this matter pursuant to, inter alia, Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. § 9607, and by the State, ORS §§ 465.255, 465.200(17), 496.705 and 468.745 against defendant, Thatcher

CONSENT DECREE -- PAGE 1

90-11-3-678

DEPARTMENT OF JUSTICE

OCT - 2 1992

1 Company, for: 1) recovery of natural resource damages, including  
2 the reasonable costs of assessing such damages, incurred in  
3 connection with the release of hydrochloric acid, a hazardous  
4 substance, into the environment in and around the North Fork of  
5 the John Day River in the State of Oregon (the John Day Acid  
6 Spill); and 2) a declaratory judgment, pursuant to 28 U.S.C. §  
7 2201, awarding Plaintiffs any costs to be incurred in the future  
8 in connection with natural resource damages caused by the John  
9 Day Acid Spill. In addition, the State seeks reimbursement of  
10 its costs for past response actions in connection with the  
11 release. For the purpose of effectuating resolution of these  
12 claims through this Consent Decree (Decree), this Court, upon  
13 entry of this Decree, hereby consolidates the Plaintiffs'  
14 complaints and enters the Order Directing the Deposit of Natural  
15 Resource Damages into the Registry of the Court (Attachment A).

16 B. The North Fork of the John Day River runs through north-  
17 central Oregon, drains a land area of about 8000 square miles and  
18 is one of the longest free-flowing rivers in the contiguous  
19 United States. The John Day River drainage is an important  
20 watershed for the protection of native stocks of fish and  
21 wildlife. Migratory birds, including bald eagles, waterfowl and  
22 other species; mammals, including mink and river otter;  
23 anadromous fish (fish that ascend rivers from the sea for  
24 spawning), including Pacific three tooth lamprey (a species of  
25 critical importance to the CTUIR), summer steelhead trout and  
26 Pacific chinook salmon; resident fish; and aquatic invertebrates,

1 all are supported by or are in some way dependent upon the  
2 wetland habitat, surface waters and sediments or submerged lands  
3 of the North Fork of the John Day River. Many of these species  
4 are of commercial, subsistence, cultural, and recreational  
5 importance to both the Indian and non-Indian populations.

6 C. Hydrochloric acid is quickly diluted in large quantities of  
7 water. Although the strength of the hydrochloric acid released  
8 in the John Day Acid Spill was ultimately diluted, it first  
9 flowed downstream, causing extensive damage to certain natural  
10 resources for approximately 12 miles, including short term  
11 changes in the acidity of the North Fork of the John Day River  
12 and the killing of a great number of fish and aquatic organisms.  
13 Although the acid diluted within a few hours, the effects of such  
14 a spill are prolonged. The fish that are killed reduce the pool  
15 of fish available for spawning. This, in turn, effects the food  
16 chain, with ultimate, long term effects on both wildlife and  
17 people who live on or depend upon the North Fork of the John Day  
18 River area for their livelihood or recreation.

19 D. The United States Department of the Interior (Interior),  
20 pursuant to 40 C.F.R. § 300.600, as amended (55 Fed. Reg. 8666,  
21 8857, Mar. 8, 1990), serves as Natural Resource Trustee for  
22 resources which include migratory birds; certain anadromous fish,  
23 endangered species and marine mammals; and certain federally  
24 managed water resources. Interior, in its capacity as Natural  
25 Resource Trustee may, inter alia, assert natural resource damage  
26

1 claims pursuant to Section 107(a)(4)(C) and (f) of CERCLA, 42  
2 U.S.C. § 9607(a)(4)(C) and (f).

3 E. The CTUIR has treaty rights, established, inter alia, under  
4 the Treaty with the Walla Walla, Cayuse and Umatilla Tribes on  
5 June 9, 1855, 12 Stat. 945, which include fishing rights to the  
6 area affected by the John Day Acid Spill. Pursuant to Section  
7 107(f) of CERCLA, 42 U.S.C. § 9607(f), the CTUIR is a trustee for  
8 certain natural resources belonging to, managed by, held in trust  
9 for and pertaining to, or otherwise controlled by the CTUIR.

