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Honorable _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, STATE OF)
WASHINGTON, PUYALLUP TRIBE OF)
INDIANS and MUCKLESHOOT INDIAN)
TRIBE,)
Plaintiffs,)
vs.)
BHP HAWAII, INC., as successor to PRI)
Northwest, Inc.,)
Defendant.)
_____)

CIVIL NO.
CONSENT DECREE

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I. INTRODUCTION

The United States of America (“United States”), on behalf of the National Oceanic and Atmospheric Administration (“NOAA”) and the United States Department of the Interior; the State of Washington (the “State”) through the Washington State Department of Ecology; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe (collectively, “Plaintiffs”), have filed a complaint in this case against defendant BHP Hawaii, Inc. (“Defendant”), the alleged successor to PRI Northwest, Inc., pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. § 9607; the Model Toxics Control Act (MTCA), chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A). This Consent Decree (the “Decree”) addresses the claims asserted in the Complaint against Defendant for Natural Resource Damages (as defined below) in the Commencement Bay Environment (as defined below).

II. RECITALS

A. The United States Department of Commerce, acting through NOAA; the United States Department of the Interior; the Washington State Department of Ecology on behalf of the State of Washington; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe (collectively, the “Trustees” and, individually, a “Trustee”), under the authority of Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section 1006(b) of OPA, 33 U.S.C. § 2706(b), and 40 C.F.R. Part 300, subpart G, serve as trustees for natural resources for the assessment and recovery of damages for injury to, destruction of, and loss of natural resources under their trusteeship.

B. Investigations conducted by the United States Environmental Protection Agency

1 (“EPA”), the Trustees and others have detected hazardous substances in the sediments, soils and
2 groundwater of the Commencement Bay Environment, including but not limited to arsenic,
3 antimony, cadmium, chromium, copper, mercury, nickel, lead, zinc, bis(2-ethylhexyl)-phthalate,
4 hexachlorobenzene, hexachlorobutadiene, polycyclic aromatic hydrocarbons, and polychlorinated
5 biphenyls. Overall, the Trustees have documented the presence of over 30 hazardous substances in
6 the marine sediments of Commencement Bay’s Hylebos Waterway.
7

8 C. The Trustees began assessing natural resource damages in the Commencement Bay
9 Environment in October 1991 by finding that hazardous substances had been released into the
10 Commencement Bay Environment; that public trust natural resources had likely been injured by the
11 releases; that data sufficient to pursue a natural resource damage assessment were available or could
12 likely be obtained at a reasonable cost; and that, without further action, implemented and planned
13 response actions would not adequately remedy the resource injuries. *See* Preassessment Screen of
14 Natural Resource Damages in the Commencement Bay Environment Due to Activities Taking Place
15 In and About the Commencement Bay/Nearshore Tidelands (CB/NT) Superfund Site (October 29,
16 1991). The Trustees notified representatives of known potentially responsible parties (“PRPs”) of
17 their intent to conduct a damage assessment. The Trustees subsequently entered into a Funding and
18 Participation Agreement for Phase 1 of the Commencement Bay-Wide Natural Resource Damage
19 Assessment, dated February 10, 1993, with several of the major PRPs. The Trustees published a
20 report on the results of Phase 1 of the damage assessment process in June 1995. The PRPs did not
21 participate in subsequent stages of the damage assessment, and the Trustees continued the process
22 independently. The Trustees have now completed a series of studies during Phase 2 of the damage
23 assessment, focusing on impacts of contaminants on marine sediments, benthic organisms, flatfish
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1 and salmonids. Results of those studies were published in a series of reports, consisting of
2 Commencement Bay Natural Resource Trustees, 1996, Hylebos Waterway Data and Data Analysis
3 Report; Collier, T.K., L.L. Johnson, M.S. Myers, C.M. Stehr, M.M. Krahn, and J.E. Stein, 1998,
4 Fish injury in the Hylebos Waterway in Commencement Bay, Washington; Mary R. Arkoosh, Ed
5 Casillas, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects of Chemical
6 Contaminants from the Hylebos Waterway on Disease Resistance of Juvenile Salmon; Ed Casillas,
7 Bich-Thuy L. Eberhart, Frank C. Sommers, Tracy K. Collier, Margaret M. Krahn and John E. Stein,
8 1998, Effects of Chemical Contaminants from the Hylebos Waterway on Growth of Juvenile
9 Chinook Salmon; and Ed Casillas, Bich-Thuy L. Eberhart, Tracy K. Collier, Margaret M. Krahn and
10 John E. Stein, 1998, Exposure of Juvenile Chinook Salmon to Chemical Contaminants Specific to
11 the Hylebos Waterway. Based on this research, the Plaintiffs and Defendant (collectively, the
12 “Parties” and, individually, a “Party”) agree that no further natural resource damage assessment is
13 required to effectuate the purposes of this Consent Decree, with respect to Defendant.

14
15
16 D. Plaintiffs have filed a complaint (the “Complaint”) pursuant to section 107 of
17 CERCLA, 42 U.S.C. § 9607; MTCA, chapter 70.105D RCW; CWA, 33 U.S.C. §§ 1251 et seq.; and
18 OPA, 33 U.S.C. §§ 2701 et seq., seeking recovery from Defendant of damages for injury to,
19 destruction of, and loss of natural resources resulting from releases of hazardous substances into the
20 Commencement Bay Environment, including the costs of assessing the damages.

