



## Department of Energy

Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

PUBLIC AFFAIRS

November 8, 2007

In reply refer to: DK-7

Mr. Mark N. Salvo  
Sagebrush Sea Campaign  
2224 W. Palomino Drive  
Chandler, AZ 85224

RE: FOIA #08-004

Dear Mr. Salvo:

This letter is your final response to your request for information that you made to the Bonneville Power Administration (BPA), under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

In your request, you asked for an electronic or hard copy, of the Memorandum of Agreement between BPA and the Confederated Tribes that governs management of the Pine Creek Conservation Area as referenced in the Pine Creek Conservation Plan. BPA is releasing this document to you in its entirety.

If you are dissatisfied with our determination, you may make an appeal within thirty (30) days of receipt of this letter to Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. Both the envelope and the letter must be clearly marked "Freedom of Information Act Appeal." There will be no charge for this request.

I appreciate the opportunity to assist you with this matter. If you have any questions about this letter, please contact our office at 503-230-7305.

Sincerely,

/s/ Christina J. Brannon

Christina J. Brannon  
Freedom of Information Act Officer

Enclosure:

1. Responsive document

Aug 21, 2001

**AMENDED AND RESTATED PINE CREEK RANCH FISH AND WILDLIFE  
PROJECT  
MEMORANDUM OF AGREEMENT**

This Amended and Restated Pine Creek Ranch Wildlife Project Memorandum of Agreement is made by and between **THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON** ("Tribe") and **THE UNITED STATES OF AMERICA**, acting through the Department of Energy, Bonneville Power Administration ("BPA").

**RECITALS**

**WHEREAS**, the Tribe and BPA are parties to that certain Pine Creek Ranch Wildlife Project Memorandum of Agreement dated September 28, 1999, and now desire to amend and restate that agreement as set for herein.

**WHEREAS**, The Tribe is a sovereign entity with rights reserved in the Treaty with the Tribes of Middle Oregon of June 25, 1855 (12 Stat. 963). These rights include the authority to co-manage fish and wildlife and their habitats in the area ceded by the Tribe to the United States.

**WHEREAS**, BPA is a power marketing agency within the United States Department of Energy. The Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501 (Act) directs BPA to protect, mitigate, and enhance fish and wildlife affected by the development and operation of federal hydroelectric projects of the Columbia River and its tributaries, in a manner consistent with the purposes of the Act, the program adopted by the Pacific Northwest Electric Power and Conservation Planning Council (Council) under subsection 4(h) of the Act, and other environmental laws.

**WHEREAS**, The Tribe developed, in 1999, the Pine Creek Ranch Project (Project) to assist BPA in fulfilling its wildlife mitigation obligation associated with the John Day Dam. A legal description of the Project is in Attachment A of this Agreement. The total cost of the Pine Creek Ranch was \$5.65 million. The Council recommended and prioritized approximately \$3.2

million for Fiscal Years 1997-1999 for the Project. BPA funded the initial \$3.2 million, in 1999, the remaining \$2.45 million in subsequent fiscal years.

**WHEREAS,** BPA completed a Wildlife Mitigation Program Final Environmental Impact Statement (March 1997), the Watershed Management Program Final Environmental Impact Statement (July 1997), and their Record of Decision. This EIS and a Supplemental Analysis addressing the acquisition and management of the Project provided the basis for National Environmental Policy Act compliance for the Project.

**WHEREAS,** BPA funding under this Agreement has been and will be provided in a manner consistent with section 4(h)(10)(D) of the Act.

**WHEREAS,** The Tribe has and will continue to dedicate the Project to wildlife habitat protection permanently and will manage it according to the terms of this Agreement and the site-specific management plan (Plan) that the Tribe will prepare.

**WHEREAS,** The purpose of this Agreement is to provide a mechanism for the BPA to fund, and the Tribe to implement, the protection, mitigation, and enhancement of wildlife habitat permanently to help fulfill BPA's duties under the Northwest Power Act. To implement this Agreement, the following activities will typically take place:

(i) Pursuant to a separate Intergovernmental Contract, the Tribe will conduct pre-project studies and analysis, such as estimating Habitat Evaluation Procedure values for the Project, conducting landowner negotiations, and assisting BPA in National Environmental Policy Act compliance.

(ii) Under another Intergovernmental Contract, the Tribe will receive funding for Project acquisition or implementation. After acquisition or approval for implementation, the Tribe will conduct a baseline Habitat Evaluation Procedure, showing actual habitat units at the Project, undertake a fish habitat survey and prepare a Management Plan.

(iii) Subsequent agreements will provide funding for habitat improvements, operation and maintenance, and follow-up Habitat Evaluation Procedures.

**WHEREAS**, the Tribe and BPA anticipated in 1999 the opportunity to expand the scope of the Project to include the Wagner Ranch, an adjoining parcel of approximately 10,000 acres of habitat, a legal description of which is attached as Attachment B. Wagner Ranch is contiguous with Pine Creek and the parties intent the properties to be managed as a single block of fish and wildlife habitat. **WHEREAS**, the Tribe and BPA now wish to purchase the Wagner Ranch and include it within the scope of the Pine Creek Ranch Wildlife Project ("Project").

### **AGREEMENT**

**1. BPA Obligations.** (a) In consideration of the promises and covenants made and set out herein, BPA shall make monetary transfers to the Tribe in amounts and at times mutually agreed upon by the parties and after BPA receives a signed Intergovernmental Contract and invoice from the Tribe.

(b) BPA shall reimburse the Tribe's costs of complying with federal real property acquisition law, including the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655, in the implementation of the Project.

(c) BPA shall also provide a reasonable amount of additional funds for operation and maintenance to help the Tribe ensure the habitat's natural characteristics and mitigation qualities are developed and self-sustaining. The parties expect those amounts to include allowances for items and activities such as vehicle acquisition, building maintenance, Project management, noxious weed treatment, and habitat evaluation. All operations and maintenance funding will be subject to a yearly prioritization process administered by the Council, its assigns or successors. By January 30, 2003, the parties shall make their best efforts to negotiate a long-term operation and maintenance funding plan for payment on an annual basis, through establishment of a trust fund, or by any other means agreed to by the parties. Until such time that a long term agreement is reached, operations and maintenance funding will continue to be subject to the annual prioritization process.

(d) Where this Agreement grants BPA approval authority--of the Management Plan, for example--then unless provided otherwise BPA shall complete its review and announce its decision within a reasonable time, typically within 30 days. For amended or redrafted submissions, review should typically be within 14 days. BPA shall not withhold its approval unreasonably.

**2. Project Fund.** (a) The monies provided pursuant to section 1 above, any interest earned from them, and net income earned from the Project shall constitute the Pine Creek Ranch Mitigation Fund (Fund). Subject to the prioritization process and prior BPA approval, the Tribe may use the Fund to acquire the Project and fulfill its other obligations under this agreement. The Tribe shall maintain the Fund in a discreet account similar to other accounts managed by the Tribe. The Tribe shall maintain accounting for the Fund sufficient to allow tracking of all income and expenditures for the Fund in accordance with generally accepted accounting principles.

(b) In addition to monies provided pursuant to section 1 above, the Tribe may use net revenue received from managing the Project, including but not limited to conservation reserve program payments or other similar payments, to pay costs associated with managing the Project or to implement the Plan. Such revenues generated that are in excess of amounts needed to pay property taxes may be subtracted from O&M funds that would otherwise have been provided by BPA, unless otherwise agreed by the parties.

**3. Habitat Acquisition** (a) Habitat Units. The Tribe shall acquire or otherwise provide BPA with habitat units (HUs) as specified in the Intergovernmental Contract(s) between the parties to implement the Project.