10 Pursuant to 40 C.F.R. § 300.600(b)(2):

11 Interior shall also be trustee for those natural  
12 resources for which an Indian tribe would otherwise act  
13 as trustee in those cases where the United States acts  
on behalf of the Indian tribe.

14 The CTUIR has formally requested that the Bureau of Indian  
15 Affairs (BIA) of Interior act as trustee on its behalf in the  
16 filing of a complaint in this matter.

17 F. The State of Oregon, pursuant to Section 107(f)(1) of  
18 CERCLA, 42 U.S.C. § 9607(f)(1), is a trustee for natural  
19 resources within the State or belonging to, managed by,  
20 controlled by, or appertaining to the State.

21 G. Defendant Thatcher Company does not admit any liability  
22 arising out of the occurrences alleged in the complaints.

23 H. The Parties recognize, and the Court by entering this Decree  
24 finds, that this Decree has been negotiated by the Parties at  
25 arms-length and in good faith; implementation of this Decree will  
26 expedite the restoration of any natural resource damages caused  
by the John Day Acid Spill; will avoid prolonged and complicated

CONSENT DECREE -- PAGE 4

1 litigation between the Parties; and this Decree is fair,  
2 reasonable, and in the public interest.

3 NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:

4 II. JURISDICTION

5 1. This Court has jurisdiction over the subject matter of this  
6 action pursuant to Sections 107, and 113(b) of CERCLA, 42 U.S.C.  
7 §§ 9607 and 9613(b), and 28 U.S.C. §§ 1331 and 1345. This Court  
8 also has personal jurisdiction over Thatcher Company, which,  
9 solely for purposes of this Decree and the underlying complaints,  
10 waives all objections and defenses that it may have to  
11 jurisdiction of the Court or to venue in this District. Thatcher  
12 Company shall not challenge the terms of this Decree or this  
13 Court's jurisdiction to enter and enforce it.

14 III. PARTIES BOUND

15 2. This Decree applies to and is binding upon Plaintiffs, the  
16 United States, including departments, agencies and  
17 instrumentalities thereof, the CTUIR and the State of Oregon, and  
18 defendant, Thatcher Company and its successors and assigns. Any  
19 change in ownership or corporate status of Thatcher Company,  
20 including, but not limited to, any transfer of assets or real or  
21 personal property shall in no way alter Thatcher Company's  
22 obligations and responsibilities under this Decree. The  
23 undersigned representative of each Party certifies that he or she  
24 is fully authorized by the Party whom he or she represents to  
25 enter into the terms and conditions of this Decree, to execute  
26 this Decree, and to bind legally such Party to it.

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#### IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them therein. Whenever terms listed below are used in this Decree, the following definitions shall apply:

A. "CERCLA" shall mean the Comprehensive Environmental Response Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601. et seq.

B. "Consent Decree" or "Decree" shall mean this Decree and any Attachments which accompany this Decree and are hereby incorporated by reference. In the event of conflict between this Decree and any Attachment, the text of the Decree, as opposed to the Attachments, shall control.

C. "Day" shall mean a calendar day including Saturday, Sunday or a federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the day which is not a Saturday, Sunday or federal holiday.

D. "John Day Acid Spill" shall mean the incident, occurring on February 8, 1990, when a tanker truck owned and operated by defendant Thatcher Company, skidded off Highway 395 south of Camas Creek Bridge near the town of Dale, Oregon; rolled down an embankment into the North Fork of the John Day River; and released, through a ruptured disc valve, approximately 3,500

1 gallons or 33,500 pounds of hydrochloric acid into the North Fork  
2 of the John Day River. The hydrochloric acid flowed downstream,  
3 causing extensive damage to the ecosystem for 12 miles or more,  
4 including changes in the acidity of the North Fork John Day River  
5 and the killing of a great number of fish and aquatic organisms.

6 E. "Natural Resource Trustees" shall mean the United States  
7 Department of the Interior, the CTUIR and the State of Oregon.