21
22 E. Plaintiffs allege in the Complaint that PRI Northwest, Inc. in the past owned and/or
23 operated real properties or facilities, identified by the Trustees as the OCCIDENTAL site and the
24 US NAVAL RESERVE site, from which storm water, surface water runoff, wastewater, other
25 process discharges, and/or groundwater have flowed to the Commencement Bay Environment.
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1 Plaintiffs also allege that investigations by EPA and others have detected concentrations of
2 hazardous substances in soils, groundwater and/or sediments on or in those properties or facilities.
3 Some of these hazardous substances are found in the sediments of the Commencement Bay
4 Environment.
5

6 F. Plaintiffs further allege that hazardous substances have been or are being released to
7 the Commencement Bay Environment from properties or facilities owned and/or operated by PRI
8 Northwest, Inc. through direct discharge, surface water runoff, groundwater and/or seeps, and that
9 those hazardous substances have caused injury to, destruction of and loss of natural resources in the
10 Commencement Bay Environment under Plaintiffs' trusteeship, including fish, shellfish,
11 invertebrates, birds, marine sediments, and resources of cultural significance. Plaintiffs further allege
12 that each of them and the public have suffered the loss of natural resource services (including
13 ecological services as well as direct and passive human use losses) as a consequence of those
14 injuries.
15

16 G. Plaintiffs allege that the Defendant is the successor to PRI Northwest Inc., who was
17 (a) the owner and/or operator of a vessel or a facility; (b) a person who at the time of disposal or
18 release of any hazardous substance owned or operated any facility at which such hazardous
19 substances were disposed of; (c) a person who by contract, agreement, or otherwise arranged for
20 disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of
21 hazardous substances owned or possessed by such person, by any other party or entity, or otherwise
22 generated any hazardous substance disposed of or treated, at any facility or incineration vessel
23 owned or operated by another party or entity and containing such hazardous substances; and/or (d)
24 a person who accepts or accepted any hazardous substances for transport to disposal or treatment
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1 facilities, incineration vessels or sites selected by such person from which there is a release or a
2 threatened release of a hazardous substance that causes the incurrence of response costs within the
3 meaning of 42 U.S.C. § 9607 and RCW 70.105D.040.

4 H. Defendant denies many of the allegations of the Complaint.

5 I. Although the Trustees have initiated but not yet completed a natural resource damage
6 assessment for the Commencement Bay Environment, the Trustees have developed and analyzed
7 information sufficient to support a settlement that is fair, reasonable and in the public interest.

8 J. To facilitate resolving natural resource damage claims, the Trustees developed a
9 proposed allocation of Hylebos Waterway Natural Resource Damages liability among Hylebos
10 Waterway PRPs solely for settlement purposes. Relying upon the results of the damage-assessment
11 studies, remedial investigations, regulatory standards, and scientific literature, the Trustees first
12 developed an estimate of the amount of injury to natural resources that had occurred as a result of
13 releases of hazardous substances to the Hylebos Waterway. The Trustees quantified the effects of
14 the injuries in terms of the losses of ecological services over affected areas of the waterway and over
15 time, discounted to the current year. The Trustees used the term discounted ecological service
16 acre-years (DSAYs) to describe both the scale of the injuries, and the amount of habitat restoration
17 they are seeking to compensate for the injuries. For the Hylebos Waterway, the Trustees are seeking
18 to recover from all PRPs funds, property and/or in-kind services needed to generate habitat
19 restoration sufficient to compensate for the loss of 1526.77 DSAYs.

20 K. Plaintiffs assert that hazardous-substance releases to the Hylebos Waterway have
21 become dispersed and commingled to the extent that the effects of one PRP's releases cannot be
22 readily distinguished from another's. Plaintiffs further assert that the circumstances of the Hylebos
23

1 Waterway contamination make all PRPs who contributed to the contamination jointly and severally
2 liable for all injuries to natural resources that have resulted from the contamination. As a
3 consequence, Plaintiffs assert the right to recover for the loss of all 1526.77 DSAYs from any
4 Hylebos Waterway PRP. Without prejudice to their position, and solely for purposes of facilitating
5 settlement with individual PRPs, the Trustees have developed a proposal for allocating liability for
6 the 1526.77 DSAYs among the PRPs. Independent consultants hired by the Trustees reviewed
7 existing information from the files of EPA, the Washington State Department of Ecology, and local
8 public libraries to allocate liability among the various Hylebos Waterway facilities that contributed
9 to the contamination.
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12 L. To insure that all PRPs had an equal opportunity to be informed of and to offer their
13 views on the Trustees' settlement proposal, in April 2002 the Trustees presented their report on the
14 proposed allocation to the public for notice and comment. The Trustees took comments for 60 days,
15 revised the report based upon the comments received, and made it available to PRPs in final form.
16

17 M. The Trustees' report allocated liability for DSAY losses for settlement purposes
18 among the various industrial sites along the Hylebos Waterway. As a result of their allocation
19 process, the Trustees allocated a total of 0.908 DSAYs to PRI Northwest, Inc. The Trustees also
20 allocated a total of \$5,238.56 in damage assessment costs relating to the Hylebos Waterway to PRI
21 Northwest, Inc.
22