(b) Habitat Inventory and Management Plans. The Tribe shall develop an inventory of the fish and wildlife habitat on the Project. Based on the information obtained from the inventory the Tribe shall develop a site specific management plan (Plan). The Tribe shall develop the Plan within one year of completion of the baseline actual HEP and fish habitat inventory described in section 4 below. The Tribe shall obtain BPA's review and approval of the Plan prior to implementing it. The completed plan shall be incorporated into and made a part of this

Agreement. The Plan will focus on habitat management designed to achieve and maintain native habitat that is naturally self-sustaining. The Tribe will develop the Plan in consultation with any federal, state, tribal or public entity that wishes to participate. The Plan should address management methods and, if necessary, mitigation, for all resources incorporate the NEPA ROD by reference. The Tribe will integrate management planning for historic and cultural resources, as defined by the National Historic Preservation Act, with the fish and wildlife management practices as a means of avoiding impacts to cultural and historic resources. Cultural resource surveys shall be done prior to acquisition of the Wagner Ranch and before initiating on the Project non-exempt ground-disturbing activities identified in the Wildlife EIS. The Tribe will also avoid sensitive sites if at all possible in implementing habitat improvement actions. Only ground-disturbing activities approved in the Plan may be undertaken.

(c) NEPA Compliance. The Tribe shall assist BPA in complying with NEPA by applying the process outlined in the BPA Wildlife Mitigation and Watershed Management Programmatic EISs and their Records of Decision (ROD) to the Project. This process includes assisting BPA in the completion of a Supplement Analysis which will consider (1) whether the Project is substantially consistent with the ROD relevant to environmental concerns, and (2) whether there are significant new circumstances or information relevant to environmental concerns. The NEPA compliance will be done prior to the acquisition of the Wagner Ranch.

(d) The Tribe will have all management and operation control of the Project, and will therefore be responsible for all incidents of ownership of real property interests acquired with the Fund. The Tribe shall hold harmless and indemnify BPA from any liability from any incident of ownership that may arise in the implementation of the Plan; provided BPA retains liability as provided for under the Federal Torts Claims Act. Such incidents of ownership include, but are not limited to, hazardous waste response, cultural resource mitigation, and tort liability. Should a catastrophic event such as a wildfire, destroy or diminish the fish and wildlife habitat, the Tribe shall have no obligation to reproduce the pre-existing wildlife values any faster than natural regeneration reproduces them.

(e) The Tribe will ensure that all the habitat acquired, improved, or managed with BPA funds is permanently protected and managed for fish and wildlife on behalf of BPA, preventing any and all uses of the properties that are inconsistent with this Agreement, the Northwest Power Planning Council's Columbia River Basin Fish and Wildlife Program, the Northwest Power Planning Act, and the Plan required by section 3(b). Prohibited uses of the habitat acquired, improved, or managed under this Agreement include by way of example, but are not limited to, the following:

(i) Grazing of domestic livestock and feral horses and cattle on the properties unless used as a method to manage the properties for wildlife as outlined in the Plan,

(ii) Timber harvesting, except such harvesting as is consistent with the Plan for the purpose of improving the properties as wildlife habitat, as is necessary for proper fire or land management, or protection of person or property as outlined in the Plan, and

(iii) All residential, commercial, or industrial uses of the properties, that are not permitted in the Plan, with the possible exception of a home site for a Project manager and the maintenance and use of the buildings, on the lands at the time they are acquired, for purposes furthering the intent of this Agreement. Unless otherwise agreed by the parties in writing, the Tribe will achieve permanent protection for wildlife habitat as described in section 6.

(f) Management Plan and Wildlife and Fish Inventories for Wagner Ranch. Based on the information obtained from the following wildlife and fish inventories, the Tribe shall amend the Project management plan to include Wagner Ranch. The Tribe shall amend the management plan within two years of acquisition of the Wagner Ranch. The amended management plan will focus on the criteria set forth in Section 3(b). The Tribe shall obtain BPA's review and approval of the amended management plan before implementing it. The amended management plan shall be incorporated into and made a part of this Agreement.

(i) Fish Habitat Inventory. The Tribe shall complete a fish habitat inventory on the Wagner Ranch, including a baseline, modified Hankin and Reeves, or other widely accepted stream habitat assessment.

(ii) **Wildlife Habitat Inventory.** The Tribe shall complete a wildlife habitat inventory for Wagner Ranch, using the HEP methodology. The Tribe will conduct HEPs, using the HEP guidelines developed by the U.S. Fish and Wildlife Service. The parties will identify the study species in the Project's Intergovernmental Contract(s). Species and habitat selection will generally be based on the Wildlife Impact Assessment, John Day Project, Oregon and Washington (Annual Report 1990, DOE/BP-924 30-1). HEP models will be followed when available for target species; however, some modifications may be necessary. For example, when models are not available or applicable for one species, the parties may agree to substitute other species. The Tribe will notify BPA of the HEPs in time for BPA to observe the HEPs.

The Tribe must conduct a baseline HEP to determine then existing HUs at the Wagner Ranch within one year following the acquisition and prior to undertaking wildlife habitat improvement activities. The parties may conduct additional HEP studies as agreed upon in an Intergovernmental Contract. The party requesting the study shall fund it, unless the parties agree otherwise.

**4. BPA Credit.** The Tribe shall support BPA's taking of protection, mitigation, and enhancement credit. BPA intends to seek or assert credit as follows:

(a) For having used BPA funds to purchase, improve, and manage the Project, BPA shall receive as a credit to wildlife mitigation under the Act, at a minimum, the HUs agreed upon in the Intergovernmental Contract(s), and as a maximum, the HUs achieved or acquired.

(i) BPA shall receive full credit for all HUs achieved through protection or improvement activities. Full credit for protection means one credit for each HU acquired. Full credit for improvement or enhancement activities means one credit for each HU achieved over the baseline actual HEP. If BPA funds only a portion of the Project, BPA shall receive full credit in proportion to the share of costs it provides.

(ii) A minimum of three HEP events is anticipated. The first is an estimate of HUs; a full or complete HEP is not expected. This estimate will be used in the Intergovernmental Contract conveying funds to Tribe for acquisition of the Project. Next is the baseline HEP analyses of actual or existing HUs on the Ranch. This second HEP event will precede development of the Plan. Finally, the Tribe will conduct additional HEP analysis to evaluate the results of implementing the Plan.

(b) The Tribe will conduct HEPs, using the HEP guidelines developed by the U.S. Fish and Wildlife Service. The parties will identify the study species in the Project's Intergovernmental Contract(s). Species and habitat selection will generally be based on upon the Wildlife Impact Assessment, John Day Project, Oregon and Washington (Annual Report 1990, DOE/BP - 924 30-1). HEP models will be followed when available for target species; however, some modifications may be necessary. For example, when models are not available or applicable for one species, the parties may agree to substitute other species. The Tribe will notify BPA of the HEPs in time for BPA to observe the HEPs. The results of the HEPs shall be used to evaluate the full credit due.

(i) Baseline HEP. The Tribe will conduct the baseline HEP to determine the then existing HUs at the Project within one year following the acquisition and prior to undertaking habitat improvement activities.

(ii) Subsequent HEPs. If the Project involves minor habitat improvement activities, such as non-native vegetation removal, minimal revegetation or minimal mechanical manipulation, HEP sampling should occur within five to seven years following completion of the improvement activities. If the Project involves major habitat improvement activities, such as revegetation, mechanical manipulation or other large scale land use modifications, HEP sampling should occur seven to ten years following completion of the improvement activities.

(iii) The parties may conduct additional HEP studies as agreed upon in an Intergovernmental Contract. The party requesting the study shall fund it unless the parties agree otherwise.

(c) BPA shall receive full credit for all HUs, including those from both the acquisition of real property interests and from habitat improvement and management activities which are a direct result of BPA funding. BPA may credit these HUs toward its mitigation duty for wildlife habitat losses at the John Day Project or any other Federal Columbia River Power System project (i) agreed to by BPA, the Tribe and the Council, or (ii) adopted by BPA consistent with the Northwest Power Act and applicable law.

