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10
11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF NEVADA**

13
14 UNITED STATES OF AMERICA,)
15 Plaintiff,)
16 v.)
17 UNION PACIFIC RAILROAD)
COMPANY,)
18 Defendant.)
19

Case No.
CONSENT DECREE

20
21 WHEREAS, the Plaintiff, the United States of America (“United States”), on behalf of
22 the United States Environmental Protection Agency (“EPA”), has filed a Complaint in this action
23 concurrently with the lodging of this Consent Decree, alleging that Defendant, Union Pacific
24 Railroad Company (“Union Pacific”), violated Sections 301(a), 308(a), 402, and 404 of the Clean
25 Water Act (“CWA” or “Act”), 33 U.S.C. §§ 1311(a), 1318(a), 1342, and 1344;

26 WHEREAS, the Complaint requests that the Court: (1) enjoin the discharge of pollutants
27 into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2)
28 require Union Pacific, at its own expense and at the direction of EPA, to restore and mitigate the

1 damages caused by its unlawful activities; and (3) require Union Pacific to pay civil penalties as
2 provided in CWA Section 309(d), 33 U.S.C. § 1319(d);

3 WHEREAS, Union Pacific has already performed substantial removal, restoration, and
4 revegetation Work at many Sites;

5 WHEREAS, the United States and Union Pacific agree that settlement of this case is in
6 the public interest and that entry of this Consent Decree is the most appropriate means of
7 resolving the United States' claims under the CWA against Union Pacific as specifically set forth
8 in the Complaint; and

9 WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement
10 of the United States' claims under the CWA against Union Pacific as specifically set forth in the
11 Complaint, and that this Consent Decree adequately protects the public interest in accordance
12 with the CWA and all other applicable federal law.

13 THEREFORE, before the taking of any testimony upon the pleadings, without the
14 adjudication or admission of any issue of fact or law except as provided in Section I of this
15 Consent Decree, and upon consent of the Parties hereto by their authorized representatives, it is
16 hereby ORDERED, ADJUDGED and DECREED as follows:

17 I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT

18 1. This Court has jurisdiction over the subject matter of these actions and over the
19 Parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and CWA Section 309(b), 33 U.S.C.
20 § 1319(b). Venue lies in the District of Nevada pursuant to CWA Section 309(b), 33 U.S.C.
21 § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because Union Pacific conducts business in this
22 District; the waters of the United States into which Union Pacific is alleged to have discharged
23 pollutants are located in this District; and the causes of action alleged in the Complaint arose in
24 this District.

25 2. For purposes of this Consent Decree only, and any action to enforce this Consent
26 Decree by the United States, Union Pacific consents to the Court's jurisdiction over this Consent
27 Decree and any such action and over Union Pacific and consents to venue in this judicial district.

1 transfer by Union Pacific of any interest in a Site, or the ownership or operation of any interest
2 therein, without complying with this Paragraph constitutes a violation of this Consent Decree.

3 **III. DEFINITIONS**

4 7. Terms used in this Consent Decree that are defined in the CWA or in regulations
5 promulgated pursuant to the CWA shall have the meanings assigned to them in the statute or
6 such regulations, unless otherwise provided in this Consent Decree.

7 8. Whenever the terms set forth below are used in this Consent Decree, the
8 definitions in the following subparagraphs shall apply.

9 a. "CWA" or "Act" shall mean the Clean Water Act, 33 U.S.C. §§ 1251-1387.

10 b. "Complaint" shall mean the Complaint filed by the United States in this action.

11 c. "Consent Decree" shall mean this Consent Decree; all Appendices attached hereto
12 (and listed in Section XX of this Consent Decree); all Deliverables (approved by EPA in
13 accordance with Section XIV of this Consent Decree); and all modifications (made effective in
14 accordance with Section XV of this Consent Decree). To the extent that the description of any
15 injunctive relief requirement contained in Section V of this Consent Decree could be construed
16 as inconsistent with or requiring actions beyond its associated Appendix, Deliverable, or
17 modification, such Appendix, Deliverable, or modification shall control.

18 d. "Day" shall mean a calendar day unless expressly stated to be a business day. In
19 computing any period of time under this Consent Decree, where the last day would fall on a
20 Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next
21 working day.

22 e. "Deliverable" shall mean any report, work plan, or other document that is required
23 to be submitted to EPA for its review and approval pursuant to this Consent Decree.

24 f. "EPA" shall mean the United States Environmental Protection Agency and any of
25 its successor departments or agencies.

26 g. "Effective Date" shall mean the date on which this Consent Decree is entered by
27 the Court.

1 h. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic
2 numeral.

3 I. "Parties" shall mean the United States and Union Pacific.

4 j. "Section" shall mean, except when citing a provision of the CWA, a portion of
5 this Consent Decree identified by a Roman numeral.