23 N. The Trustees quantified natural resource damages in their Hylebos Waterway report
24 in terms of DSAYs in order to encourage settling parties to resolve their liability by constructing
25 habitat restoration projects. For parties who prefer settling on a cash-damages basis, the Trustees
26 reviewed data from existing restoration projects and estimated it would cost fifty-two thousand
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1 dollars (\$52,000.00) per DSAY if the Trustees themselves constructed the required restoration
2 projects. The cash damages equivalent of the 0.908 DSAYs allocated to PRI Northwest, Inc. totals
3 \$47,216.00. When combined with the damage assessment costs allocated to PRI Northwest, Inc.,
4 the dollar value of the Trustees' claim asserted against Defendant, including any liability as the
5 alleged successor to PRI Northwest, Inc., totals \$52,454.56. The Trustees have agreed to settle their
6 natural resource damage claims against Defendant, including any liability as the alleged successor
7 to PRI Northwest, Inc., associated with the Commencement Bay Environment for cash payments
8 totaling \$51,761.33 in natural resource damages and damage assessment costs. Defendant has agreed
9 to pay the Trustees the identified sum in return for the Trustees' covenants not to sue Defendant or
10 PRI Northwest, Inc. for Natural Resource Damages as provided below in Paragraph 16.
11

12
13 O. Defendant does not admit any liability to Plaintiffs arising out of the transactions or
14 occurrences alleged in the Complaint.

15 P. Plaintiffs and Defendant agree, and this Court by entering this Decree finds, that this
16 Decree has been negotiated by the Parties in good faith; that settlement of this matter will avoid
17 prolonged and complicated litigation between the Parties; and that this Decree is fair, reasonable,
18 and in the public interest.
19

20 THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED,
21 AND DECREED:

22 **III. JURISDICTION AND VENUE**

23
24 1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.
25 §§ 1331, 1345 and 1367, 42 U.S.C. §§ 9607 and 9613(b) and 33 U.S.C. § 2717(b). The Court has
26 personal jurisdiction over the Parties. Solely for the purposes of this Decree and the underlying
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1 Complaint, the Parties waive all objections and defenses that they may have to jurisdiction of the
2 Court or to venue in this District. The Parties may not challenge the terms of this Decree or this
3 Court's jurisdiction to enter and enforce this Decree.
4

5 IV. PARTIES BOUND

6 2. This Decree is binding upon the United States, the State, the Puyallup Tribe of
7 Indians, the Muckleshoot Indian Tribe and upon Defendant and their heirs, successors and assigns.
8 Any change in ownership or corporate or other legal status, including but not limited to any transfer
9 of assets or real or personal property, will in no way alter the status or responsibilities of Defendant
10 under this Decree.
11

12 V. DEFINITIONS

13 3. Unless otherwise expressly provided, terms used in this Decree that are defined in
14 CERCLA or in regulations promulgated under CERCLA have the meanings assigned to them in
15 CERCLA or in such regulations. Whenever the terms listed below are used in this Decree or in any
16 attached appendix, the following definitions will apply:
17

18 a. "Commencement Bay Environment" means the waters of Commencement
19 Bay, State of Washington -- including the shoreline, intertidal areas, tributaries, drainage areas,
20 estuaries and bottom sediments -- lying south of a line drawn from Point Defiance to Dash Point.
21 These waters include the Thea Foss Waterway, Wheeler-Osgood Waterway, Middle Waterway, St.
22 Paul Waterway, Puyallup River from the mouth south to the present City limits, Milwaukee
23 Waterway, Sitcum Waterway, Blair Waterway, and Hylebos Waterway. This area includes but is
24 not limited to the Commencement Bay Nearshore/Tideflats Superfund Site, as identified or amended
25 by the EPA, including the B&L Landfill, and areas affected by releases of hazardous substances
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1 within the Commencement Bay Nearshore/Tideflats Superfund Site.

2 b. “Commencement Bay Restoration Account” means the Commencement Bay
3 Natural Resource Restoration Account authorized by the Order Directing the Deposit of Natural
4 Resource Damages into the Registry of the Court in United States v. Port of Tacoma, No.
5 C93-5462B (W.D. Wash. Oct. 8, 1993) (attached as Appendix A).
6

7 c. “DSAYs” means discounted ecological service acre-years, the metric
8 established by the Trustees to determine the scale of Natural Resource Damages liability associated
9 with the Hylebos Waterway and the natural resource restoration efforts needed to compensate for
10 injury to, destruction or loss of natural resources giving rise to liability.
11

12 d. “Defendant” means BHP Hawaii, Inc.

13 e. “Natural Resource Damages” means damages, including costs of damage
14 assessment, recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607; Chapter 70.105D RCW;
15 Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil
16 Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A), for injury to, destruction of, or loss of
17 natural resources resulting from releases of hazardous substances or discharges of oil to the
18 Commencement Bay Environment at or from sites along, adjacent to or draining to the Hylebos
19 Waterway.
20

21 f. “Parties” mean the United States, the State of Washington, the Puyallup Tribe
22 of Indians, the Muckleshoot Indian Tribe and BHP Hawaii, Inc.
23

24 g. “Plaintiffs” mean the United States, the State, the Puyallup Tribe of Indians,
25 and the Muckleshoot Indian Tribe.