(d) If another crediting methodology is imposed by applicable law or by judicial decision, or agreed to among the Council, BPA and the Tribe--and not overturned by any court of competent jurisdiction, that formula shall be used to recompute the credit provided in this part and the recomputed credit shall be used for all purposes, including the final determination of BPA's ultimate obligation to provide wildlife mitigation, protection and enhancement; however, in no event will any such recalculation affect BPA's obligations under this Agreement.

(e) The Tribe agrees that BPA's expenditure of money is consistent with sections 4(h) and 10(e) of the Act. The Tribe shall support BPA's obtaining full credit for its expenditures with respect to protecting and managing existing habitat on the Project, and for habitat improvements when implemented on the Project, so long as BPA complies with the terms of this Agreement, including but not limited to BPA's obligation to provide operation and maintenance funding as provided in section 1(c).

(f) Crediting for Wagner Ranch. The original Pine Creek Ranch Wildlife Project Memorandum of Agreement, Recital D, provided that "[I]f the Wagner Ranch is added to the Project, its acquisition and management shall be pursuant to this Agreement." The Tribe agrees to perform fish and wildlife habitat inventories for Wagner Ranch pursuant to Sections 3(f)(i) and (ii) of this Agreement. BPA believes it is entitled to crediting under the Act and pertinent biological opinions for fish, wildlife, and ESA benefits resulting from implementation of this Agreement and intends to take such credits in a manner consistent with the Act and the biological opinions. The Tribe takes no position in this MOA as to whether or not BPA is entitled to credit under the Act.

**5. Acquisition Process.** (a) The Tribe may utilize its own processes in preparing to acquire real property interests. The Tribe will comply with federal real property acquisition laws, such as the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655. If the acquisition involves potential relocation costs, the Tribe shall consult BPA's Manager, Real Property Services, before taking any action or making any commitments that may necessitate reimbursement by BPA under section 1(b). The Tribe shall obtain BPA's review and approval of an appraisal before the acquisition. BPA shall have ten calendar days to review the preliminary appraisal for compliance with Uniform Standards and Procedures of Appraisal Practices. BPA shall have five calendar days to approve the final appraisal after it has been revised and resubmitted, as necessary. Before acquisition of the Project, BPA shall conduct a hazardous material and petroleum products survey in a timely manner and promptly provide the Tribe a copy of the results.

(b) Allocating Responsibility for Wagner Ranch.

(i) Incidents of Ownership. Once acquisition is complete, the Tribe will have all management and operation control of Wagner Ranch and will, therefore, be responsible for all incidents of ownership of real property interests acquired under this Agreement.

(ii) Uniform Relocation Act. BPA agrees to hold harmless and indemnify the Tribe against claims arising under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601 to 4655, ("Uniform Relocation Act"), as long as the Tribe complies with the notice provisions of Section 5(a) of this Agreement.

(iii) Unauthorized Actions. If either party engages in actions that are not authorized by this Agreement, that party will indemnify and hold harmless the other party from any and all liability and costs resulting from such unauthorized action.

(iv) Management Plan's Allocation of Responsibility. The parties understand and agree that responsibility for actions taken pursuant to the Management Plan under Section 3(f) will be agreed to and allocated among the parties in the Management Plan, contract modifications, or subsequent Intergovernmental Contracts.

**6. Permanent Protection of Wildlife Mitigation.** (a) To ensure the Project is protected as self-sustaining native wildlife habitat permanently, the Tribe shall take title to it by a deed conveying fee simple subject to an executory interest in favor of BPA, in a form substantively equivalent to Attachment C. The Tribe shall record such deed and this Agreement in the appropriate county record. The parties intend that the real property transaction addressed in this Agreement shall be governed by ORS 105.950 to 105.975, Oregon's Uniform Statutory Rule Against Perpetuities.

(b) Title Requirements for Wagner Ranch. The Tribe shall take title to the Wagner Ranch by a deed conveying fee simple interest. To ensure that the Wagner Ranch is protected as self-sustaining native fish and wildlife habitat permanently, the Tribe shall execute the deed of conservation easement in favor of BPA, in a form substantially equivalent to Attachment D immediately upon obtaining ownership of the Project. At closing the Tribe shall record the deeds and easements in the appropriate county record.

(c) Rights of Way over Wagner Ranch. If at any time BPA needs a transmission line right-of-way over Wagner Ranch, the Tribe must grant BPA perpetual easements and rights-of-way, in a form substantively equivalent to Attachment E. Provided, prior to the Tribe granting such easements, BPA must first provide proof of compliance with all applicable Federal laws, including but not limited to the National Environmental Policy Act, the Endangered Species Act, and the Clean Water Act. Provided further, that BPA shall fund (1) the Tribe to complete additional habitat evaluations after the transmission facility is complete and (2) habitat improvements as agreed upon by the parties, such as fencing or replanting, to protect the remaining fish and wildlife habitat.

**7. Recording by the Tribe.** Within 30 days of recording any conveyance described in section 6, the Tribe shall submit to the BPA contracting officer a copy of the recorded documents showing the recording information. BPA may suspend its funding under section 1(c) if it has not received the recording information within 30 days of recording.

**8. BPA Power Of Termination.** Except as provided in section 10, if BPA determines that the Project is not being managed for fish and wildlife habitat--as evidenced by a twenty percent drop

in the highest documented actual HEP values and such reduction is not the result of force majeure as described in section 10 below--and unless BPA provides written consent to the Tribe continuing to own and manage the Project despite the twenty percent drop, then fee title shall vest in BPA as provided by the deed conveying fee simple subject to an executory interest in favor of BPA that the Tribe will have had recorded as provided under section 6 above. This provision shall not apply if the United States takes the property into trust on behalf of the Tribe.

**9. Tribal Power of Termination.** In the event the Tribe determines that the operation and maintenance funds provided by BPA are inadequate to fulfill the Tribe's obligations under this Agreement the Tribe may provide BPA with written notice that the funds are inadequate and then take action as provided below.

(a) (i) Within 120 days of the letter, transfer any real property interests acquired with the Fund to BPA, upon receipt of BPA approval and acceptance. BPA shall assume full responsibility for managing the transferred property for the permanent protection of fish and wildlife habitats;

(ii) promptly sell at fair market value any remaining property and remit to BPA the received value less the Tribe's costs of each property sale, including reasonable management or other action to prepare the property for sale;

(iii) immediately transfer the balance of the Fund to BPA. The Fund may not be used to prepare property for sale or transfer under this provision without BPA's written approval.

(b) The Tribe may conduct a HEP on the Project and follow-up HEPs to determine HUs lost attributable to the reduction or elimination of BPA O&M funding as a result of prioritization or BPA action. Any loss of HUs may be subtracted from BPA's improvement HUs only, not acquisition HUs.

**10. Force Majeure.** Neither party shall be liable to the other or deemed in fault under this Agreement if and to the extent that the party's performance of the Agreement is prevented by reason of force majeure. The term "force majeure" means an occurrence that is beyond the

control of the party affected and could not have been avoided by exercising reasonable diligence. Force majeure includes, but is not limited to, acts of God, riots, strikes, fire, floods, epidemics, acts of government other than the Tribe or BPA, embargo, wrecks, or unavoidable delay in materials or manufacturing facilities from generally recognized sources in the applicable industry. The parties will make all reasonable efforts to resume performance promptly once the force majeure is eliminated. Tribe shall have no obligation to reproduce the Project's pre-existing wildlife habitat values any faster than natural regeneration reproduces them.

**11. Acquisition, Exchange, Sale.** If the Tribe determines that a sale or exchange of the Project would provide a net gain in HUs or aid in the fulfillment of the management objectives as stated in this Agreement, then the Tribe may sell or exchange the Project ensuring the following conditions are met: (a) the new real property interests are of equal or greater wildlife habitat value, as measured by a habitat evaluation procedure, to the habitats targeted in this Agreement, or aid in fulfillment of the Project or facilitate management of real property already acquired, (b) BPA's Fish and Wildlife Division Director concurs in the sale or exchange, and (c) the Tribe complies with sections 6 and 7 of this agreement with regard to the new property acquired. BPA concurrence shall not be unreasonably withheld.

