

## SETTLEMENT AGREEMENT

*Luciano Farms v. United States*  
Case No. 2:13-cv-02116-KJM-AC (E.D. Cal.)

### 1. PARTIES

1.1. This Settlement Agreement is entered as of this 13 day of November 2015 between Luciano Farms, LLC and Robert A. Luciano, Jr., an individual and the Trustee of the Robert A. Luciano Jr. Revocable Trust Dated February 27, 1995 (collectively "Plaintiff" or "Mr. Luciano") and the United States of America; United States Department of Agriculture; United States Forest Service and various officials within those agencies (collectively "Defendants" or "Forest Service"). The parties to this Settlement Agreement may be referred to collectively as the "Parties."

### 2. RECITALS

2.1. *WHEREAS*, on October 15, 2013, Plaintiff brought suit in the United States District Court for the Eastern District of California, captioned *Luciano Farms v. United States*, 2:13-CV-02116-KJM-AC (E.D. Cal.). On May 13, 2014 that court entered an Order granting in part and denying in part Defendant's Motion to Dismiss in Part. Among the claims dismissed were Plaintiff's claim under the Healthy Forest Restoration Act, 16 U.S.C. §§ 6501 *et seq.* Plaintiff filed a First Amended Complaint on May 27, 2014. The First Amended Complaint sought, *inter alia*, judicial confirmation of rights-of-way for a ditch system historically used by Plaintiff which is located in part on National Forest System land administered by Defendants.

2.2. *WHEREAS*, the ditch system addressed in the First Amended Complaint is generally described as located in part on National Forest System land administered by Defendants within the SW 1/4 of the NE 1/4 of Section 1, T21N, R12E, MDB&M. The ditch system includes the Upper Ditch which diverts water from Wash Creek at a point approximately

1112 feet west of and 400 feet south of the NE 1/16 corner of Section 1, T21N, R12E, MDB&M<sup>1</sup> thence runs northeasterly approximately 236 feet to a "Y" where the Lower Ditch branches off and thence northerly approximately 255 feet to the southern boundary of Plaintiff's property. The Lower Ditch begins at the "Y" and flows northeasterly approximately 643 feet to the boundary with Mr. Luciano's property. The general location of the ditch system is shown on the map attached as Exhibit A.

2.3. *WHEREAS*, the Parties have exchanged sufficient historic and other materials to enable the Parties to agree that the property served by Plaintiff's ditch system has been continuously irrigated since the early 1870s.

2.4. *WHEREAS*, the exact location of the ditch system has been determined by survey conducted at Mr. Luciano's expense and by a surveyor approved by the Parties.

2.5. *WHEREAS*, Defendants have executed a disclaimer issued pursuant to the Quiet Title Act, 28 U.S.C. § 2409a(e) recognizing a right-of-way ("the under Right-of-Way") Revised Statute 2339, codified at 43 U.S.C. § 661 (repealed), for the ditch system. The physical scope of the right-of-way extends 10 feet from the centerline of each ditch.

2.6. *WHEREAS*, the Parties agree that repair, maintenance and/or replacement of the rock retaining wall located on Wash Creek immediately upstream of the diversion point for the Upper Ditch is the sole right and responsibility of the Forest Service, and subject to applicable law. Any such repair, maintenance and/or replacement of the rock wall shall leave the diversion point in good operating condition.

2.7. *WHEREAS*, the Parties now desire to compromise and settle the claims asserted in the action identified above.

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<sup>1</sup> This location refers to a corner marker set by the Forest Service. Plaintiff disputes the accuracy of the corner's location and its location is used here only for reference.

*NOW THEREFORE*, the Parties agree and stipulate as follows:

### 3. MAINTENANCE OF RIGHT-OF-WAY

3.1. The Parties agree that Mr. Luciano shall have the right to engage in routine maintenance of the right-of-way without further authorization from the Forest Service.

3.2. Mr. Luciano agrees to provide 72 hours notice of the nature and scope of routine maintenance to be conducted on National Forest System land.

3.3. The paragraphs below address activities the Parties have agreed are, or are not, routine maintenance. Subject to the Forest Service's review and consent, other activities may be considered routine maintenance.

3.4. Routine maintenance serves to preserve the *status quo*. It includes but is not limited to:

- a. Visual inspection of the ditch system
- b. Removal or replacement of small amounts of silt, sediment or other obstructions (e.g., dead wood or brush) from diversion structure or ditch and deposition of same on National Forest System land.
- c. Adjustment of devices used to control the flow of water.
- d. Minor cutting of vegetation of smaller than 5 inches in diameter within or immediately adjacent to the ditch system where such vegetation is interfering with the flow of water in the ditch.
- e. Use of agreed upon access routes.
- f. Repair of the conveyance facility which can be done with hand tools (e.g., rakes, shovels, picks, axes, wheelbarrows), which does not alter the facility's nature, capacity or character and which takes place entirely within the physical boundary of the right-of-way.

3.5. Non-routine maintenance requires authorization from the Forest Service. It includes but is not limited to:

- a. Bringing in and/or use of mechanized equipment.
- b. Replacing or maintaining any part of the water transmission system where such activity disturbs or affects roads on National Forest System land.
- c. Using other than approved routes for access.
- d. Motorized use in an area closed to motorized use.
- e. Removal and disposal of significant amounts of vegetation and silt and deposition of the same, if the deposition is on National Forest System lands.
- f. Burning, application of seed mixtures, chemical application or any means of vegetation control other than using hand tools to cut vegetation within or immediately adjacent to the facility.
- g. Reconstruction or rerouting of all or a portion of the ditch or diversion structure.
- h. Any maintenance requiring the use of National Forest System land outside the physical boundary of the right-of-way.