26 h. “Trustees” mean the United States Department of Commerce, acting through
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1 NOAA; the Department of the Interior; the Washington State Department of Ecology, on behalf of
2 the State of Washington; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe.

3
4 VI. GENERAL PROVISIONS

5 4. The Complaint states claims upon which relief may be granted.

6 5. Nothing in this Consent Decree shall be construed as an admission of liability by the
7 Defendant for any claims or allegations made in the Complaint or in this Consent Decree.

8 6. All rights obtained by Defendant through this Consent Decree shall apply to both
9 Defendant and PRI Northwest, Inc., as the alleged predecessor of BHP Hawaii, Inc.

10
11 VII. PAYMENT OF NATURAL RESOURCE DAMAGES

12 AND DAMAGE ASSESSMENT COSTS

13 7. Within 30 days of entry of this Decree, Defendant will pay to the Trustees \$46,592.00
14 for Natural Resource Damages. This payment will be made by a certified check made payable to the
15 Clerk of the Court. This check will be deposited in the Commencement Bay Natural Resource
16 Restoration Account.

17
18 8. Within 30 days of entry of this Decree, Defendant will pay to the Trustees sums
19 totaling \$5,169.33 in damage assessment costs. These sums shall be paid in the following amounts
20 and particulars:

21 Trustee: National Oceanic and Atmospheric Administration

22 Amount: \$4,170.09

23 Trustee: U.S. Department of the Interior

24 Amount: \$697.18

25
26 Payments to NOAA and the U.S. Department of the Interior shall be made by certified checks made
27 payable to "U.S. Department of Justice," bearing the notation "BHP Hawaii, Inc. - Commencement
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1 Bay Assessment Costs,” and delivered to United States Attorney’s Office; Western District of
2 Washington; Attn: Financial Litigation Unit; 700 Stewart Street, Suite #5220; Seattle, WA 98101.
3 Any payments received by the Department of Justice after 4:00 p.m. Eastern Standard Time shall
4 be credited on the next business day.
5

6 Payments to the other Trustees shall be made by certified checks, bearing the notation “BHP
7 Hawaii, Inc. - Commencement Bay Assessment Costs,” in the amounts indicated and made payable
8 and addressed as follows:

9 Trustee: State of Washington
10 Amount: \$86.03
11 Payee: State of Washington/Department of Ecology
12 Address: State of Washington
13 Department of Ecology
14 Attention: Cashiering Section
15 P.O. Box 5128
16 Lacey, WA 98503-0210

16 Trustee: Puyallup Tribe of Indians
17 Amount: \$196.82
18 Payee: Puyallup Tribe of Indians
19 Address: Mr. William Sullivan
20 Environmental Protection Department
21 Puyallup Tribe of Indians
22 3009 E. Portland Ave.
23 Tacoma, WA 98404

22 Trustee: Muckleshoot Indian Tribe
23 Amount: \$19.22
24 Payee: Muckleshoot Indian Tribe
25 Address: Mr. Rob Otsea
26 Office of the Tribal Attorney
27 Muckleshoot Indian Tribe
28 39015 172nd Avenue S.E.

1 Auburn, WA 98002

2 9. At the time of each payment Defendant will send notice that payment has been made
3 to the Trustees and DOJ in accordance with Section XIV (Notices and Submissions). Such notice
4 will reference Commencement Bay NRDA, DOJ case number 90-11-2-1049, and the civil action
5 number.
6

7 VIII. FAILURE TO COMPLY WITH CONSENT DECREE

8 10. Interest on Late Payments. If Defendant fails to make any payment under
9 Paragraphs 7 and 8 by the required due date, interest shall be assessed at the rate specified for
10 interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. §
11 9507, compounded annually on October 1 of each year in accordance with 42 U.S.C. § 9607(a). The
12 applicable rate of interest is the rate in effect at the time the interest accrues. The rate of interest is
13 subject to change on October 1 of each year. Interest will continue to accrue on the unpaid balance
14 through the date of payment.
15

16 11. Stipulated Penalties.

17 a. If any amounts due under Paragraphs 7 and 8 are not paid by the required
18 date, Defendant will be in violation of this Decree and, as a stipulated penalty, in addition to the
19 interest required by Paragraph 10, will increase the financial contributions it makes under this
20 Consent Decree to fund habitat restoration actions by paying the Trustees \$1,000 per violation per
21 week that such payment is late. After the second week that such payment is late, the stipulated
22 penalty shall apply to each additional day that the payment is late.
23

24 b. Stipulated penalties are due and payable within 30 days of the date of the
25 demand for payment of the penalties by the Trustees. All payments to the Trustees under this
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1 Paragraph will be made by a certified check made payable to the Clerk of the Court. This check will
2 be deposited in the Commencement Bay Restoration Account.

3 c. At the time of each payment, Defendant will send notice that payment has
4 been made to the Trustees and DOJ in accordance with Section XIV (Notices and Submissions).
5 This notice will reference Commencement Bay NRDA, DOJ Case Number 90-11-2-1049, and the
6 civil action number.
7

8 d. Penalties will accrue as provided in this Paragraph regardless of whether the
9 Trustees have notified Defendant of the violation or made a demand for payment, but the penalties
10 need only be paid upon demand. All penalties will begin to accrue on the day after payment is due
11 and will continue to accrue through the date of payment. Nothing in this Decree prevents the
12 simultaneous accrual of separate penalties for separate violations of this Decree.
13

14 12. If Plaintiffs bring an action to enforce this Decree, Defendant will reimburse
15 Plaintiffs for all costs of such action, including but not limited to costs of attorney time.