**12. Conveyance to BPA.** In the event of a conveyance of real property by the Tribe to BPA pursuant to section 9 of this Agreement, the Tribe will warrant (i) that it has not by affirmative act or negligence allowed any situation to occur with respect to the property, or entered into any leases or renewals, or other agreements relating to the property, that would frustrate BPA's ability to manage the property according to the site-specific management plan and (ii) that there is no known hazardous waste contamination on the Project.

**13. Protection of Tribal Rights.** Fishing, hunting, gathering and Tribal cultural and religious activities on the Project according to Tribal custom and law are not prohibited by this Agreement. Tribal members shall be subject to tribal regulation of wildlife harvest. All other hunters will be subject to state and federal regulations.

**14. Public Access.** The public shall have reasonable access to the Project. The Tribe may regulate access, provided that access and transportation regulations shall apply equally to tribal members and non-tribal members. The Tribe will not provide public access or use that will result in adverse impacts to fish and wildlife, the reduction of fish and wildlife habitat values, or the destruction of other natural resource values for which the Properties are managed, or impede the increase in HEP value of improvement HUs. Nothing in this Agreement limits the authority or ability of the Tribe to manage the properties for public safety and wildlife habitat conservation, or to preserve and protect cultural, historic, and religious sites, and to carry out and protect the federally guaranteed rights of the Tribe and its members. Nothing in this Agreement limits or diminishes any treaty retained right or privilege of the Tribe or its members afforded under federal law as a result of the status of the Tribe or Tribal members, provided that treaty reserved rights will be exercised consistent with this Agreement.

**15. Right to Enter.** BPA shall have the right to enter upon the Project at reasonable times to monitor the Tribe's compliance with this Agreement and to enforce its terms.

**16. Tribe Reporting.** Beginning June 30, 2000, and every June 30 thereafter, or as agreed upon in Intergovernmental Contracts, the Tribe shall provide BPA an annual written report generally describing the real property interests in the Project, HEP analyses undertaken or in progress, and management activities undertaken or in progress. The Tribe shall also provide an accounting of the Fund at this time and provide, upon request, access to the records that will allow BPA to verify the accounting.

**17. Limitation of Credit.** The credit BPA obtains for the consideration paid to provide and maintain the project as fish and wildlife habitat as required and provided in this Agreement shall not be affected or diminished as a result of the failure of the Tribe to carry out its obligations to maintain the properties as provided in this Agreement.

**18. Binding Effect.** This Agreement shall be binding on the parties and their assigns and successors. Either party shall have the right to enforce the terms of this Agreement as provided herein.

**19. Dispute Resolution.** BPA and the Tribe agree to submit in good faith any disputes regarding the implementation of this Agreement or the management of the Project to non-binding mediation. This provision shall be triggered when one party makes a written request for the other party to join in mediation. Within 30 days of this provision being triggered, the parties shall select a mediator, or if they are unable to select a mediator, each party shall select a mediator and the two selected will choose a third mediator who shall be the sole mediator. The parties shall use their best efforts to resolve the dispute in mediation. After a dispute has been in mediation for at least 60 days and there have been at least two mediation sessions, either party may initiate legal action to resolve the dispute. Except as provided in this part, pending completion of mediation no party shall initiate any legal proceeding except in aid of mediation.

**20. Effective Date.** The original Pine Creek Agreement was effective on September 28, 1999. This Amended and Restated Agreement shall be effective when signed by the Chairman of the Tribal Council pursuant to Article 5, Section 1(a), (d) and (l) of the Tribal Constitution and Tribal Resolution # \_\_\_\_\_ (Attachment F); BPA's Manager Real Property Services; and BPA's Group Vice President of the Office of Environment, Fish and Wildlife.

**21. Contract Approval.** If a court of competent jurisdiction finds that the parties or either of them were not authorized to perform any obligation under this contract, this Agreement shall terminate and the parties will have no further obligations to each other under this Agreement. Upon such termination, and upon BPA's request and approval, the Tribe shall transfer title to real property acquired pursuant to section 3 to BPA, and convey to BPA any and all personal property acquired with funding provided by BPA under this Agreement; provided, the Tribe shall retain fixtures used for habitat improvement on land the Tribe owned on or before the date of this Agreement. Unless otherwise agreed by the parties, the parties shall use their best efforts to enter into a new and binding agreement that accomplishes the intent of this Agreement. Either party may invoke the dispute resolution provisions of this Agreement to facilitate the negotiation of a new agreement.

**22. Modification.** The parties by mutual agreement may modify the terms of this Agreement. Any such modification shall be in writing signed by both parties. The parties may enter into additional Intergovernmental Contracts to effect the acquisition of Wagner Ranch.

**23. Applicable Law.** All activities undertaken pursuant to this Agreement and the Intergovernmental Contracts must be in compliance with all applicable state and federal laws and regulations. Federal law shall govern the implementation of this Agreement and any action, whether mediated or litigated, brought or enforced. THIS WAIVER OF SOVEREIGN IMMUNITY OF THE TRIBES FROM SUIT OR ACTION IS ADOPTED PURSUANT TO THE TERMS OF WARM SPRINGS TRIBAL CODE CHAPTER 30 AND SHALL BE STRICTLY CONSTRUED AND LIMITED TO ITS SPECIFIC TERMS AND THE SPECIFIC WAIVER GRANTED. Without such waiver the contract would be unenforceable by BPA, BPA requires enforceability, and therefore there is no other workable alternative. The Tribe grants a limited waiver of its sovereign immunity for BPA or its successors--but no other person or entity--if BPA alleges a breach of an obligation or duty by the Tribe under this Agreement and seeks to bring the Tribe into compliance with this Agreement or seeks payment of a monetary obligation arising from noncompliance; provided, any payments from the Tribe shall be payable only from monies, assets, or properties derived from the benefits of this Agreement--all other monies, assets or properties of the Tribe being unavailable to satisfy a judgment. The waivers of sovereign immunity by the United States bind BPA and can be found generally in the statutes establishing the jurisdiction of the United States District Courts, 28 U.S.C. § 1346, the Court of Claims, 28 U.S.C. § 1491, and the Federal Torts Claims Act, 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2411, 2412, 2671 et seq.

**24. Attorney Fees.** In the event of litigation involving this Agreement each party shall bear its own costs and attorney fees, including those incurred on appeal.

**25. Waiver.** The failure of any party to require strict performance of any term of this Agreement or a party's waiver of performance shall not be a waiver of any future performance or of a party's right to require strict performance in the future.

**26. Assignment.** The Tribe may not assign or transfer its rights or delegate its responsibilities under this Agreement without written approval from BPA, which approval shall not be unreasonably withheld. The parties agree that Tribe will retain ownership of properties acquired in fee with the Fund and, unless otherwise agreed by the parties, may only delegate its duties through long term leases, conservation easements and management agreements.

**27. In Lieu Funding.** Tribe may use the Fund only for acquisitions and improvements that are in addition to, not in lieu of, other expenditures it is required to make under other agreements or provisions of law. Tribe will pay, from a source other than BPA, payments in lieu of taxes, county weed assessments and minimum noxious weed control costs as required by state law for the Project.

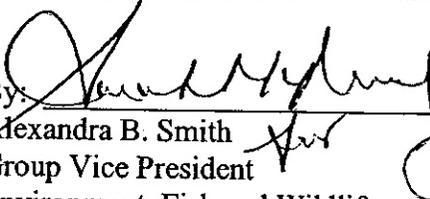
**28. Notice.** Any notice permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any party may from time to time specify to the other party in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail.

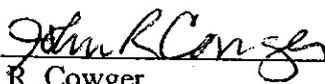
Notices to BPA should be sent to:  
[Project COTR] B KECW-4  
Bonneville Power Administration  
P.O. Box 3621  
Portland, OR 97208

Notices to the Tribe should be sent to:  
Director, Natural Resources  
Confederated Tribes of the Warm Springs  
Indian Reservation  
Warm Springs, OR 97761

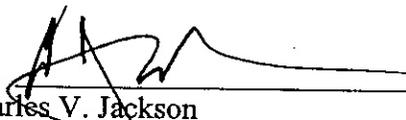
IN WITNESS WHEREOF, each of the parties hereto has executed this Amended and Restated Pine Creek Ranch Wildlife Project Memorandum of Agreement.