8 F. "Paragraph" shall mean a portion of this Decree identified  
9 by an arabic numeral.

10 G. "Parties" (when used with an upper-case "P") shall mean the  
11 Parties to this Decree, i.e., the United States of America, the  
12 CTUIR, the State of Oregon and Thatcher Company. "Party" (when  
13 used with an upper-case "P") shall refer to one of the Parties to  
14 this Decree.

15 H. "Plaintiffs" shall mean the United States of America,  
16 including, for purposes of this Decree, the CTUIR, on whose  
17 behalf the United States is acting, and the State of Oregon.

18 I. "Response Costs" means all costs that may have been or may  
19 be incurred for activities under 42 U.S.C. 9601(23-25); including  
20 but not limited to, legal, administrative, personnel, travel,  
21 removal, remedial, response, transportation, oversight,  
22 investigative (including remedial investigation/feasibility study  
23 and any other studies or reports), overhead, enforcement costs,  
24 and other direct or indirect costs (including any and all  
25 interest thereon) incurred or to be incurred by or at the behest  
26

1 of the United States or the State pursuant to CERCLA for response  
2 actions undertaken in connection with the John Day Acid Spill.

3 J. "Section" shall mean a portion of this Decree identified by  
4 a Roman numeral.

5  
6 V. GENERAL PROVISIONS

7 4. Objectives of the Parties. The objectives of the Parties in  
8 entering into this Decree are to provide funding for the natural  
9 resource trustees to restore, replace, or acquire the equivalent  
10 of any natural resources injured or destroyed in the John Day  
11 Acid Spill, and to reimburse the State for costs incurred in its  
12 response action to the Spill and to resolve all claims asserted  
13 in the complaints.

14 VI. PAYMENTS BY THE THATCHER TRUCKING COMPANY

15 5. State Response Costs. Defendant Thatcher Company has paid  
16 the State of Oregon \$7498.00 for its response costs.

17 6. Natural Resource Damages. Within fifteen (15) days from the  
18 entry of this Decree, defendant Thatcher Company will also pay  
19 Plaintiffs a total of \$275,000 (Two Hundred and Seventy Five  
20 Thousand Dollars) for natural resource damages. Payment shall be  
21 made to the Clerk of the Court of the United States District  
22 Court for the District of Oregon, in accordance with Attachment  
23 A, the Order Directing the Deposit of Natural Resource Damage  
24 Payments into the Registry of the Court, and shall  
25 reference "Natural Resource Damages, United States v. Thatcher  
26 Company, DOJ no. 90-11-3-678." In the event defendant does not  
pay all or any portion of the amounts as specified in this



1 this Section, interest shall accrue on the outstanding balance  
2 calculated in accordance with Section 107(a) of CERCLA, 42 U.S.C.  
3 § 9607(a). The interest shall be calculated from the first day  
4 following the date payment is due until the entire outstanding  
5 balance has been received.

6 7. General provisions regarding payment by defendant. All  
7 payments will be in the form of certified checks, wire transfers  
8 or other acceptable method of payment. A copy of the check(s) or  
9 other documentation for natural resource damages shall be mailed  
10 to:

11 Steven R. Baer  
12 Environmental Enforcement Section  
13 Environment and Natural Resources Division  
United States Department of Justice  
Washington, D.C. 20530

14 and to:

15 Penny H. Harrison  
16 Natural resources Section  
17 General Counsel Division  
Oregon Department of Justice  
1515 SW Fifth Avenue, Suite 410  
18 Portland, Oregon 97201

19 In the event defendant does not pay all or any portion of the  
20 amounts as specified in this Section, interest shall accrue on  
21 the outstanding balance calculated in accordance with Section  
22 107(a) of CERCLA, 42 U.S.C. § 9607(a). The interest shall be  
23 calculated from the first day following the date payment is due  
24 until the entire outstanding balance has been received.