16 13. Payments made under this Section are in addition to any other remedies or sanctions
17 available to Plaintiffs by virtue of Defendant's failure to comply with the requirements of this
18 Decree.
19

20 14. Notwithstanding any other provision of this Section, Plaintiffs may, in their
21 unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued
22 pursuant to this Decree. Payment of stipulated penalties does not excuse Defendant from payment
23 as required by Section VII or from performance of any other requirement of this Consent Decree.
24

25 15. The Trustees may use sums paid as stipulated penalties under Paragraph 11 to pay
26 unreimbursed damage assessment costs and/or to fund or contribute to additional actions to restore
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1 Commencement Bay natural resources.

2 IX. COVENANT NOT TO SUE BY PLAINTIFFS

3 16. Except as specifically provided in Section X (Reservations of Rights) below,
4 Plaintiffs covenant not to sue or to take administrative action against Defendant or PRI Northwest,
5 Inc. pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D RCW; Section
6 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; or Section 1002(a) of the Oil Pollution Act
7 of 1990 (OPA), 33 U.S.C. § 2702(a), to recover Natural Resource Damages. This covenant not to
8 sue will take effect upon receipt by the Registry of the Court and by each of the Trustees of all
9 payments required by Paragraphs 7 and 8 of Section VII. This covenant not to sue is conditioned
10 upon the satisfactory performance by Defendant of its obligations under this Decree. This covenant
11 not to sue extends only to Defendant and PRI Northwest, Inc. and their heirs, successors, and
12 assigns, and does not extend to any other person.
13
14

15 X. RESERVATIONS OF RIGHTS

16 17. Plaintiffs reserve, and this Decree is without prejudice to, all rights against Defendant
17 or PRI Northwest, Inc. with respect to all matters not expressly included within the Covenant Not
18 to Sue by Plaintiffs in Paragraph 16. Notwithstanding any other provision of this Decree, Plaintiffs
19 reserve, and this Decree is without prejudice to, all rights against Defendant or PRI Northwest, Inc.
20 with respect to:
21

- 22 a. liability for failure of Defendant to meet a requirement of this Decree;
23 b. liability for costs of response incurred or to be incurred by Plaintiffs;
24 c. liability for injunctive relief or administrative order enforcement under Section 106 of
25 CERCLA, 42 U.S.C. § 9606, and
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1 d. criminal liability to the United States or State.

2 XI. REOPENERS

3 18. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve,
4 and this Consent Decree is without prejudice to, the right to institute proceedings against Defendant
5 and/or PRI Northwest, Inc. in this action or in a new action for:

7 a. Claims based on a failure of Defendant to satisfy the requirements of this Consent
8 Decree; and

9 b. Additional claims for Natural Resource Damages if conditions, factors or information
10 in the Commencement Bay Environment, not known to the Trustees at the time of entry of this
11 Consent Decree, are discovered that, together with any other relevant information, indicates that
12 there is injury to, destruction of, or loss of natural resources of a type unknown, or of a magnitude
13 significantly greater than was known, at the time of entry of this Consent Decree, which is
14 attributable to the Defendant or PRI Northwest, Inc.

16 XII. COVENANT NOT TO SUE BY DEFENDANT

17 19. Defendant, for itself and as successor to PRI Northwest, Inc., covenants not to sue
18 and agrees not to assert any claims or causes of action against the United States, the State, the
19 Puyallup Tribe of Indians and the Muckleshoot Indian Tribe or their contractors or employees, for
20 any civil claims or causes of action relating to Natural Resource Damages.

22 XIII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

23 20. Except as otherwise provided herein, nothing in this Consent Decree shall be
24 construed to create any rights in, or grant any cause of action to, any person not a Party to this
25 Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited
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1 to, any right to contribution), defenses, claims, demands, and causes of action they each may have
2 with respect to any matter, transaction, or occurrence relating in any way to the Commencement Bay
3 Environment against any person not a Party hereto.
4

5 21. The Parties agree, and by entering this Consent Decree this Court finds, that
6 Defendant and PRI Northwest, Inc. are entitled, as of the effective date of this Consent Decree, to
7 protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C.
8 § 9613(f)(2), and RCW 70.105D.040(4)(d) for Natural Resource Damages.

9 22. Defendant agrees that it will notify the Trustees and the United States in writing no
10 later than 60 days before bringing a suit or claim for contribution for Natural Resource Damages.
11 Defendant also agrees that it will notify the Trustees and the United States in writing within 10 days
12 of service of a complaint or claim upon Defendant and/or PRI Northwest, Inc. relating to a suit or
13 claim for contribution for Natural Resource Damages. In addition, Defendant will notify the Trustees
14 and the United States within 10 days of service or receipt of any Motion for Summary Judgment and
15 within 10 days of receipt of any order from a court setting a case for trial for matters related to this
16 Decree.
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18 23. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs for
19 injunctive relief, recovery of response costs, or other appropriate relief other than Natural Resource
20 Damages, Defendant, for itself and as successor to PRI Northwest, Inc., shall not assert, and may
21 not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral
22 estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the
23 claims raised by the Plaintiffs in the subsequent proceeding were or should have been brought in the
24 instant case; provided, however, that nothing in this Paragraph affects the enforceability of the
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1 covenants not to sue set forth in Paragraphs 16 and 19.