6 k. "Site" or "Sites" shall mean the locations identified as Sites 1 through 21 in this
7 Consent Decree, identified by reference to Union Pacific railroad milepost markers ("MP") as
8 follows:

9 Site 1: MP 464 to 465.49
10 Site 2: MP 466.2 to 467
11 Site 3: MP 411.1 to 411.38
12 Site 4: MP 431.65 to 431.95
13 Site 5: MP 394.75 to 396.50
14 Site 6: MP 398.5 to 399
15 Site 7: MP 404.7 to 406.55
16 Site 8: MP 407.25 to 408.65
17 Site 9: MP 415.75 to 415.85
18 Site 10: MP 428.25 to 429.8
19 Site 11: MP 433.2 to 434.6
20 Site 12: MP 435.1 to 435.25
21 Site 13: MP 439.3 to 441
22 Site 14: MP 462.9 to 463.15
23 Site 15: MP 467.4 to 467.62
24 Site 16: MP 469.95 to 470.2
25 Site 17: MP 470.8 to 471
26 Site 18: MP 471.2 to 471.3
27 Site 19: MP 472.5
28 Site 20: MP 472.9
Site 21: MP 474.18

20 The geographic extent of a Site, including aquatic and upland areas, is further described and/or
21 outlined in Appendices B through F. To the extent that the description of a Site in this Paragraph
22 could be construed as inconsistent with the description of the same Site contained in an
23 associated Appendix, Deliverable, or modification, such Appendix, Deliverable, or modification
24 shall control.

25 l. "Union Pacific" shall mean Union Pacific Railroad Company.

26 m. "United States" shall mean the United States of America, acting on behalf of
27 EPA.

1 n. "Work" shall mean any and all on-the-ground activities that Union Pacific is
2 required to perform, or otherwise agrees to undertake, pursuant to this Consent Decree.

3 IV. GENERAL PROVISIONS

4 9. This Consent Decree resolves the civil claims of the United States for the
5 violations of the CWA alleged in the Complaint through the date of the lodging of this Consent
6 Decree. The United States covenants not to sue or take administrative action against Union
7 Pacific, its officers, directors, employees, representatives, successors and assigns for the civil
8 claims of the United States for the violations of the CWA alleged in the Complaint through the
9 date of the lodging of this Consent Decree.

10 10. It is the express purpose of the Parties in entering this Consent Decree to further
11 the objectives set forth in CWA Section 101, 33 U.S.C. § 1251.

12 11. Except as in accordance with this Consent Decree, Union Pacific and Union
13 Pacific's agents, successors and assigns are enjoined from discharging dredged or fill material
14 into Meadow Valley Wash, or Clover Creek, or wetlands adjacent to either, at any Site, except
15 insofar as such discharge complies with any applicable provision of Section 404 of the CWA, 33
16 U.S.C. § 1344, and its implementing regulations.

17 12. The Parties acknowledge and agree that Nationwide Permit 32, found at 72 Fed.
18 Reg. 11,092, 11,127-28 (Mar. 12, 2007), authorizes any structure, work, or discharge of dredged
19 or fill material remaining in place or undertaken for mitigation, restoration, or environmental
20 benefit in compliance with the terms of a consent decree resulting from an enforcement action
21 brought by the United States under Section 404 of the CWA, including, for purposes of this
22 Consent Decree only, the following: (a) any fill that was placed by Union Pacific as of June 6,
23 2005, at Sites 1 through 21 that is not subject to removal or restoration under Paragraphs 22 or 23
24 of this Consent Decree; and (b) the discharge of dredged or fill material, insofar as such
25 discharge is necessary to complete Work. Any such fill and discharges shall be subject to the
26 conditions of Nationwide Permit 32 and this Consent Decree.

27 13. This Consent Decree is not and shall not be interpreted to be a permit, or
28 modification of any permit, under any federal, state, or local laws or regulations. For any

1 discharge or activity other than those described in Paragraph 12 of this Consent Decree, nothing
2 in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to
3 issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional
4 general permit, nor shall this Consent Decree limit EPA's ability to exercise its authority
5 pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

6 14. This Consent Decree in no way affects or relieves Union Pacific of its
7 responsibility to comply with any applicable federal, state, or local law, regulation or permit.

8 15. Except as provided in Paragraph 9 of this Consent Decree, this Consent Decree in
9 no way affects the rights of the United States as against any person not a party to this Consent
10 Decree. This Consent Decree shall not be construed to create rights in, or grant any cause of
11 action to, any third party not a party to this Consent Decree.

12 16. The United States reserves any and all legal and equitable remedies available to
13 enforce this Consent Decree and applicable law. This Consent Decree shall not be construed to
14 limit the rights of the United States to obtain penalties or injunctive relief under the CWA or its
15 implementing regulations, or under other federal laws, regulations, or permit conditions, except
16 as expressly specified in Paragraph 9 of this Consent Decree.

17 17. Except as provided in Section I of this Consent Decree, nothing in this Consent
18 Decree shall constitute or be construed as an admission of liability or wrongdoing by Union
19 Pacific, or as an admission of fact or law by any party, or as a waiver of any right or defense
20 Union Pacific may have, including the right to contest CWA jurisdiction over a particular
21 waterway.

22 18. The obligations of this Consent Decree are independent of any Nevada stormwater
23 requirements. Nothing in this Consent Decree affects Union Pacific's right to seek termination
24 of the applicability of a Stormwater General Construction Permit or authorization for subsequent
25 construction activities under a separate stormwater permit.

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1 V. SPECIFIC PROVISIONS

2 CIVIL PENALTIES

3 19. Within thirty (30) Days of the Effective Date of this Consent Decree, Union
4 Pacific shall pay a civil penalty to the United States in the amount of eight-hundred thousand
5 dollars (\$800,000).