25 VII. USE OF MONEY PAID FOR NATURAL RESOURCE DAMAGES

26 8. The \$275,000 (Two Hundred and Seventy Five Thousand Dollars)  
paid for natural resource damages shall be used by the Plaintiffs

CONSENT DECREE -- PAGE 9

1 only to restore, replace or acquire the equivalent of any natural  
2 resources injured or destroyed by the John Day Acid Spill,  
3 pursuant to applicable state and federal laws and regulations.

4 9. Interior, the CTUIR and the State shall coordinate the  
5 restoration, replacement or acquisition of equivalent natural  
6 resources pursuant to the Memorandum of Agreement (MOA)  
7 accompanying this Decree as Attachment B.

8 VIII. COVENANTS NOT TO SUE

9 10. Covenant Not to Sue. In consideration of the payments made  
10 by defendant Thatcher Company under the terms of this Decree, and  
11 except as specifically provided in this Section, the Plaintiffs  
12 covenant not to sue or to take administrative action against the  
13 Thatcher Company for natural resource damages pursuant to Section  
14 107 of CERCLA by all Trustees and also pursuant to ORS §§  
15 465.255, 465.200(17), 496.705 and 468.745 by the State, for the  
16 John Day Acid Spill. This Covenant Not to Sue is conditioned  
17 upon the complete and satisfactory performance by defendant of  
18 its obligations pursuant to this Decree. This Covenant Not to  
19 Sue applies only to the John Day Acid Spill and extends only to  
20 defendant and its officers, directors, employees, affiliates,  
21 successors, assigns, insurers or agents and does not extend to  
22 any other person.

23 11. Reopener provisions. Notwithstanding any other provision of  
24 this Decree, Plaintiffs reserve, and this Decree is without  
25 prejudice to, the right to institute proceedings in this action  
26 or in a new action, or to issue an administrative order seeking

1 recovery of natural resource damages, including the reasonable  
2 costs of assessing such damages, incurred in connection with the  
3 John Day Acid Spill, if:

4 (i) information previously unknown to Plaintiffs is  
5 received after entry of this Decree indicating the  
6 presence of additional hydrochloric acid or other  
7 hazardous substances attributable to the John Day  
8 Acid Spill at the situs of the spill, or

9 (ii) this previous unknown condition, together with any  
10 other relevant information, indicates that the  
11 injury to, destruction of, or loss of natural  
12 resources is of a type unknown, or of a magnitude  
13 greater than was known at the time of entry of  
14 this Decree.

15 12. For purposes of the preceding Paragraph, the information  
16 previously received by and the conditions known to the Plaintiffs  
17 shall include that information and those conditions set forth in  
18 the Preassessment Screen and other preliminary studies and  
19 assessments conducted by Interior prior to the entry of this  
20 Decree; and any information received by the Plaintiffs prior to  
21 the entry of this Decree.

22 13. General reservations of rights. The Covenant Not to Sue set  
23 forth above does not pertain to any matters other than those  
24 expressly specified in Paragraph 10. Plaintiffs reserve, and  
25 this Decree is without prejudice to, all rights against defendant  
26

1 with respect to any claims not expressly addressed in the  
2 complaints, including but not limited to, the following:

- 3 1) claims based on a failure by defendant to meet a  
4 requirement of this Decree;  
5 2) liability arising from the past, present, or future  
6 disposal, release, or threat of release of hazardous  
7 substances or materials other than as alleged in the  
8 complaints; and  
9 3) criminal liability.

10 14. Notwithstanding any other provision of this Decree, the  
11 Plaintiffs retain all authority and reserves all rights to take  
12 any and all response actions authorized by law; provided,  
13 however, the liability of defendant arising out of any such  
14 action will be limited in accordance with the Covenant Not to Sue  
15 provisions herein.

16 15. In the event that Plaintiffs institute a new action pursuant  
17 to this Section, or any other authority of law, seeking  
18 additional remedial measures, reimbursement of costs incurred in  
19 implementing such additional remedial measures, or any other  
20 reimbursement or damages related to or arising out of the John  
21 Day Acid Spill, defendant hereby expressly reserves any and all  
22 rights, claims and defenses that it has or may have in the  
23 future.