2 XIV. NOTICES AND SUBMISSIONS

3 24. Whenever notice is required to be given or a document is required to be sent by one
4 Party to another under the terms of this Decree, it will be directed to the individuals at the addresses
5 specified below, unless those individuals or their successors give notice of a change to the other
6 Parties in writing. Written notice as specified constitutes complete satisfaction of any written notice
7 requirement of the Decree for Plaintiffs, Defendant and PRI Northwest, Inc.

8
9 As to the United States and as to DOJ:

10
11 Chief, Environmental Enforcement Section
12 Environment and Natural Resources Division
13 U.S. Department of Justice
14 P.O. Box 7611
15 Washington, D.C. 20044-7611
16 (DJ # 90-11-2-1049)

17 As to NOAA:

18 Robert A. Taylor
19 NOAA Office of General Counsel GCNR/NW
20 7600 Sand Point Way NE
21 Seattle, WA 98115-0070

22 As to the United States Department of the Interior:

23 Jeff Krausmann
24 U.S. Fish & Wildlife Service
25 510 Desmond Dr. SE, Suite 102
26 Lacey, WA 98503-1263

27 As to the State:

28 Craig Thompson

1 Toxics Cleanup Program
2 State of Washington
3 P.O. Box 47600
4 Olympia, WA 98504-7600

5 As to the Puyallup Tribe of Indians:

6 Bill Sullivan
7 Environmental Department
8 Puyallup Tribe of Indians
9 3009 E. Portland Ave.
Tacoma, WA 98404

10 As to the Muckleshoot Indian Tribe:

11 Mr. Rob Otsea
12 Office of the Tribal Attorney
13 Muckleshoot Indian Tribe
14 39015 172nd Avenue S.E.
Auburn, WA 98002

15 As to Defendant and PRI Northwest, Inc.:

16 Jan Potts, Esq.
17 BHP Billiton
18 1360 Post Oak Boulevard
19 Suite 150
20 Houston, TX 77056-3020

21 With a copy to:

22 Mark Schneider, Esq.
23 Perkins Coie LLP
24 1201 Third Avenue
25 Suite 4800
Seattle, WA 98101

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XV. EFFECTIVE DATE

25. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XVI. RETENTION OF JURISDICTION

26. This Court will retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Decree.

XVII. INTEGRATION/APPENDICES

27. This Decree and its appendices constitute the final, complete, and exclusive agreement and understanding with respect to the settlement embodied in this Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Decree. The following appendices are attached to and incorporated into this Consent Decree:

Appendix A is the Order Directing the Deposit of Natural Resource Damages into the Registry of the Court in United States v. Port of Tacoma, No. C93-5462B (W.D. Wash. Oct. 8, 1993).

XVIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

28. This Decree will be lodged with the Court for a period of not less than 30 days for public notice and comment. The Plaintiffs each reserve the right to withdraw or withhold their consent if the comments regarding the Decree disclose facts or considerations that indicate this Decree is inappropriate, improper, or inadequate. Defendant, for itself and as successor to PRI Northwest, Inc., consents to the entry of this Decree without further notice.

29. If for any reason this Court declines to approve this Decree in the form presented, this

1 agreement may be voided at the sole discretion of any Party, and the terms of the agreement may
2 not be used as evidence in any litigation between the Parties.

3
4 **XIX. SIGNATORIES/SERVICE**

5 30. The Assistant Attorney General for the Environment and Natural Resources Division
6 of the United States Department of Justice and each undersigned representative of the State, the
7 Puyallup Tribe of Indians, the Muckleshoot Indian Tribe and Defendant certifies that he or she is
8 authorized to enter into the terms and conditions of this Decree and to execute and bind legally the
9 Party or Parties that he or she represents to this document.

10
11 31. Defendant, for itself and as successor to PRI Northwest, Inc., agrees not to oppose
12 entry of this Decree by this Court or to challenge any provision of this Decree unless any Plaintiff
13 has notified Defendant in writing that it no longer supports entry of the Decree.

14 32. Defendant will identify on the attached signature page the name and address of an
15 agent who is authorized to accept service of process by mail on behalf of it and PRI Northwest, Inc.
16 with respect to all matters relating to this Decree. Defendant and PRI Northwest, Inc. agree to accept
17 service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal
18 Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to
19 service of a summons.
20

21 **XX. FINAL JUDGMENT**

22 33. Upon approval and entry of this Decree by the Court, this Decree will constitute the
23 final judgment between and among the United States, the State, the Puyallup Tribe of Indians, the
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Muckleshoot Indian Tribe, and Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ___ DAY OF _____ 2008

United States District Judge

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in United States, et al. v. BHP
2 Hawaii, Inc. as successor to PRI Northwest, Inc.

3 FOR THE UNITED STATES OF AMERICA
4

5 Date: 5/20/2008

6 Ronald J. Tempas
7 Assistant Attorney General

8 Environment and Natural Resources Division
9 U.S. Department of Justice
10 Washington, D.C. 20530

11 FOR THE STATE OF WASHINGTON
12

13 Date: _____
14

15 _____
16 Director
17 Washington State Department of Ecology

18 Date : _____
19

20 _____
21 Assistant Attorney General
22 State of Washington

23 FOR THE PUYALLUP TRIBE OF INDIANS
24

25 Date: 12/27/07
26

27 _____
28

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in United States, et al. v. BHP
2 Hawaii, Inc. as successor to PRI Northwest, Inc.