**BONNEVILLE POWER ADMINISTRATION**

By:  Date: Aug 29, 2001  
Alexandra B. Smith  
Group Vice President  
Environment, Fish and Wildlife

By:  Date: 8/29/01  
John R. Cowger  
Manager, Real Property Services

**CONFEDERATED TRIBES OF THE WARM SPRINGS INDIAN RESERVATION OF OREGON**

By:  Date: Aug 28, 2001  
Charles V. Jackson  
Secretary-Treasurer

ATTACHMENT A  
PINE CREEK LEGAL DESCRIPTION

WC54686

EXHIBIT A

Located in WHEELER COUNTY, OREGON:

**TRACT I:**

**IN TOWNSHIP 7 SOUTH, RANGE 19 EAST OF THE WILLAMETTE MERIDIAN:**

Section 33: SE $\frac{1}{4}$ SE $\frac{1}{4}$ ; EXCEPTING therefrom a parcel of land described as follows: Beginning at a point which is 1,333.73 feet South and 1,417.82 feet East of the center of said Section 33; thence South 78°09'30" East, 233.51 feet thence South 9°28'30" East 389.98 feet; thence North 72°56' West 264.57 feet; thence North 11°06' East 135.41 feet; thence North 16°31'30" West 231.62 feet to the place of beginning.

Section 34: S $\frac{1}{2}$ SW $\frac{1}{4}$ ; SW $\frac{1}{4}$ SE $\frac{1}{4}$ .

Section 36: NE $\frac{1}{4}$ NE $\frac{1}{4}$ ; S $\frac{1}{2}$ NE $\frac{1}{4}$ ; S $\frac{1}{2}$ ; EXCEPTING therefrom a parcel of land located in the SE $\frac{1}{4}$  of said Section 36 described as follows: Commencing at a rock 30 x 24 x 20 inches and marked thus + situated near the East boundary of the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of said Section 36 and 21.8 chains along the Pine Creek County Road Northwest but not due Northwest of the sixth milestone on said County Road; thence North 72-3/4° West 3.15 chains to a stake in rock mound; thence North 17.25° East 3.155 chains to rock mound; thence South 72.75° East 3.155 chains to rock 24 x 24 x 20 inches marked +, thence South 17.25° West 3.155 chains to place of beginning.

**IN TOWNSHIP 7 SOUTH, RANGE 20 EAST OF THE WILLAMETTE MERIDIAN:**

Section 19: Lots 3 and 4; SE $\frac{1}{4}$ NW $\frac{1}{4}$ ; NW $\frac{1}{4}$ SW; SE $\frac{1}{4}$ .

Section 20: SW $\frac{1}{4}$ SW $\frac{1}{4}$ .

Section 24: S $\frac{1}{2}$ SE $\frac{1}{4}$ .

Section 25: All, EXCEPTING therefrom that portion lying Southerly and Easterly of State Highway No. 218.

Section 26: E $\frac{1}{2}$ E $\frac{1}{2}$ ; SW $\frac{1}{4}$ SE $\frac{1}{4}$ .

Section 29: SW $\frac{1}{4}$ NW $\frac{1}{4}$ ; W $\frac{1}{2}$ SW $\frac{1}{4}$ ; E $\frac{1}{2}$ W $\frac{1}{2}$ ; SW $\frac{1}{4}$ SE $\frac{1}{4}$ .

Section 30: Lots 1, 2, 3, and 4; E $\frac{1}{2}$ W $\frac{1}{2}$ ; E $\frac{1}{2}$ .

Section 31: Lots 1, 2, 3, and 4; E $\frac{1}{2}$ W $\frac{1}{2}$ ; W $\frac{1}{2}$ .

EXCEPTING therefrom a parcel of land lying in the S $\frac{1}{2}$ SE $\frac{1}{4}$  of said Section 31 described as follows: Beginning at the South quarter corner of said Section 31; thence North 34°04'15" East 899.82 feet to the true point of beginning; thence North 65°46'30" East 304.81 feet; thence South 73°17'00" East 255.85 feet; thence South 38°53'40" East 285.91 feet; thence South 66°45'40" East 640.71 feet; thence South 89°04'30" East 198.73 feet; thence North 14°50'00" East 270.0 feet; thence North 75°10'00" West 815.0 feet; thence North 14°50'00" East 280.0 feet; thence North 75°10'00" West 701.75 feet; thence South 14°50'00" West 481.15 feet the true point of beginning.

Section 32: W $\frac{1}{2}$ ; SE $\frac{1}{4}$ SE $\frac{1}{4}$ .

Section 33: N $\frac{1}{2}$ S $\frac{1}{2}$ ; S $\frac{1}{2}$ SW $\frac{1}{4}$ .

Section 34: S $\frac{1}{2}$ ; S $\frac{1}{2}$ N $\frac{1}{2}$ .

Section 35: N $\frac{1}{2}$ NE $\frac{1}{4}$ ; S $\frac{1}{2}$ N $\frac{1}{2}$ ; S $\frac{1}{2}$ .

Section 36: N $\frac{1}{2}$ ; N $\frac{1}{2}$ S $\frac{1}{2}$ , EXCEPTING therefrom that portion lying Southerly and Easterly of State Highway No. 218.

See Exhibit A - Continued (Page 1)

Exhibit A - Continued (Page 1)

Located in WHEELER COUNTY, OREGON:

IN TOWNSHIP 7 SOUTH, RANGE 21 EAST OF THE WILLAMETTE MERIDIAN:

Section 19: NE $\frac{1}{4}$ SW $\frac{1}{4}$ ; SE $\frac{1}{4}$ ; Lots 3 and 4, EXCEPTING therefrom that portion lying Southerly and Easterly of State Highway No. 218.

Section 30: NE $\frac{1}{4}$ NW $\frac{1}{4}$ ; Lots 1, and 2 EXCEPTING therefrom that portion lying Southerly and Easterly of State Highway No. 218.

IN TOWNSHIP 8 SOUTH, RANGE 19 EAST OF THE WILLAMETTE MERIDIAN:

Section 1: S $\frac{1}{2}$ NE $\frac{1}{4}$ ; N $\frac{1}{2}$ SE $\frac{1}{4}$ ; SW $\frac{1}{4}$ SE $\frac{1}{4}$ ; Lots 1, 2, 3, and 4.

Section 3: Lot 4.

Section 4: Portion of Lot 1 described as follows: Commencing at a point on Township line between Township 7 and 8 South, above Range, which is 74 rods West of the Northeast corner of said Lot 1, and running thence East on said Township line 74 rods to the Northeast corner of said Lot 1; thence following East boundary of said Lot 1, 67 rods to the Southeast corner of said Lot 1; thence West on the South boundary of said Lot 1, 21 rods, thence in a Northwesterly direction in a straight line to the place of beginning.

Section 12: N $\frac{1}{2}$ NE $\frac{1}{4}$ .

IN TOWNSHIP 8 SOUTH, RANGE 20 EAST OF THE WILLAMETTE MERIDIAN:

Section 1: Lots 3, 4, 5, 6, and 7.

Section 2: All, EXCEPTING therefrom a parcel of land lying in the S $\frac{1}{2}$ NW $\frac{1}{4}$  of said Section 2 described as follows: Beginning at a point which is 40 feet distant Northerly from (when measured at right angles to) the relocated centerline of the Shaniko-Fossil Highway at Engineer's Center Line Station 234+00; said point also being South 1,491 feet and East 565 feet from the Northwest corner of said Section 2; thence South 60°41' West parallel to said relocated centerline 400 feet; thence North 29°19' West 210 feet; thence 60°41' parallel to and 250 feet from said centerline 400 feet; thence South 29°19' East 210 feet to the point of beginning.