24 16. The Parties expressly reserve all claims, demands and causes  
25 of action, either judicial or administrative, past or future in  
26 law or equity, against any person or entity not a party to this

1 Decree for any matter arising out of the John Day Acid Spill.  
2 Nothing in this Decree is intended as a release or Covenant Not  
3 to Sue for any claim or cause of action, administrative or  
4 judicial, civil or criminal, past or future, in law or in equity,  
5 which the Parties may have against any person, firm, corporation  
6 or other entity not a signatory to this Decree. No person or  
7 entity, other than the Parties shall have the authority to seek  
8 to enforce the terms of this Decree.

9 VII. COVENANTS BY DEFENDANT

10 17. Except as herein provided, defendant Thatcher Company hereby  
11 covenants not to sue and agrees not to assert any claims or  
12 causes of action against the Plaintiffs with respect to the John  
13 Day Acid Spill or this Decree, including, but not limited to, any  
14 direct or indirect claim for reimbursement from the Hazardous  
15 Substance Superfund (established pursuant to the Internal Revenue  
16 Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 111 or  
17 112, from the State Hazardous Substance Remedial Action Fund  
18 (established pursuant to ORS 405.380) or any other provision of  
19 law, any claim against any department, agency or instrumentality  
20 of the Plaintiffs related to the John Day Acid Spill or any  
21 claims arising out of response activities in connection with the  
22 John Day Acid Spill.

23 18. Nothing in this Decree shall be deemed to constitute  
24 preauthorization of a claim within the meaning of Section 111 of  
25 CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).  
26

1  
2 IX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

3 19. This Decree shall be lodged with this Court for a period of  
4 not less than thirty (30) days for public notice and comment in  
5 accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. §  
6 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the  
7 right to withdraw or withhold its consent if the comments  
8 regarding the Decree disclose facts or considerations which  
9 indicate that the Decree is inappropriate, improper, or  
10 inadequate. Thatcher Company consents to the entry of this  
11 Decree without further notice.

12 20. If for any reason the Court should decline to approve this  
13 Decree in the form presented, this agreement is voidable at the  
14 sole discretion of any party and the terms of the agreement may  
15 not be used as evidence in any litigation between the Parties.

16 X. EFFECTIVE DATE

17 21. The effective date of this Decree shall be the date upon  
18 which this Decree is entered by the Court, except as otherwise  
19 provided herein.

20 XI. RETENTION OF JURISDICTION

21 22. This Court retains jurisdiction over both the subject matter  
22 of this Decree and the Parties for the duration of the  
23 performance of the terms and provisions of this Decree for the  
24 purpose of enabling any of the Parties to apply to the Court at  
25 any time for such further order, direction, and relief as may be  
26 necessary or appropriate for the construction of this Decree, or  
to effectuate or enforce compliance with its terms.

XIII. GENERAL PROVISIONS

23. Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Decree. Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

24. This Decree may be signed on behalf of the Parties in counterparts.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 1992.

\_\_\_\_\_  
United States District Judge

1  
2 FOR THE UNITED STATES:  
3

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6 Acting Assistant Attorney General

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FOR THE CONFEDERATED TRIBES OF THE  
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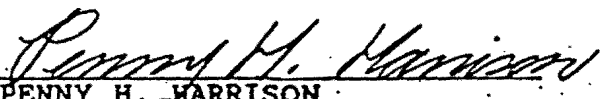


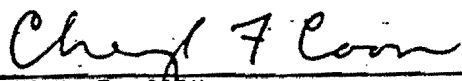
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FOR THE STATE OF OREGON:

CHARLES S. CROOKHAM  
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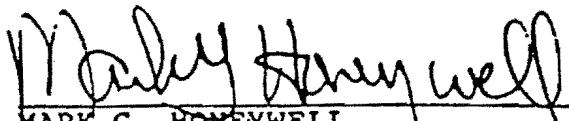
  
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2 FOR THE THATCHER COMPANY:  
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6 MARK G. HONEYWELL  
7 Gordon, Thomas, Honeywell, Malanca,  
8 Peterson & Daheim  
9 One Union Square  
10 600 University, suite 2101  
11 Seattle, Washington 98101-4185  
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13 AGENT FOR SERVICE OF PROCESS  
14 PURSUANT TO THIS DECREE:  
15

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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

UNITED STATES OF AMERICA, AND  
STATE OF OREGON

Plaintiffs,

v.