6 20. Payment to the United States shall be made in accordance with the written
7 instructions to be provided to Union Pacific by the United States Department of Justice.

8 21. Union Pacific shall not deduct any penalties paid under this Consent Decree
9 pursuant to this Section or Section X in calculating its federal income tax.

10 INJUNCTIVE RELIEF

11 22. Removal: To the extent it has not done so already, Union Pacific shall remove
12 earthen material at Sites 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, and 21 in
13 accordance with Appendix A (entitled “ Work and Deliverable Schedule”); Appendix B (entitled
14 “Removal Designs (Volumes I and II)”); and all applicable Deliverables (approved by EPA in
15 accordance with Section XIV of this Consent Decree) and modifications (made effective in
16 accordance with Section XV of this Consent Decree).

17 23. Restoration: To the extent it has not done so already, Union Pacific shall restore
18 the stream channel at Sites 1, 3, 4, 7, 8, 16, 17, and 18 in accordance with Appendix A (entitled
19 “Work and Deliverable Schedule”); Appendix C (entitled “Stream Restoration Designs”); and all
20 applicable Deliverables (approved by EPA in accordance with Section XIV of this Consent
21 Decree) and modifications (made effective in accordance with Section XV of this Consent
22 Decree).

23 24. Revegetation: To the extent it has not done so already, Union Pacific shall
24 revegetate Sites 1 through 21 in accordance with Appendix A (entitled “Work and Deliverable
25 Schedule”); Appendix D (entitled “Revegetation Designs”); and all applicable Deliverables
26 (approved by EPA in accordance with Section XIV of this Consent Decree) and modifications
27 (made effective in accordance with Section XV of this Consent Decree).

1 25. Revegetation Monitoring and Maintenance: After Union Pacific completes
2 removal, restoration, and revegetation Work in accordance with Paragraphs 22 through 24 above,
3 Union Pacific shall monitor and maintain the vegetation at Sites 1 through 21 in accordance with
4 Appendix A (entitled “Work and Deliverable Schedule”); Appendix E (entitled “Revegetation
5 Monitoring and Maintenance”); and all applicable Deliverables (approved by EPA in accordance
6 with Section XIV of this Consent Decree) and modifications (made effective in accordance with
7 Section XV of this Consent Decree).

8 26. Stream Functions Monitoring and Maintenance: After Union Pacific completes
9 restoration Work in accordance with Paragraph 23 above, and after Union Pacific completes
10 revegetation Work in accordance with Paragraph 24 above, Union Pacific shall monitor and
11 maintain stream functions at Sites 1, 3, 4, 7, 8, 16, 17, and 18 in accordance with Appendix A
12 (entitled “Work and Deliverable Schedule”); Appendix F (entitled “Stream Functions Monitoring
13 and Maintenance”); and all applicable Deliverables (approved by EPA in accordance with
14 Section XIV of this Consent Decree) and modifications (made effective in accordance with
15 Section XV of this Consent Decree).

16 27. Erosion Control: For all slopes disturbed by implementation of Work to be
17 conducted under this Consent Decree, other than slopes consisting entirely of rip-rap, Union
18 Pacific shall incorporate into its Storm Water Pollution Prevention Plans, and shall implement,
19 the following erosion and stabilization best management practices (“BMPs”): sediment logs
20 (“SC-5”) or gravel filter strips and either hydraulic mulch (“SS-3”) or geotextiles (“SS-7”) or
21 rock mulch, as set forth in Appendix B (entitled “Removal Designs (Volumes I and II)”) to this
22 Consent Decree. If Union Pacific believes that alternative BMPs are more appropriate for a
23 particular Site or portion of a Site, Union Pacific may propose them to EPA for review and
24 approval in accordance with Section XIV of this Consent Decree.

25 28. Mitigation: Union Pacific shall mitigate in accordance with Appendix A (entitled
26 “Work and Deliverable Schedule”); Appendix G (entitled “Mitigation Project”); and all
27 applicable Deliverables (approved by EPA in accordance with Section XIV of this Consent
28

1 Decree) and modifications (made effective in accordance with Section XV of this Consent
2 Decree).

3 VI. NOTICES AND OTHER SUBMISSIONS

4 29. Within 30 Days after the end of each calendar-year quarter (i.e., by April 30, July
5 31, October 31, and January 31) following the Effective Date of this Consent Decree, Union
6 Pacific shall submit a report for the preceding quarter that shall include, inter alia, the following
7 information: status of all Work; status of all Deliverables; dates of completion; problems
8 encountered or anticipated, together with implemented or proposed solutions; status of permit
9 applications; and monitoring and maintenance efforts.

10 30. Each report submitted by Union Pacific under this Section shall be signed by an
11 individual at Union Pacific who constitutes a “responsible corporate officer” or “duly authorized
12 representative” within the meaning of 40 C.F.R. § 122.22(a)(1) & (b), and each report submitted
13 by Union Pacific under this Section shall include the following certification:

14 “I certify under penalty of law that this document and all attachments were prepared
15 under my direction or supervision in accordance with a system designed to assure that
16 qualified personnel properly gather and evaluate the information submitted. Based upon
17 personal knowledge or my inquiry of the person or persons who manage the system, or
18 those persons directly responsible for gathering the information, the information
submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am
aware that there are significant penalties for submitting false information, including the
possibility of fine and imprisonment for knowing violations.”