Section 3: All.

Section 4: All.

Section 5: All.

Section 6: S $\frac{1}{2}$ NE $\frac{1}{4}$ ; SE $\frac{1}{4}$ NW $\frac{1}{4}$ ; SE $\frac{1}{4}$ ; Lots 1, 2, 3, 4, 5, and 6.

Section 7: NE $\frac{1}{4}$ ; E $\frac{1}{2}$ SE $\frac{1}{4}$ .

Section 8: NE $\frac{1}{4}$ ; E $\frac{1}{2}$ W $\frac{1}{2}$ ; E $\frac{1}{2}$ SE $\frac{1}{4}$ ; Lots 1, 2, 3, and 4.

Section 9: All EXCEPT Lot 3.

Section 10: All.

Section 11: E $\frac{1}{2}$ W $\frac{1}{2}$ ; NE $\frac{1}{4}$ NE $\frac{1}{4}$ ; E $\frac{1}{2}$ SE $\frac{1}{4}$ ; W $\frac{1}{2}$ E $\frac{1}{2}$ ; Lots 1, 2, 3, and 4.

Section 12: SW $\frac{1}{4}$ NE $\frac{1}{4}$ ; E $\frac{1}{2}$ NW $\frac{1}{4}$ ; E $\frac{1}{2}$ SW $\frac{1}{4}$ ; W $\frac{1}{2}$ SE $\frac{1}{4}$ ; SE $\frac{1}{4}$ SE $\frac{1}{4}$ ; Lots 1 and 4.

Section 13: All.

Section 14: All.

Section 15: E $\frac{1}{2}$ E $\frac{1}{2}$ ; W $\frac{1}{2}$ NE $\frac{1}{4}$ ; NE $\frac{1}{4}$ NW $\frac{1}{4}$ ; NW $\frac{1}{4}$ SE $\frac{1}{4}$ ; Lot 3.

Section 16: All.

Section 17: All.

Section 18: E $\frac{1}{2}$ SE $\frac{1}{4}$ ; SW $\frac{1}{4}$ SE $\frac{1}{4}$ ; E $\frac{1}{2}$ W $\frac{1}{2}$ .

See Exhibit A - Continued (Page 2)

Exhibit A - Continued (Page 2)

Located in WHEELER COUNTY, OREGON:

**IN TOWNSHIP 8 SOUTH, RANGE 20 EAST OF THE WILLAMETTE MERIDIAN:**

- Section 19: N $\frac{1}{2}$ NE $\frac{1}{4}$ ; SE $\frac{1}{4}$ NE $\frac{1}{4}$ .
- Section 20: E $\frac{1}{2}$ NW $\frac{1}{4}$ ; Lots 1, and 2: W $\frac{1}{2}$ NE $\frac{1}{4}$ .
- Section 21: E $\frac{1}{2}$ SW $\frac{1}{4}$ ; W $\frac{1}{2}$ SE $\frac{1}{4}$ ; SE $\frac{1}{4}$ SE $\frac{1}{4}$ ; Lot 4; NE $\frac{1}{4}$ ; E $\frac{1}{2}$ NW $\frac{1}{4}$ .
- Section 22: E $\frac{1}{2}$ ; SE $\frac{1}{4}$ SW $\frac{1}{4}$ ; Lots 1, 2, and 4.
- Section 23: All.
- Section 24: All.
- Section 25: All.
- Section 26: NE $\frac{1}{4}$ ; NE $\frac{1}{4}$ NW $\frac{1}{4}$ ; NW $\frac{1}{4}$ SE $\frac{1}{4}$ ; E $\frac{1}{2}$ SE $\frac{1}{4}$ .
- Section 27: Lot 1.
- Section 28: N $\frac{1}{2}$ NE $\frac{1}{4}$ ; NE $\frac{1}{4}$ NW $\frac{1}{4}$ ; Lot 1.
- Section 29: SE $\frac{1}{4}$ NE $\frac{1}{4}$ .
- Section 36: All.

**IN TOWNSHIP 8 SOUTH, RANGE 21 EAST OF THE WILLAMETTE MERIDIAN:**

- Section 17: S $\frac{1}{2}$ N $\frac{1}{2}$ ; S $\frac{1}{2}$ .
- Section 18: All.
- Section 19: All.
- Section 20: N $\frac{1}{2}$ ; N $\frac{1}{2}$ SW $\frac{1}{4}$ .
- Section 21: NE $\frac{1}{4}$ NW $\frac{1}{4}$ ; Lots 1 and 2.
- Section 29: E $\frac{1}{2}$ W $\frac{1}{2}$ ; Lots 1, 2, 3, and 4.
- Section 30: All.
- Section 31: All.
- Section 32: SE $\frac{1}{4}$ SW $\frac{1}{4}$ ; Lots 1, 2, 3, and 4.

**IN TOWNSHIP 9 SOUTH, RANGE 20 EAST OF THE WILLAMETTE MERIDIAN:**

- Section 1: S $\frac{1}{2}$ N $\frac{1}{2}$ .