THATCHER COMPANY,

Defendant,

Civil Action Nos.

ORDER DIRECTING THE  
DEPOSIT OF NATURAL  
RESOURCES DAMAGE PAYMENTS  
INTO REGISTRY OF THE  
COURT

This Order is a part of and will become effective upon entry by this Court of the Consent Decree between the United States, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), and the State of Oregon and Thatcher Company (the Decree). Pursuant to Rule 67 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2041, and in accordance with the terms of the Decree in the above captioned matter, it is hereby:

1. ORDERED, that the Clerk establish an account in the Registry of the Court titled the "United States v. Thatcher Company Trust Fund" specifically and exclusively for the funds for restoration of natural resource damages to be paid as specified in Part VI. of the Decree, said funds to be held by the Clerk on behalf of the Trustees pursuant to Rule 67 of the Federal Rules of Civil Procedure; and it is

2. FURTHER ORDERED, that the Clerk of the Court shall administer the funds so received as follows:

a) the Clerk shall invest a portion of such funds in

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(Order Directing  
Deposit Into Registry  
Of Court -- Page 1)

1 91-day United States Treasury securities, at the highest  
2 prevailing interest rate available for such Treasury securities;

3 b) the Clerk shall initially purchase an aggregate  
4 number of Treasury securities whose total purchase price shall  
5 most nearly equal \$275,000;

6 c) the balance of such funds shall be deposited in  
7 such federally insured interest bearing commercial bank accounts  
8 as the Clerk deems appropriate; and it is

9 3. FURTHER ORDERED, that, no less than two weeks prior to  
10 the maturation of the Treasury securities referred to in the  
11 preceding paragraph, or any other Treasury securities purchased  
12 pursuant to this Order, the Clerk shall consult with  
13 representatives of the Trustees, and depending upon the Trustees'  
14 anticipated funding needs, shall advise the Clerk regarding the  
15 portion of the proceeds of the maturing Treasury securities that  
16 should be "rolled over" by investment in additional 91-day  
17 Treasury securities and the portion that should be deposited in  
18 commercial bank accounts; the Clerk may make such "roll-over"  
19 investments as directed by counsel for Plaintiffs in accordance  
20 with the Memorandum of Agreement or MOA (Attachment B to the  
21 Decree) without further order of the Court; and it is

22 4. FURTHER ORDERED, that all income earned as interest on  
23 funds so invested or deposited shall be credited to the United  
24 States v. Thatcher Company Trust Fund; and it is

25 5. FURTHER ORDERED that the Clerk shall prepare quarterly  
26 reports on the status and activity of the United States v.

1 Thatcher Company Trust Fund account showing payments received,  
2 disbursements made, income earned, maturity dates of securities  
3 held, and principal balance, and shall distribute the reports to  
4 counsel for the United States, State of Oregon and the CTUIR; and  
5 it is .

6 6. FURTHER ORDERED, that funds in the United States v.  
7 Thatcher Company Trust Fund account shall remain in the Registry  
8 until further order of this Court; and it is

9 7. FURTHER ORDERED, that applications for orders for  
10 disbursements from the United States v. Thatcher Company Trust  
11 Fund account may be made only in accordance with the MOA by the  
12 United States on behalf of and with the approval of the Trustees;  
13 counsel for the United States shall serve as the point of contact  
14 for the Clerk on behalf of the parties to this Decree, and shall  
15 distribute copies of the reports refereed to in this Order to the  
16 other parties to this Decree; and it is

17 8. FURTHER ORDERED that the Trustees establish such  
18 procedures as are necessary to arrive at decisions for approving  
19 expenditures of funds from the Trust Fund consistent with the  
20 Decree and will also ensure that such decisions are properly  
21 memorialized for purposes of evidencing the Trustees' approval of  
22 a motion for disbursement of funds; and it is