19 In addition, the signature and certification requirements of this Paragraph apply to each report
20 submitted by Union Pacific pursuant to this Consent Decree to the extent that such report
21 addresses completion of mitigation; monitoring; or adaptive management. The signature and
22 certification requirements of this Paragraph also apply as provided below in Paragraph 41 of this
23 Consent Decree prior to the close of the informal negotiation period.

24 31. The reporting requirements of this Consent Decree do not relieve Union Pacific of
25 any reporting obligations required by the CWA or its implementing regulations, or by any other
26 federal, state, or local law, regulation, permit, or other requirement.

1 32. Any information provided pursuant to this Consent Decree may be used by the
2 United States in any proceeding to enforce the provisions of this Consent Decree and as
3 otherwise permitted by law.

4 VII. RETENTION OF RECORDS AND RIGHT OF ENTRY

5 33. Until three (3) years after the termination of this Consent Decree pursuant to
6 Section XVI, Union Pacific shall retain, and shall instruct its contractors, consultants, and other
7 agents to preserve all non-identical copies of all documents, records, or other information
8 (including documents, records, or other information in electronic form) in its or its contractors'
9 or other agents' possession or control, or that come into its contractors' or other agents'
10 possession or control, and that relate in any manner to Union Pacific's performance of its
11 obligations under this Consent Decree. This information-retention requirement shall apply
12 regardless of any contrary corporate or institutional policies or procedures. At any time during
13 this information-retention period, upon request by the United States, Union Pacific shall provide
14 copies of any documents, records, or other information required to be maintained under this
15 Paragraph, except insofar as the information is privileged or enjoys attorney work product
16 immunity to the extent recognized by federal law. However, no data of any kind (regardless of
17 finality) or final documents, records, or other information created or generated pursuant to the
18 requirements of this Consent Decree shall be withheld on grounds of privilege or attorney work
19 product immunity. Union Pacific shall advance any assertion of privilege or attorney work
20 product in accordance with Paragraph 35(b) of this Consent Decree.

21 34. The United States and its authorized representatives, including attorneys,
22 contractors, and consultants, shall have the right of entry into any area relevant to this Consent
23 Decree, including but not limited to Sites 1 through 21, surrounding areas, reference sites, and
24 any area related to mitigation, upon presentation of credentials, to assess Union Pacific's
25 compliance with this Consent Decree and to inspect and review any records required to be kept
26 under this Consent Decree and/or the CWA. Specifically, the United States may:

- 27 a. monitor the activities required by this Consent Decree;
- 28

1 b. verify any data or information submitted to the United States in accordance with the
2 terms of this Consent Decree;

3 c. obtain samples and, upon request, splits of any samples taken by Union Pacific,
4 including its representatives, contractors, or consultants; and

5 d. obtain evidence, including documents, photographs, GPS, flow measurement, and
6 other similar data.
7

8 For purposes of this Paragraph, prior to entry on property owned by Union Pacific, the United
9 States and its authorized representatives will, to the extent practicable, provide notice to Union
10 Pacific sufficient to ensure Union Pacific's ability to comply with relevant and appropriate
11 railroad safety laws, regulations, protocols, and training requirements. The United States and its
12 authorized representatives are responsible for ensuring compliance with federal railroad safety
13 laws, regulations, and training requirements insofar as they pertain to their own personnel.
14 Nothing in this Paragraph limits or affects EPA's rights of entry, access, and inspection as
15 provided by, and pursuant to, Section 308 of the CWA, 33 U.S.C. § 1318.

16 35. a. This Consent Decree in no way limits or affects any other rights of entry
17 and inspection, or any rights to obtain information, held by the United States, including EPA,
18 pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or
19 obligation of Union Pacific to maintain documents, records, or other information imposed by
20 applicable federal or state laws, regulations, or permits.

21 b. This Consent Decree in no way limits or affects the applicability of
22 privileges, work product immunity, or other protection to documents, records or other
23 information, provided that: (a) upon request by the United States, Union Pacific produces a log
24 (so that the United States and, if necessary, the Court can determine whether a privilege,
25 immunity, or other protection applies to the information in question); and (b) Union Pacific
26 complies with EPA regulations concerning confidential business information ("CBI") insofar as
27 Union Pacific asserts CBI for any particular document, record or other information.
28

VIII. DISPUTE RESOLUTION

1
2 36. Unless otherwise expressly provided for in this Consent Decree, the dispute
3 resolution procedures of this Section (“Dispute Resolution”) shall be the exclusive mechanism
4 for Union Pacific to resolve all of its disputes arising under or with respect to this Consent
5 Decree. Union Pacific’s failure to seek resolution of a dispute under this Section shall preclude
6 Union Pacific from raising any such issue as a defense to an action by the United States to
7 enforce any obligation of Union Pacific arising under or with respect to this Consent Decree.