3 FOR THE UNITED STATES OF AMERICA
4

5
6 Date: _____ Ronald J. Tenpas
7 Assistant Attorney General

8 Environment and Natural Resources Division
9 U.S. Department of Justice
10 Washington, D.C. 20530

11 FOR THE STATE OF WASHINGTON
12

13
14 Date: _____
15 Director
16 Washington State Department of Ecology

17
18 Date: 12/21/07 _____
19 Assistant Attorney General
20 State of Washington

21 FOR THE PUYALLUP TRIBE OF INDIANS
22

23
24 Date: _____
25
26
27
28

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in United States, et al. v. BHP
2 Hawaii, Inc. as successor to PRI Northwest, Inc.

3 FOR THE UNITED STATES OF AMERICA

4
5 Date: _____

6 _____
7 Ronald J. Tenpas
8 Assistant Attorney General
9 Environment and Natural Resources Division
10 U.S. Department of Justice
11 Washington, D.C. 20530

12 FOR THE STATE OF WASHINGTON

13
14 Date: 12/18/07

15 _____
16 Director
17 Washington State Department of Ecology

18 Date : _____

19 _____
20 Assistant Attorney General
21 State of Washington

22 FOR THE PUYALLUP TRIBE OF INDIANS

23
24 Date: _____

25 _____

1 FOR THE MUCKLESHOOT INDIAN TRIBE

2

3 Date: 12-14-07

4

5

6

7 FOR BHP HAWAII, INC. AND PRI NORTHWEST, INC.

8

9

10 Date: _____

11

12

13 Agent authorized to receive service of process by mail on behalf of BHP Hawaii, Inc. and PRI
14 Northwest, Inc. with respect to all matters relating to this Decree:

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1 FOR THE MUCKLESHOOT INDIAN TRIBE

2
3 Date: _____
4

5
6
7 FOR BHP HAWAII, INC. AND PRI NORTHWEST, INC.

8
9 Date: 29 NOVEMBER 2007
10 _____

11
12
13 Agent authorized to receive service of process by mail on behalf of BHP Hawaii, Inc. and PRI
14 Northwest, Inc. with respect to all matters relating to this Decree:
15

16 Jan Potts, Esq.
17 BHP Billiton
18 1360 Post Oak Boulevard
19 Suite 150
20 Houston, TX 77056-3020
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APPENDIX A

Hon. Robert J. Bryan

FILED RECEIVED LODGED
OCT 07 1993
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY DEPUTY

FILED RECEIVED LODGED
OCT - 8 1993
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
ENTERED
ON DOCKET

OCT 8 1993

By Deputy

UNITED STATES OF AMERICA,
ON BEHALF OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
THE UNITED STATES DEPARTMENT OF
THE INTERIOR, AND THE NATIONAL
OCEANIC AND ATMOSPHERIC
ADMINISTRATION;
STATE OF WASHINGTON;
PUYALLUP TRIBE OF INDIANS;
MUCKLESHOOT INDIAN TRIBE;

Plaintiffs,

v.

PORT OF TACOMA

Defendant

Civil No. C93-5462B

ORDER DIRECTING THE
DEPOSIT OF NATURAL
RESOURCE DAMAGES INTO
THE REGISTRY OF THE
COURT

This Order is entered in furtherance of a Consent Decree
in the above captioned matter between Plaintiffs the United
States of America, State of Washington, Puyallup Tribe of Indians
and Muckleshoot Indian Tribe and Defendant the Port of Tacoma
("Settling Defendant"). Under the Consent Decree, Settling
Defendant has agreed, among other matters, to pay \$12,000,000

ORDER DIRECTING DEPOSIT OF
NATURAL RESOURCE DAMAGES - 1

U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

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cf/Financed

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1 (twelve million dollars), in installments as identified in the
2 Consent Decree, to the Natural Resource Trustees (National
3 Oceanic and Atmospheric Administration of the U.S. Department of
4 Commerce, the U.S. Department of the Interior, the Washington
5 Department of Ecology (on behalf of the Washington Department of
6 Fisheries, the Washington Department of Natural Resources, and
7 the Washington Department of Wildlife), the Puyallup Tribe of
8 Indians, and the Muckleshoot Indian Tribe) in settlement of
9 Settling Defendant's liability for Natural Resource Damages
10 caused by releases of hazardous substances from property owned,
11 managed or operated by Settling Defendant within the Commencement
12 Bay Environment, as defined in the Consent Decree. This Order
13 addresses handling and investment of those funds by the Registry
14 of the Court.