23 9. FURTHER ORDERED, that the Clerk is authorized and  
24 directed by this Order to deduct for maintaining funds in the  
25 Registry Account the fee as authorized in the Federal Register  
26 Vol. 55, No.206 at page 42867 (October 24, 1990); and it is

CONSENT DECREE -- PAGE 24  
(Order Directing  
Deposit Into Registry  
Of Court -- Page 3)



1 10. FURTHER ORDERED, that a certified copy of this Order  
2 shall be served upon the Clerk of this Court.  
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CONSENT DECREE -- PAGE 25  
(Order Directing  
Deposit Into Registry  
Of Court -- Page 4)

MEMORANDUM OF AGREEMENT  
FOR THE  
JOHN DAY RIVER HYDROCHLORIC ACID SPILL  
NATURAL RESOURCE DAMAGE RESTORATION

This Memorandum of Agreement (MOA or the "Agreement") is between the Oregon Department of Fish and Wildlife, on behalf of the State of Oregon, the United States Department of the Interior (DOI), and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) (collectively referred to as the "Trustees")

I. PURPOSE

This MOA is entered into to ensure the coordination and cooperation of the Trustees in the expenditure of jointly recovered funds for the restoration, replacement and/or acquisition of equivalent natural resources which have been injured as a result of a spill of hydrochloric acid into the John Day River on February 8, 1990.

II. AUTHORITY

The following officials are the signatories to this MOU:

1. The Director, Department of Fish and Wildlife of the State of Oregon.
2. The Director of the Office of Environmental Affairs of the Department of the Interior.
3. The Chairman of the Confederated Tribe of the Umatilla Indian Reservation.

III. SCOPE

This MOU is intended to address natural resources damaged on and after February 8, 1990, at approximately 9:30 a.m., when a tanker truck owned and operated by Thatcher Trucking Company, Salt Lake City, Utah, skidded off of Highway 395 and rolled down the embankment into the North Fork of the John Day River at river mile 56.8. The accident occurred just south of the Camas Creek Bridge near the town of Dale, Oregon, and immediately above the mouth of Camas Creek. The truck was carrying approximately 5,000 gallons of 35.2 percent solution of hydrochloric acid. After the truck rolled into the river, hydrochloric acid began to leak

through a ruptured disk on the pressure valve. An estimated 3,500 gallons or 33,500 lbs of acid was discharged into the North Fork of the John Day River. The acid flowed slowly downstream of the accident site and resulted in extensive mortality of anadromous and resident fish species, salmonid alevins, aquatic plants, aquatic invertebrates, and possibly other resources for which the State, CTUIR and DOI are Trustees.

#### IV. RESTORATION TRUST FUND

The Trustees recognize that \$275,000 dollars will be deposited in an account in the Registry of the Federal District Court pursuant to the consent decree for the John Day Acid Spill. This MOA is intended to guide the use of those funds, hereinafter referred to as the "Trust Fund". No money shall be expended from the Trust Fund except to the extent that such expenditure is consistent with this MOA and the Consent Decree.

#### V. JOHN DAY RESTORATION COMMITTEE

- A. A John Day Restoration Committee ("Committee") will be established to review and select restoration activities to be funded with monies available in the Trust Fund. Each of the Trustees will have representatives on the Committee, but only one representative of each trustee will be designated by the respective trustee as a voting member of the Committee.
- B. Representatives on the Committee should be technically competent in fish habitat issues and knowledgeable of John Day River basin fisheries and habitat needs.
- C. Use of Trust Fund Money
  - 1. The Trust Fund shall be spent on only restoration, replacement or acquisition of equivalent resources injured in the John Day Spill. This will entail habitat restoration and/or enhancement programs for anadromous and resident fish in the North Fork John Day River and tributaries to mitigate for the fish losses resulting from the spill. Emphasis will be placed on riparian systems/habitat recovery through land and easement purchases and riparian fencing and in kind exchanges for riparian lands. Selected projects shall

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<sup>1</sup> DOI's representative will be appointed by the Regional Director, Region 1, Fish and Wildlife Service. That representative shall consult and coordinate with the Portland Area Office, Bureau of Indian Affairs.

be consistent with the Salmon and Steelhead Production Plan for the John Day Subbasin, Northwest Power Planning Council, September 1, 1990.