8 37. Any dispute Union Pacific has that is subject to Dispute Resolution shall first be
9 the subject of informal negotiations. The dispute shall be considered to have arisen when Union
10 Pacific sends the United States a written Notice of Dispute, pursuant to Section XI. Such Notice
11 of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not
12 exceed thirty (30) Days from the date the dispute arises, unless that period is modified in writing
13 by the United States. If Union Pacific and the United States cannot resolve a dispute by informal
14 negotiations, then the position advanced by the United States shall be considered binding unless,
15 within forty five (45) Days after the conclusion of the informal negotiation period, Union Pacific
16 files with the Court a motion for judicial resolution of the dispute.

17 38. For purposes of this Section of the Consent Decree, to the extent that the Court
18 concludes that judicial resolution of the dispute is on the administrative record, the
19 administrative record shall include but not be limited to any written statements, positions,
20 documents, reports, or other information submitted by Union Pacific to the United States prior to
21 the close of the informal negotiation period.

22 39. The invocation of Dispute Resolution procedures under this Section shall not, by
23 itself, extend, postpone, or affect in any way any obligation of Union Pacific under this Consent
24 Decree. Stipulated penalties and interest, if applicable to the disputed matter, shall continue to
25 accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of
26 the dispute as provided in Section X. If Union Pacific does not prevail on the disputed issue,
27 stipulated penalties, and interest, if applicable, shall be assessed and paid as provided in Section
28 X.

IX. FORCE MAJEURE

1
2 40. "Force majeure," for purposes of this Consent Decree, is defined as any event
3 arising from causes beyond the control of Union Pacific, of any entity controlled by Union
4 Pacific, or of Union Pacific's contractors or consultants, that delays or prevents the performance
5 of any obligation under this Consent Decree despite Union Pacific's best efforts to fulfill the
6 obligation. The requirement that Union Pacific exercise "best efforts to fulfill the obligation"
7 includes using best efforts to anticipate any potential force majeure event and best efforts to
8 address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent
9 or minimize any resulting delay to the extent possible. "Force majeure" does not include Union
10 Pacific's financial inability to perform any obligation under this Consent Decree.

11 41. If any force majeure event occurs or has occurred that may delay the performance
12 of any obligation under this Consent Decree, Union Pacific shall provide notice by telephone,
13 facsimile, and email to EPA, as specified in Section XI, within 72 hours of when Union Pacific
14 first knows that the event might cause a delay. For any other event that is not a force majeure
15 event but nevertheless may delay the performance of any obligation under this Consent Decree,
16 Union Pacific shall provide initial notice to EPA, as specified in Section XI, promptly and in a
17 manner that is reasonable in light of the totality of the circumstances. Regardless of whether the
18 event qualifies as a force majeure event, within four (4) Days after the initial notice, Union
19 Pacific shall provide in writing to the United States, in accordance with Section XI, an
20 explanation and description of the reasons for the delay; the anticipated duration of the delay; all
21 actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of
22 any measures to be taken to prevent or mitigate the delay or the effect of the delay; Union
23 Pacific's rationale for attributing such delay to a force majeure event if it intends to assert such a
24 defense; and a statement as to whether, in the opinion of Union Pacific, such event may present a
25 risk to public health, welfare or the environment. The United States may, in its unreviewable
26 discretion, extend the time within which such explanation and description and/or notice must be
27 given. No such extension shall be effective unless it is in writing. Union Pacific shall include
28 with any written notice required by this Section available documentation supporting the claim

1 that the delay was attributable to a force majeure event, and, prior to the close of the informal
2 negotiation period, such notice shall be signed and certified as set forth in Paragraph 30 of this
3 Consent Decree. Failure to comply with the requirements of this Section shall preclude Union
4 Pacific from asserting any defense of force majeure for that event, and for any additional delay
5 caused by such failure.

6 42. If the United States agrees that the delay or anticipated delay is attributable to a
7 force majeure event, the time for performance of the obligations under this Consent Decree that
8 are affected by the force majeure event may be extended by the United States for such time as is
9 necessary to complete those obligations. An extension of the time for performance of the
10 obligations affected by the force majeure event shall not, of itself, extend the time for
11 performance of any other obligation.

12 43. If the United States does not agree that the delay or anticipated delay has been or
13 will be caused by a force majeure event, or does not agree to the extension of time sought by
14 Union Pacific, then the United States' position shall be binding, unless Union Pacific invokes
15 Dispute Resolution under Section VIII of this Consent Decree.

16 44. If Union Pacific invokes Dispute Resolution under Section VIII of this Consent
17 Decree, Union Pacific shall have the burden of demonstrating that the delay or anticipated delay
18 has been or will be caused by a force majeure event; the number of Days of delay or anticipated
19 delay that was or will be caused by such force majeure event; that the duration of the delay or the
20 extension sought was or will be warranted under the circumstances; that Union Pacific could not
21 have reasonably foreseen and prevented such delay; that Union Pacific, including its contractors
22 and consultants, exercised best efforts to prevent, avoid, minimize and mitigate the delay and its
23 effects; and that Union Pacific complied with the requirements of this Section.

24 X. STIPULATED PENALTIES

25 45. Union Pacific shall be liable for stipulated penalties to the United States for
26 violations of this Consent Decree, unless excused under Section IX (Force Majeure). A violation
27 includes failing to perform any obligation required by the terms of this Consent Decree, including
28 any work plan, schedule or modification approved under this Consent Decree, according to all

1 applicable requirements of this Consent Decree and within the specified time schedules
2 established by or approved under this Consent Decree.