15 Pursuant to Rule 67 of the Federal Rules of Civil
16 Procedure, 28 U.S.C. § 2041, and Local Rule GR 6, and in
17 accordance with the terms of the Consent Decree, it is hereby

18 1. ORDERED that Settling Defendant, following entry of the
19 Consent Decree and in accordance with the payment schedules
20 established therein, pay to the Clerk of the Court all sums
21 specified in paragraph 51.b. of the Consent Decree, which sums
22 constitute recovery for Natural Resource Damages and Future
23 Trustee Assessment Costs, as defined in the Consent Decree; and
24 it is

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ORDER DIRECTING DEPOSIT OF
NATURAL RESOURCE DAMAGES - 2

U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

1 2. ORDERED that Settling Defendant shall make the
2 aforementioned payments by checks made payable to the Clerk of
3 the Court, bearing the notation Civil Action No. C93-5462B
4 (W.D. Wash.), which checks shall be sent to:

5 Office of the United States Attorney
6 3600 SeaFirst Fifth Avenue Plaza
7 800 Fifth Avenue
8 Seattle, Washington 98104

9 The U.S. Attorney shall immediately deposit such funds with the
10 Registry of the Court. The Settling Defendant shall cause
11 photocopies of each check and of any transmittal letter
12 accompanying the check to be sent to: Chief, Environmental
13 Enforcement Section, Department of Justice, P.O. Box 7611, Ben
14 Franklin Station, Washington, D.C. 20044; and to Robert A.
15 Taylor, NOAA Damage Assessment and Restoration Center, 7600 Sand
16 Point Way NE, BIN C15700, Seattle, WA 98115; and it is

17 3. ORDERED that an account shall be established in the
18 Registry for payments received in the above captioned matter and
19 for such other payments as may be received from time to time in
20 connection with restoration and protection of the ecosystem of
21 the Commencement Bay watershed, and that the account shall be
22 titled Commencement Bay Natural Resource Restoration Account
23 ("Commencement Bay Restoration Account"); and it is

24 4. ORDERED that the Clerk of the Court shall administer the
25 funds so received as follows:
26

1 a) \$100,000 of the funds received shall be deposited in
2 such interest-bearing federally insured commercial bank account
3 or accounts as the Clerk deems appropriate;

4 b) the balance of the funds received shall be used to
5 purchase 91-day Treasury Securities, at the highest prevailing
6 interest rate available for such Treasury Securities;

7 c) upon maturity of the Treasury Securities referred to
8 in subparagraph b), the Clerk shall consult with counsel for the
9 United States regarding the allocation of the proceeds of such
10 Treasury Securities between the bank account or accounts
11 identified in subparagraph a) and the purchase of additional
12 short-term Treasury Securities. Counsel for the United States
13 shall consult with representatives of the Natural Resource
14 Trustees and, depending upon the Natural Resource Trustees'
15 anticipated funding needs, shall advise the Clerk regarding the
16 desired allocation of such proceeds between the bank account or
17 accounts and reinvestment in Treasury Securities. The Clerk may
18 make any such allocations of funds as directed by counsel for the
19 United States without further Order of the Court; and it is

20 5. ORDERED that all income earned as interest on funds so
21 invested or deposited shall be credited to the Commencement Bay
22 Restoration Account; and it is

23 6. ORDERED that the Natural Resource Trustees may apply to the
24 Court for an Order establishing an investment procedure or
25 vehicle alternative to that identified in paragraph 4 above that

1 provides a comparable level of security and earnings potential,
2 which application may be acted upon by the Court without notice
3 to or consent by Settling Defendant; and it is

4 7. ORDERED that the Clerk shall prepare quarterly reports on
5 the status and activity of the Commencement Bay Restoration
6 Account showing payments received, disbursements made, income
7 earned, maturity dates of securities held, and principal balance,
8 and shall distribute the reports to counsel for the United
9 States; and it is

10 8. ORDERED that funds in the Commencement Bay Restoration
11 Account shall remain in the Registry until further order of this
12 Court; and it is

13 9. ORDERED that the Natural Resource Trustees shall establish
14 such decision making procedures regarding expenditures of funds
15 from the Commencement Bay Restoration Account as they deem
16 appropriate. Applications for orders for disbursements from the
17 Commencement Bay Restoration Account shall be made by the United
18 States on behalf of the Natural Resource Trustees. The
19 application shall be supported by a certification of the Natural
20 Resource Trustees that their determination to make such
21 disbursement was in compliance with said decision making
22 procedures and is consistent with the terms of the Consent Decree
23 and other applicable law. Such applications may be acted upon by
24 the Court without notice to or consent by Settling Defendant.

25 Any of the Natural Resource Trustees may petition the Court for
26

1 review of a decision by the United States to seek or not to seek
2 an application for an order for disbursement, provided that the
3 party or parties seeking review have complied with any dispute
4 resolution provisions adopted as part of the decision making
5 procedures referred to above; and it is

6 10. ORDERED that counsel for the United States shall serve as
7 the point of contact for the Clerk on behalf of the Natural
8 Resource Trustees, and shall distribute copies of the reports
9 referred to in paragraph 7 of this Order to the other Natural
10 Resource Trustees; and it is

11 11. ORDERED that the Clerk is authorized and directed by this
12 Order to deduct for maintaining funds in the Registry Account the
13 fee as authorized in the Federal Register Vol. 56, No. 213 at
14 page 56356 (November 4, 1991); and it is

15 12. ORDERED that a certified copy of this Order shall be
16 served upon the Clerk of this Court.

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18 Dated 8 October 1993

Hon. Robert J. Bryan, Judge
United States District Court
Western District of Washington

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ORDER DIRECTING DEPOSIT OF
NATURAL RESOURCE DAMAGES - 6

U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044