**TRACT II:**

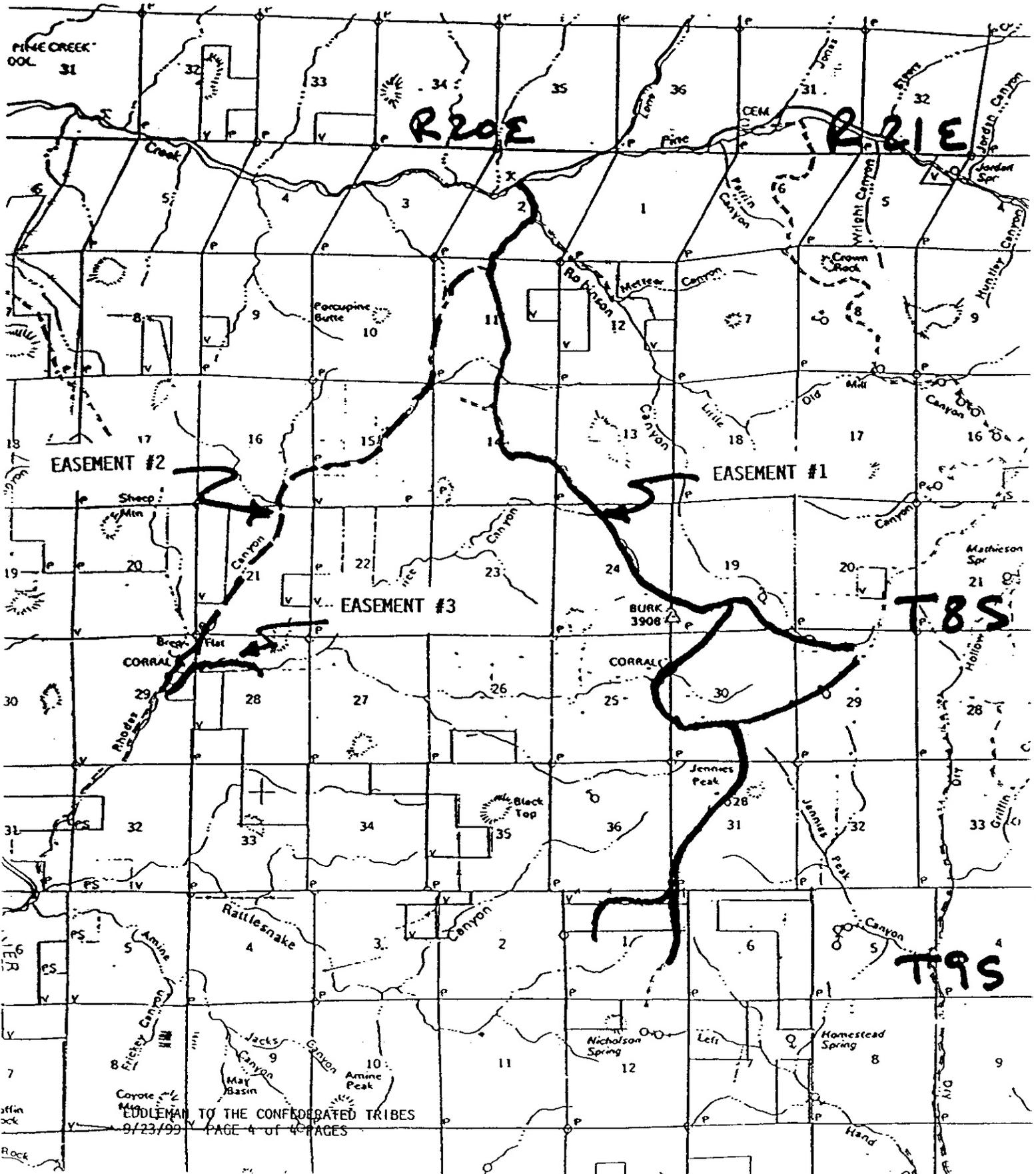
**IN TOWNSHIP 7 SOUTH, RANGE 19 EAST OF THE WILLAMETTE MERIDIAN:**

- Section 34: That portion of the SE $\frac{1}{4}$ SE $\frac{1}{4}$  lying South of the Oregon State Highway No. 218.
- Section 35: The E $\frac{1}{2}$ SE $\frac{1}{4}$ ; those parts of the W $\frac{1}{2}$ SE $\frac{1}{4}$  and the SW $\frac{1}{4}$ SW $\frac{1}{4}$  lying South of the Oregon State Highway No. 218.

**IN TOWNSHIP 8 SOUTH, RANGE 19 EAST OF THE WILLAMETTE MERIDIAN:**

- Section 1: S $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ .
- Section 2: All.
- Section 3: Lot 1, SE $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ SE $\frac{1}{4}$ .
- Section 11: Lots 1 and 2, E $\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ .
- Section 12: NW $\frac{1}{4}$ .

RESERVED EASEMENTS  
EDDLEMAN TO THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON



**ATTACHMENT B  
WAGNER RANCH LEGAL DESCRIPTION**

Warren Dan Eddleman to The Confederated Tribes of the Warm Springs Reservation

IN WHEELER COUNTY, OREGON:

IN TOWNSHIP 8 SOUTH, RANGE 20 EAST OF THE WILLAMETTE MERIDIAN:

Section 23: NE $\frac{1}{4}$ NE $\frac{1}{4}$ .

IN TOWNSHIP 8 SOUTH, RANGE 20 EAST OF THE WILLAMETTE MERIDIAN:

Section 26: SE $\frac{1}{4}$ SW $\frac{1}{4}$ ; SW $\frac{1}{4}$ SE $\frac{1}{4}$ .

Section 28: Lot 4; SE $\frac{1}{4}$ SW $\frac{1}{4}$ .

Section 33: Lots 1, 2, 3, and 4; E $\frac{1}{2}$ W $\frac{1}{2}$ ; SE $\frac{1}{4}$ .

Section 34: Lots 1, 2, 3, and 4; E $\frac{1}{2}$ W $\frac{1}{2}$ ; S $\frac{1}{2}$ NE $\frac{1}{4}$ ; SE $\frac{1}{4}$ .

Section 35: Lot 4; E $\frac{1}{2}$ NW $\frac{1}{4}$ ; SE $\frac{1}{4}$ SW $\frac{1}{4}$ ; E $\frac{1}{2}$ .

IN TOWNSHIP 9 SOUTH, RANGE 19 EAST OF THE WILLAMETTE MERIDIAN:

Section 12: That part of the NW $\frac{1}{4}$ SE $\frac{1}{4}$  lying West of the John Day River; that part of the SW $\frac{1}{4}$  lying East of the John Day River.

Section 13: That part lying East of the John Day River.

Section 24: Those parts of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ , and SE $\frac{1}{4}$ SE $\frac{1}{4}$  lying East of the John Day River.

Section 25: That part of the NE $\frac{1}{4}$ NE $\frac{1}{4}$  lying East of the John Day River.

IN TOWNSHIP 9 SOUTH, RANGE 20 EAST OF THE WILLAMETTE MERIDIAN:

Section 1: S $\frac{1}{2}$ .

Section 2: All (fractional), EXCEPT Lot 4.

Section 3: All (fractional), EXCEPT the SE $\frac{1}{4}$ NE $\frac{1}{4}$ .

Section 4: All (fractional).

Section 7: That part of the E $\frac{1}{2}$ W $\frac{1}{2}$  lying East of the John Day River; S $\frac{1}{2}$ NE $\frac{1}{4}$ ; SE $\frac{1}{4}$ .

Section 10: All.

Section 11: All.

Section 12: All.

Section 15: N $\frac{1}{2}$ .

Section 16: All.

Section 17: All.

Section 19: All (fractional).

Section 29: All.

TOGETHER WITH ASSOCIATED BLM PERMITS.

## ATTACHMENT C

The deed described in Section 6(a) of this Memorandum of Agreement shall include the following provision or one substantively equivalent to it:

The Grantee's acquisition of this real property has been enabled by the United States, Bonneville Power Administration (BPA), with the agreement that the Grantee use the property for wildlife habitat protection permanently and that title to this property shall vest in BPA, upon (1) the determination by BPA that this real property is not being managed for wildlife habitat protection, as described in the Amended and Restated Pine Creek Ranch Fish and Wildlife Project Memorandum of Agreement on file with the BPA Manager, Real Property Services, and (2) BPA's choosing to accept conveyance of the property.

## ATTACHMENT D

### DEED OF CONSERVATION EASEMENT FOR WAGNER RANCH

THIS GRANT DEED OF CONSERVATION EASEMENT is made this \_\_\_\_ day of \_\_\_\_\_ 2001, by the Confederated Tribes of the Warm Springs Reservation of Oregon, based in Warm Springs, Oregon ("the Grantor or Tribes"), in favor of the United States of America, acting by and through the Department of Energy, Bonneville Power Administration, based in Portland, Oregon ("the Grantee or BPA").

#### I. RECITALS

- A. The Grantor is the fee simple owner of the real property ("Wagner Ranch") in Wheeler County, Oregon, described in Exhibit A, attached to this deed and incorporated by reference.
- B. The Bonneville Power Administration (BPA) is a power-marketing agency within the United States Department of Energy. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839b et seq. ("Act") directs BPA to protect, mitigate, and enhance fish and wildlife affected by the development and operation of Federal hydroelectric projects of the Columbia River and its tributaries, in a manner consistent with the purposes of the Act, the program adopted by the Pacific Northwest Electric Power and Conservation Planning Council ("Council") under subsection 4(h) of the Act, and other environmental laws. BPA has the authority pursuant the Northwest Power Act, 16 U.S.C. §§ 839b(h) and 839f(a), the Federal Columbia River Transmission System Act, 16 U.S.C. §838i(b), or the Bonneville Project Act, 16 U.S.C. §§ 832a(e) through(f), to acquire real estate or to assist in the acquisition and transfer of real property interests.
- C. The Wagner Ranch is located on the John Day River and provides passage, spawning and rearing habitat for anadromous fish species listed under the Endangered Species Act, and is a high priority sub basin for fish habitat protection pursuant to the 2000 National Marine Fisheries Service Biological Opinion on the Operation of the Federal Columbia River Power System. In addition, the Wagner Ranch provides wildlife habitat for species affected by the construction and operation of the Federal Columbia River Power System. This Conservation Easement is created for the purpose of retaining and protecting the natural values of the Wagner Ranch by protecting its natural resources, maintaining or enhancing air or water quality, and preserving its underlying archaeological or cultural aspects.
- D. The Tribes and BPA have entered an agreement governing the acquisition and use of the Wagner Ranch. The Pine Creek Ranch Wildlife Project Memorandum of Agreement (September 1999), together with the Amended and Restated Pine Creek Ranch Fish and Wildlife Memorandum of Agreement (\_\_\_\_\_, 2001), (hereinafter "MOA") is incorporated into this agreement and is on file with BPA Manager, Real Property Services, 905 NE 11th Street (97232), P.O. Box 3621(97208), Portland, OR. The Tribes intends to convey to BPA the right to preserve and protect the attributes of the Wagner Ranch, listed in subsection C above, in perpetuity.