3 46. Stipulated penalties shall accrue for violations of this Consent Decree as follows:

4 a. Failure to pay civil penalty or interest: If Union Pacific fails to pay the
5 civil penalty and/or interest required to be paid under Section V of this Consent Decree when
6 due, Union Pacific shall pay a stipulated penalty of three thousand dollars (\$3,000) per Day for
7 each Day that the payment is late.

8 b. Failure to perform removal, restoration, revegetation, or mitigation Work:
9 If Union Pacific fails to timely complete any removal, restoration, revegetation, or mitigation
10 Work as specified in Appendix A (entitled "Work and Deliverable Schedule"), Union Pacific
11 shall pay stipulated penalties as follows:

12 i. For Day 1 up to and including Day 14 of non-compliance: one
13 thousand five hundred dollars (\$1,500) per Day

14 ii. For Day 15 up to and including Day 30 of non-compliance: three
15 thousand dollars (\$3,000) per Day

16 iii. For Day 31 and beyond of non-compliance: four thousand five
17 hundred dollars (\$4,500) per Day

18 c. Failure to monitor and maintain: If Union Pacific fails to timely monitor
19 and maintain revegetation or stream functions as specified in Appendix A (entitled "Work and
20 Deliverable Schedule"), Union Pacific shall pay stipulated penalties as follows:

21 i. For Day 1 up to and including Day 14 of non-compliance: seven
22 hundred fifty dollars (\$750) per Day

23 ii. For Day 15 up to and including Day 30 of non-compliance: one
24 thousand five hundred dollars (\$1,500) per Day

25 iii. For Day 31 and beyond of non-compliance: two thousand five
26 hundred dollars (\$2,500) per Day

27 d. Failure to submit quarterly reports or Deliverables: If Union Pacific fails
28 to timely submit any quarterly report or Deliverable required under this Consent Decree, Union

1 Pacific shall pay stipulated penalties as follows:

- 2 i. For Day 1 up to and including Day 14 of non-compliance: seven
3 hundred fifty dollars (\$750) per Day
- 4 ii. For Day 15 up to and including Day 30 of non-compliance: one
5 thousand five hundred dollars (\$1,500) per Day
- 6 iii. For Day 31 and beyond of non-compliance: two thousand five
7 hundred dollars (\$2,500) per Day

8 47. Stipulated penalties under this Section shall begin to accrue on the first Day after
9 performance is due or a violation occurs and shall continue to accrue until the violation ceases or
10 has been corrected. Stipulated penalties shall accrue simultaneously for separate violations of
11 this Consent Decree.

12 48. Except as provided in Paragraph 49 below, Union Pacific shall pay any stipulated
13 penalty within thirty (30) Days of receiving the United States' written demand. Union Pacific
14 shall make any such payment in accordance with written instructions to be provided to Union
15 Pacific by the United States. Upon any such payment, Union Pacific shall provide written notice,
16 at the addresses specified in Section XI of this Consent Decree.

17 49. The United States may, in the unreviewable exercise of its discretion, reduce or
18 waive stipulated penalties otherwise due under this Consent Decree.

19 50. Any disputes concerning the amount of stipulated penalties or the underlying
20 violation that gives rise to the assessment of stipulated penalties are subject to the Dispute
21 Resolution provisions of Section VIII. Stipulated penalties and any applicable interest shall
22 continue to accrue as provided in Paragraph 46, but need not be paid until the following:

23 a. If the dispute is resolved by agreement between the United States and
24 Union Pacific, Union Pacific shall pay the accrued penalties determined to be owing, together
25 with any applicable interest, to the United States within thirty (30) Days of the effective date of
26 the agreement.

27 b. If the dispute is taken to the Court and Union Pacific prevails in whole or
28 in part, Union Pacific shall not be liable for any stipulated penalties or interest that the Court

1 determinates Union Pacific does not owe.

2 c. If the dispute is taken to the Court and the United States prevails in whole
3 or in part, Union Pacific shall pay all accrued penalties determined by the Court to be owing,
4 together with any applicable interest, within thirty (30) Days of receiving the Court's decision or
5 order, except as provided in subparagraph d, below.

6 d. If any party appeals the District Court's decision, Union Pacific shall pay
7 all accrued penalties determined to be owing, together with any applicable interest, within fifteen
8 (15) Days of receiving the final appellate court decision.

9 51. If Union Pacific fails to pay stipulated penalties in accordance with this Consent
10 Decree, Union Pacific shall be liable for interest on such penalties, as provided for in 28 U.S.C.
11 § 1961, accruing as of the date payment became due. The interest shall be computed daily from
12 the time the payment is due until the date the payment is made. The interest shall also be
13 compounded annually. Nothing in this Paragraph shall be construed to limit the United States
14 from seeking any remedy otherwise provided by law for Union Pacific's failure to pay any
15 stipulated penalties.

16 52. The stipulated penalties provided for in this Consent Decree shall be in addition to
17 any other rights, remedies, or sanctions available to the United States for Union Pacific's
18 violation of this Consent Decree or applicable law. Union Pacific reserves the right to seek to
19 reduce any CWA penalty assessed for violation of this Consent Decree by an amount equal to the
20 amount of any stipulated penalties assessed and paid pursuant to this Consent Decree for the
21 same violation.