3.6 Pursuant to 36 C.F.R. 251.50(b), non-routine maintenance may occur when necessary for the protection of life and property in emergencies, *provided* the Forest Service is informed of the use at the earliest opportunity and terms of that regulation, or its successor, are complied with.

3.7. Cultural Resources: If at any time during the maintenance of the rights-of-way any items of archaeological, paleontological, or historic value, including but not limited to historic or prehistoric artifacts, structures, monuments, human remains and funerary objects are

discovered, Mr. Luciano shall immediately cease all activities which may disturb such items and notify the District Ranger. Mr. Luciano shall not resume activities until written approval is given by the authorized officer. Failure to comply with this stipulation may result in civil or criminal penalties under the Archaeological Resources Protection Act of 1979.

#### 4. OBLIGATIONS CONTINGENT

4.1. Promptly after complete execution of this Agreement, the Parties shall jointly move the Court to (1) confirm the Quiet Title Act Disclaimer; (2) dismiss with prejudice of *Luciano Farms v. United States*, No. 2:13-CV-02116-KJM-AC (E.D. Cal.); and (3) vacate its Order of May 13, 2014 (Dkt. No. 38).

4.2. The Parties' obligations under this Agreement shall be contingent on the Court granting the Motion provided for in Paragraph 4.1.

4.3. Should the Court not grant the Motion, the Parties shall negotiate in good faith in an attempt to address the issue(s) underlying the Court's action. If the parties are not able to resolve the issue(s) to their mutual satisfaction, this Agreement shall be void.

#### 5. ACCESS

5.1. No later than two months from the date of the signing of this agreement, the Parties will meet and discuss (1) access routes by which Plaintiff may use National Forest System land to access the ditch right-of-way for use and maintenance purposes and (2) any access routes by which the Forest Service may access Plaintiff's property for inspection of the ditches

## 6. GENERAL PROVISIONS

6.1. Nothing in this Settlement Agreement may be construed to require the Defendants to obligate or pay funds or in any way take action in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

6.2. No admissions. This Settlement Agreement is entered into for the sole purpose of settling and compromising the claims in *Luciano Farms v. United States*, No. 2:13-CV-02116-KJM-AC (E.D. Cal.). This Settlement Agreement shall not be construed as an admission of liability or wrongdoing and shall not be evidence of, or constitute a waiver by, either Party as to the merits or lack of merit of any claim or defense asserted therein. Nothing in this Agreement shall be construed or offered in evidence in any proceeding as an admission by any Party as to any fact, claim or defense in this action, or as a precedent as to the merits of any claim or defense, or for any other purpose in any other proceeding. In particular this Settlement Agreement shall not prejudice either party's claims or defenses in *Robert A. Luciano Jr. v. United States*, Case No. 11-439L (Fed. Cl.) or *Luciano v. United States et al.*, No. 14-16167 (9th Cir.).

6.3. Necessary Acts. Each party agrees to perform any further acts and execute any documents that may be reasonably requested by any other party to effect the purposes of this Agreement.

6.4. Binding Effect. This Settlement Agreement shall be binding on the Parties, their officers, agents, successors and assigns and those acting in privity therewith. The undersigned representatives of the Parties certify that they are fully authorized by the Party or Parties they represent to agree to the terms of this Settlement Agreement.

6.5. Entire Agreement. This Settlement Agreement contains all agreements, promises and understandings between the Parties and no verbal or oral agreements, promises and understandings shall be binding upon either Party.

6.6. Amendments. No modification, amendment or waiver of any of the provisions of this Settlement Agreement shall be effective, unless done in writing specifically referring to this Agreement and signed by all parties.

6.7. Counterparts. This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original. All counterparts taken together shall constitute the agreement.

6.8. Attorneys' Fees. Each party shall pay its own costs, fees and expenses.

6.9. Drafting. This Settlement Agreement is a product of negotiations between the Parties. Both parties have participated fully in the preparation of this Settlement Agreement and have received the advice of counsel. In the case of a dispute concerning the interpretation of any provision of this Agreement, both parties shall be deemed to have drafted the entire Settlement Agreement and any disputed language shall not be construed against a Party on the basis that the Party drafted, suggested, chose or otherwise selected the language.

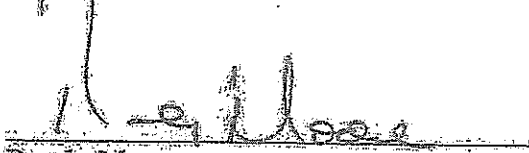
6.10. Notices. Any notice or other document required or allowed to be given pursuant to this Settlement Agreement shall be delivered personally, by electronic mail by recognized overnight courier or sent by certified mail, postage prepaid, return receipt requested to the following addresses:

District Ranger  
Beckwourth Ranger District  
23 Mohawk Road  
P.O. Box 7  
Blairsdon, CA 96013

Robert A. Luciano, Jr.  
Luciano Properties  
5875 Tyrone Rd.  
Reno, NV 89502

*IN WITNESS THEREOF*, the Plaintiff and the Defendants have executed this Settlement Agreement as of the date first above written.

UNITED STATES FOREST SERVICE



Randy Moore  
Regional Forester  
Pacific Southwest Region

ROBERT A. LUCIANO, JR.