## II. CONVEYANCE AND CONSIDERATION

For and in consideration of the funding BPA provided to the Tribes to acquire the Wagner Ranch, the Tribes hereby voluntarily grants and conveys to the United States of America a conservation easement over the Wagner Ranch in perpetuity.

## III. PURPOSE

It is the purpose of this Conservation Easement to retain the conservation values of the Wagner Ranch by protecting its natural resources, maintaining or enhancing air or water quality, and preserving its underlying archaeological or cultural aspects in perpetuity, and preventing any use of the Ranch that will impair or interfere with the conservation values of the of the Ranch. The MOA describes what in this Easement are called the conservation values, which include the following: anadromous fish and their habitat, including the riparian and upland habitats that affect instream habitat; resident fish and wildlife and their habitats; historical and cultural resources; and water quality including temperature, sediment load, and flow levels. The Tribes intend that this Easement will confine the use of the Wagner Ranch to such activities as are consistent with this purpose. BPA shall have the right, but not the obligation, to enforce any and all terms of this Easement.

## IV. RIGHTS CONVEYED TO GRANTEE

A. To accomplish the purpose of this Conservation Easement, the Tribes convey the following rights to BPA. BPA has the right to:

- Access the Wagner Ranch at all reasonable times.
- To inspect the Wagner Ranch to assure compliance with this Conservation Easement.
- To prevent any activity on the Wagner Ranch inconsistent with this Conservation Easement, the MOA, or any property management plan developed and adopted by the parties under the MOA, and to require the restoration of areas or features of the Ranch that are damaged by any inconsistent use.
- To ensure the Tribes do not convey the Wagner Ranch without BPA's written consent.
- To prevent the Tribes from allowing or taking any ground disturbing actions before completion of a management plan approved by BPA, or from allowing or taking such actions that are not part of the management plan once the plan is developed and approved.
- To prohibit grazing of domestic livestock and feral horses and cattle on Wagner Ranch, unless it is done pursuant to the property management plan to manage Wagner Ranch for fish and wildlife.
-

- To prohibit timber harvesting unless it is done pursuant to the property management plan to improve Wagner Ranch as fish and wildlife habitat, for proper fire or land management, or protection of person or property.
- To prohibit all residential, commercial, or industrial uses of Wagner Ranch, except as permitted in the property management plan.

B. Under the MOA the Tribes are obligated to develop a Property Management Plan for the Wagner Ranch, and BPA has the right to approve that plan. Once the plan is completed and approved, the parties may record a copy with the Wheeler County Clerk and substitute the restrictions in the plan for those in Subsection IV(A) above.

#### **V. PROHIBITED USES**

The Tribes may not take or allow any activity on or use of the Wagner Ranch inconsistent with the purpose of this Conservation Easement or the MOA. The Tribes agree not to engage in or permit any such activity or use.

#### **VI. PERMITTED USES**

The Tribes reserve, for itself and its heirs, successors, and assigns, the right to pursue activities on or use of the Wagner Ranch, which are consistent with the purposes of the Conservation Easement or the MOA and which are not otherwise prohibited.

#### **VII. ADMINISTRATIVE MATTERS**

The provisions of the MOA shall govern the administration of this Conservation Easement. Such administration provisions include, but are not limited to, notice, dispute resolution, hold harmless and indemnification, remedies, and waivers of sovereign immunity.

**VIII. SIGNATURE AND ACKNOWLEDGMENTS**

To have and to hold the easement herein granted unto BPA and its successors and assigns, forever.

IN WITNESS WHEREOF, the undersigned the Tribes has executed this instrument this \_\_\_\_ day of \_\_\_\_\_ 2001.

THE CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION OF OREGON

\_\_\_\_\_  
Charles V. Jackson  
Secretary-Treasurer

STATE OF OREGON     )  
                                  ) ss.  
County of Jefferson     )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_ 2001, by Charles Jackson, Secretary-Treasurer of The Confederated Tribes of The Warm Springs Reservation of Oregon, a Federally recognized Indian tribe

\_\_\_\_\_  
Notary Public for Oregon  
My Commission Expires: \_\_\_\_\_

## ATTACHMENT E

### CONTRACT AND GRANT OF EASEMENT

Transmission Line and Danger Trees

#### WITNESSETH:

That the parties hereto covenant and agree as follows:

The Grantor, for and in consideration of the provisions contained in the Amended and Restated Pine Creek Ranch Fish and Wildlife Project Memorandum of Agreement between the Grantor and Grantee herein, dated \_\_\_\_\_, and the provisions contained in this agreement, hereby grants and conveys to the United States of America a perpetual easement and right-of-way for electric power transmission purposes in, upon, over, and under the land described in Attachment A. The width of each right-of-way shall be based on BPA's Right-of-Way Width Policy dated July 17, 1991, or the appropriate future amendments to or successor of that policy.

The grant shall include the right to enter and to locate, construct, operate, maintain, repair, reconstruct, upgrade, remove and patrol one or more lines of poles or structures and appurtenances thereto, supporting conductors of one or more electric circuits of any voltage and any communication lines or equipment and appurtenances thereto, together with the present and future right to clear the right-of-way and to keep the same clear of all trees, whether natural or cultivated, and all structure supported crops, other structures, brush, vegetation, fire and electrical hazards, except non-structure supported agricultural crops less than 10 feet in height. All such trees, brush, vegetation, structures, and fire hazards presently on the right-of-way shall become the property of the United States on the date of acceptance hereof and may be disposed of by the United States in any manner it deems suitable; provided, however, such disposal shall not occur upon the real property owned by the Grantor without the Grantor's written permission.

The Grantor also hereby grants and conveys to the United States the present and future right to top, limb, or fell, and to remove, sell, burn, or otherwise dispose of "danger trees" located on the Grantor's land adjacent to said right-of-way. A danger tree is any growing or dead tree, or snag, whether stable or unstable, which the United States at any time determines could within a five-year period fall, bend or swing against the transmission or communications lines or equipment or within electrical arcing distance of said lines, or which the United States determines could interfere with the construction or maintenance of said lines and equipment.

The Grantor covenants to and with the United States and its assigns that the title to all brush and timber cut or hereinafter growing within said described easement and also all danger trees identified or cut from the Grantor's land adjacent to said described easement is and shall be vested in the United States of America and its assigns and that the consideration paid for conveying said easement and rights herein described is accepted as full compensation for all damages incidental to the exercise of any said rights. At the United States' election title to danger trees may revert to the Grantor.

The rights granted herein are subject to easements of record and mineral rights of third parties.

In addition to the consideration recited herein, the United States shall repair or make compensation for damage to agricultural crops, and to United States-permitted fences, irrigation and drainage systems within the easement area. The United States shall repair or make compensation only for damage caused by the United States and which results from and during construction, reconstruction, removal, or maintenance activities within the easement area. Payment for such damage shall be made on the basis of a damage estimate approved by the United States.

The United States shall be responsible for any loss, or damage to property, or injury to persons resulting from the United States' acts or omissions, only in accordance with the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2411, 2412, 2671 et seq.

The Grantor agrees to satisfy of record such encumbrances, including taxes and assessments, as may be required by the United States and to obtain such curative evidences of title as may be requested by the United States.

The United States shall pay all costs incidental to the preparation and recordation of this instrument and for the procurement of a title report.

The Grantor covenants to and with the United States that the Grantor is lawfully seized and possessed of the land aforesaid, with a good and lawful right and power to sell and convey the same; that the land is free and clear of encumbrances, except as herein provided; and that the Grantor will forever warrant and defend the title to the rights granted herein and the quiet possession thereof against the lawful claims and all demands of all persons whomsoever.

The provisions hereof shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors, and assigns of the Grantor and upon the assigns of the United States and its agents.