22 XI. ADDRESSES

23 53. All notices and communications required under this Consent Decree shall be
24 made to the Parties through each of the following persons and addresses:

25 a. TO THE UNITED STATES:

26 i. TO THE DEPARTMENT OF JUSTICE:

27 Andrew J. Doyle, Attorney
28 Environmental Defense Section
Environment and Natural Resources Division

1 U.S. Department of Justice
2 P.O. Box 23986
3 Washington, D.C. 20026-3986
4 (202) 514-4427 (p)
5 (202) 514-8865 (f)
6 andrew.doyle@usdoj.gov

7 Rochelle L. Russell, Attorney
8 Environmental Defense Section
9 Environment and Natural Resources Division
10 U.S. Department of Justice
11 301 Howard Street, Suite 1050
12 San Francisco, CA 94105
13 (415) 744-6566 (p)
14 (415) 744-6476 (f)
15 rochelle.russell@usdoj.gov

16 ii. TO EPA:

17 Brett Moffatt
18 Assistant Regional Counsel (ORC-2)
19 U.S. Environmental Protection Agency
20 Region IX
21 75 Hawthorne Street
22 San Francisco, CA 94105
23 (415) 972-3946 (p)
24 (415) 947-3570 (f)
25 moffatt.brett@epa.gov

26 Wilson Yee
27 Clean Water Act Compliance Office (WTR-7)
28 U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105
(415) 972-3484 (p)
(415) 947-3545 (f)
yee.wilson@epa.gov

b. TO UNION PACIFIC:

Robert C. Bylsma, Esq.
Regional Environmental Counsel
Union Pacific Railroad Company
Law Department
10031 Foothills Blvd., Suite 200
Roseville, CA 95747
(916) 879-6229 (p)
(916) 847-9019 (f)
rcbylsma@up.com

Robert W. Lawrence, Esq.

1 Davis, Graham & Stubbs LLP
2 1550 Seventeenth Street
3 Denver, CO 80202
4 (303) 892-7409 (p)
5 (303) 893-1379 (f)
6 robert.lawrence@dgsllaw.com

7 54. Any party may, by written notice to the other party, change its designated notice
8 recipient or notice address provided above.

9 55. Notices submitted pursuant to this Section shall be deemed submitted upon
10 mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties
11 in writing.

12 XII. COSTS OF SUIT

13 56. Each party to this Consent Decree shall bear its own costs and attorneys' fees in
14 this action.

15 XIII. PUBLIC COMMENT

16 57. The Parties acknowledge that after the lodging and before the entry of this
17 Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R.
18 § 50.7, which provides for public notice and comment. The United States reserves the right to
19 withhold or withdraw its consent to the entry of this Consent Decree if the comments received
20 disclose facts or considerations which lead the United States to conclude that the proposed
21 judgment is inappropriate, improper, or inadequate. Union Pacific agrees not to withdraw from,
22 oppose entry of, or to challenge any provision of this Consent Decree, unless the United States
23 has notified Union Pacific in writing that it no longer supports entry of the Consent Decree in its
24 present form. Union Pacific consents to entry of this Consent Decree in its present form without
25 further notice.

26 XIV. APPROVAL OF DELIVERABLES

27 58. After Union Pacific submits any Deliverable, EPA shall in writing: (a) approve
28 the Deliverable; (b) approve the Deliverable upon specified conditions; (c) approve part of the
Deliverable and disapprove the remainder; or (d) disapprove the Deliverable.

59. If the Deliverable is approved pursuant to Paragraph 58(a) above, Union Pacific

1 shall take all actions required by the Deliverable, in accordance with the schedules and
2 requirements of the Deliverable, as approved. If the Deliverable is conditionally approved or
3 approved only in part, pursuant to Paragraph 58(b) or (c), Union Pacific shall, upon written
4 direction from EPA, take all actions required by the approved Deliverable that EPA determines
5 are technically severable from any disapproved portions, subject to Union Pacific's right to
6 dispute only the specified conditions or the disapproved portions, under Section VIII of this
7 Consent Decree (Dispute Resolution).

8 60. If the Deliverable is disapproved in whole or in part pursuant to Paragraph 58(c)
9 or (d), Union Pacific shall, within 20 days, or such other time as the Parties agree to in writing,
10 correct all deficiencies and resubmit the Deliverable, or disapproved portion thereof, for
11 approval, in accordance with the preceding Paragraphs in this Section of the Consent Decree. If
12 the resubmitted Deliverable is approved in whole or in part, Union Pacific shall proceed in
13 accordance with Paragraph 59 above.

14 XV. MODIFICATION

15 61. The terms of this Consent Decree may be modified only by a subsequent written
16 agreement signed by all the Parties. Where the modification constitutes a material change to any
17 term of this Consent Decree, it shall be effective only upon approval by the Court. The terms and
18 schedules contained in any Appendix to this Consent Decree may be modified upon written
19 agreement of the Parties without Court approval, unless any such modification effects a material
20 change to the terms of this Consent Decree or materially affects Union Pacific's ability to meet
21 the requirements or objectives of this Consent Decree.