2. Trust Funds will not be spent on additional natural resource damage studies, monitoring or any compensation for Trustee administrative work or participation on the Committee, including salaries of any Tribal, State or Federal employee.
- D. The Trustees can seek matching funds to increase leveraging opportunities for the Trust Fund. However, the availability of matching funds is not a prerequisite for the implementation of Trust Fund restoration projects.
- E. Decisions by the Committee shall be through consensus. Trust Fund money on a selected project will not be spent until consensus is reached on that project.

#### VI. DISPUTE RESOLUTION

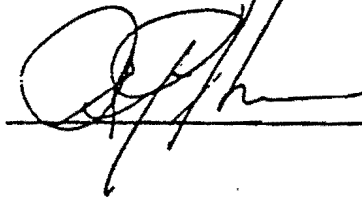
All decisions of the Trustees under this agreement shall be by consensus. In the event that consensus is not reached by the voting representatives of the Committee, the Committee should conduct extensive good faith discussions directed toward obtaining consensus among all Trustees. In the event consensus can not be reached, the matter in dispute shall be presented to higher level officials of the Trustees for resolution. The Trustees may adopt further procedures for dispute resolution.

#### VII. MISCELLANEOUS PROVISIONS

- A. Effective Date; Amendment and Termination. This Agreement shall be effective when executed by all of the Trustees and may not be amended except by written agreement of all Trustees. This Agreement shall continue in effect until terminated by agreement of all the Trustees.
- B. Commitment of Resources. Nothing in the Agreement shall be construed as obligating the United States, the Tribe, the State, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.
- C. Reservation of Rights. It is recognized that each Party to this Agreement has and reserves all rights, powers and remedies now or hereafter existing at law or in equity, or by statute or otherwise, except as specifically agreed herein, and that nothing in this Agreement waives or forecloses the exercise of any such rights, powers or remedies.

- D. No Member of or Delegate to Congress shall be admitted to any share or part of this Agreement, or to any benefit that may arise from this Agreement.

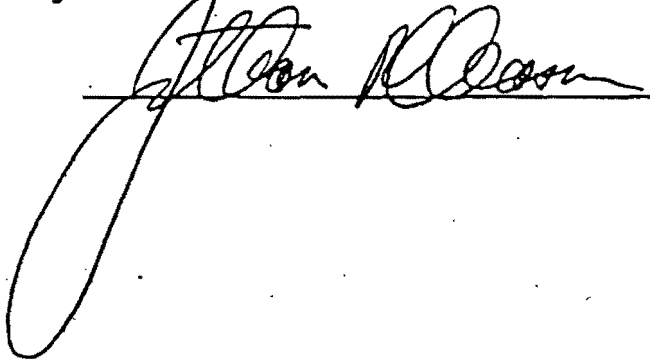
The State of Oregon, Oregon Department of Fish and Wildlife in its capacity as a natural resource Trustee, hereby approves this Memorandum of Agreement for the John Day River Hydrochloric Acid Spill Natural Resource Damage Restoration.

A handwritten signature in black ink, appearing to be 'D. H.', written over a horizontal line.


Date

Jun 7, 1992

The United States Department of the Interior in its capacity as a natural resource Trustee, hereby approves this Memorandum of Agreement for the John Day River Hydrochloric Acid Spill Natural Resource Damage Restoration.

 Date JUNE 8, 1992

The Confederated Tribes of the Umatilla Indian Reservation in its capacity as a natural resource Trustee, hereby approves this Memorandum of Agreement for the John Day River Hydrochloric Acid Spill Natural Resource Damage Restoration.

 Date 6-10-92

Elwood H. Patawa, Chairman  
Board of Trustees

CONFEDERATED TRIBES OF THE  
UMATILLA INDIAN RESERVATION