22 XVI. TERMINATION

23 62. After Union Pacific has completed the requirements of Section V of this Consent
24 Decree, including those relating to monitoring and maintenance, and has paid the civil penalty and
25 any accrued stipulated penalties as required by this Consent Decree, Union Pacific may submit to
26 the United States a Request for Termination, stating that Union Pacific has satisfied those
27 requirements, together with supporting documentation.

28 63. Following receipt by the United States of Union Pacific's Request for Termination,

1 the Parties may confer informally concerning the Request and any disagreement that the Parties
2 may have as to whether Union Pacific has satisfactorily complied with the requirements for
3 termination of this Consent Decree. If the United States agrees with the Request for Termination
4 submitted by Union Pacific in accordance with Paragraph 62 of this Consent Decree, the United
5 States shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree.

6 64. If the United States does not agree with the Request for Termination, Union Pacific
7 may invoke Dispute Resolution under Section VIII of this Consent Decree. However, Union
8 Pacific shall not seek Dispute Resolution of any dispute regarding termination, under Section VIII
9 of this Consent Decree, until ninety (90) Days after service of its Request for Termination.

10 65. Termination of this Consent Decree does not discharge Union Pacific of its
11 obligations set forth in Section VII of this Consent Decree.

12 66. Paragraph 11 of this Consent Decree terminates when Union Pacific completes its
13 obligations under Paragraphs 22, 23 and 24 of this Consent Decree.

14 XVII. SIGNATORIES/SERVICE

15 67. Each undersigned representative of Union Pacific and of the United States certifies
16 that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and
17 to execute and legally bind the Party he or she represents to this document.

18 68. This Consent Decree may be signed in counterparts, such counterpart signature
19 pages shall be given full force and effect, and its validity shall not be challenged on that basis.
20 Union Pacific agrees to accept service of process by mail with respect to all matters arising under
21 or relating to this Consent Decree and to waive the formal service requirements set forth in Rules
22 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court
23 including, but not limited to, service of a summons.

24 XVIII. INTEGRATION

25 69. This Consent Decree constitutes the final, complete, and exclusive agreement and
26 understanding among the Parties with respect to the settlement embodied in the Consent Decree
27 and supersedes any prior agreements and understandings, whether verbal or written, concerning
28 the settlement embodied herein. Other than Deliverables (approved by EPA in accordance with

1 Section XIV of this Consent Decree) and modifications (made effective in accordance with
2 Section XV of this Consent Decree), no other document, nor any representation, inducement,
3 agreement, understanding, or promise, constitutes any part of this Consent Decree or the
4 settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

5 XIX. FINAL JUDGMENT AND RETENTION OF JURISDICTION

6 70. Upon approval and entry of this Consent Decree by the Court, this Consent Decree
7 shall constitute a final judgment of the Court as to the United States and Union Pacific.

8 71. This Court retains jurisdiction over this action until termination of this Consent
9 Decree, for the purpose of resolving disputes arising under this Consent Decree, or entering orders
10 modifying this Consent Decree, or effectuating or enforcing compliance with the terms of this
11 Consent Decree.

12 XX. APPENDICES

13 72. The following Appendices are attached to and part of this Consent Decree:

14 Appendix A: Work and Deliverable Schedule

15 Appendix B: Removal Designs (Volumes I and II)

16 Appendix C: Stream Restoration Designs

17 Appendix D: Revegetation Designs

18 Appendix E: Revegetation Monitoring and Maintenance

19 Appendix F: Stream Functions Monitoring and Maintenance

20 Appendix G: Mitigation Project


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22 IT IS SO ORDERED

23 Dated, entered, and made effective this _____ day of _____, 2009.

24
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26 _____
27 United States District Judge
28

1 ON BEHALF OF THE UNITED STATES:

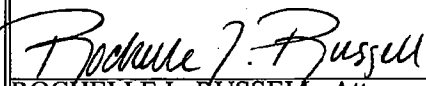
2 JOHN C. CRUDEN
Acting Assistant Attorney General
3 Environment and Natural Resources Division

4 

Dated: 8/6/2009

5
6 ANDREW J. DOYLE, Attorney
Environmental Defense Section
7 Environment and Natural Resources Division
U.S. Department of Justice
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Washington, D.C. 20026-3986
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Dated: 8/6/2009

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1 FOR EPA:
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hawaii

Dated: *July 31, 2009*

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6 LAURA YOSHIDA
7 Acting Regional Administrator
8 U.S. Environmental Protection Agency
9 Region IX
75 Hawthorne Street
San Francisco, CA 94105

10 OF COUNSEL:

11 BRETT MOFFATT, Esq.
12 Office of Regional Counsel
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15 75 Hawthorne Street
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1 FOR EPA (continued):

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Cynthia Giles

Dated: 8/5/09

5

CYNTHIA GILES
Assistant Administrator for
Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Washington, D.C.

8

9

OF COUNSEL:

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1 FOR UNION PACIFIC:
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5 
6 J. MICHAEL HEMMER
7 Senior Vice President - Law & General Counsel
8 Union Pacific Corporation
9 1400 Douglas Street
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(402) 544-6677 (p)
(402) 501-0129 (f)
mhemmer@up.com

Dated: 

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