

## NON-EXCLUSIVE SUBLICENSE AGREEMENT (Independent Grower)

BETWEEN: Potato Variety Management Institute, Inc., an Idaho nonprofit corporation (“PVMI”)  
 661 South Rivershore Lane, Suite 230, PO Box 1670, Eagle, ID 83616  
 Phone: (541)318-1485; Fax: (541)318-7561; jeannedebons@msn.com

And \_\_\_\_\_ (“GROWER”)  
 Phone: \_\_\_\_\_; Fax: \_\_\_\_\_

PVMI and GROWER agree as follows:

**1. Non-Exclusive Sublicense.** Subject to the terms and conditions of this Agreement, PVMI grants GROWER a non-exclusive sublicense to the Licensed Products identified below in the Territory identified below, for the sole purpose of propagating the Licensed Product for sale and/or internal transfer as seed (i.e., replanting for commercial production by Grower) (the “Field of Use”), for the 2008 crop year through and until December 31, 2008, unless sooner terminated by PVMI in accordance with this Agreement. GROWER may not assign or sublicense any of its rights under this Agreement. A new agreement with PVMI is required for any other contracted or affiliated grower. Further, PVMI retains all of its rights, including but not limited to domestic and international Intellectual Property Rights.

**1.1 Licensed Product and Territory.** “Licensed Product” means any type of tissue culture plantlets or mini-tubers, pre-nuclear, nuclear, first field generations, and later generations of seed potatoes of the following variety(ies) selected from among those listed in Exhibits A and B (attached hereto), to be grown solely in the territory(ies) indicated below (the “Territory”):

Variety	Designation	Territory (select and identify specific states/country, as applicable)		
		Tri-State Area (Oregon, Washington, Idaho)	Other U.S. (Outside Tri-State Area)	International (may <u>not</u> include Europe, Russia, Ukraine, Turkey or South Africa)
		[\$250 Annual License Fee]	[\$500 Annual License Fee]	[\$1000 Annual License Fee]
		[\$0.25/cwt Annual Royalty]	[\$0.50/cwt Annual Royalty]	[\$1.00/cwt Annual Royalty]

**1.2. Annual License Fee.** Upon the mutual execution of this Agreement, GROWER shall pay PVMI a single Annual License Fee in the *highest* applicable amount in the table above with respect to the Territory(ies) selected.

**1.3 Annual Royalty.** GROWER also shall pay an Annual Royalty for each variety of Licensed Product at the applicable per cwt rates stated above with respect to each category of the Territory in which the seed was grown. The Annual Royalty must be paid on all sales of Licensed Product seed from the crop year of this Agreement, whether sold within the term of this Agreement or thereafter, and are due within thirty (30) days of each respective sale or transfer dates. All Licensed Products sold or otherwise transferred by GROWER shall be presumed to have been sold as seed (unless otherwise demonstrated to PVMI's satisfaction).

**This Agreement is subject to all of the terms and conditions stated herein, including those on the following pages 2 through 6, to which GROWER and PVMI expressly agree. GROWER acknowledges and agrees that any additional or modified terms inserted by GROWER are not part of the contract between PVMI and GROWER unless expressly agreed by PVMI in writing.**

**PVMI**  
 By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**GROWER:** \_\_\_\_\_  
 By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**PVMI NON-EXCLUSIVE SUBLICENSE AGREEMENT (Grower)**  
**Additional Terms and Conditions**

**2. Intellectual Property Rights.**

**2.1 Definition.** For the purpose of this Agreement, with respect to the Licensed Products, "Intellectual Property Rights" refers to: (a) all certificates, registrations, and other rights under the U.S. Plant Variety Protection Act ("PVP"); (b) certificates, registrations, and other rights for International Plant Variety Protection pursuant to the Convention for the Protection of New Varieties of Plants (e.g., Plant Breeder Rights), and any other rights for the protection of plant varieties in all countries where such rights are available, to which PVMI has elected to exercise its rights; (c) all patent rights (including all applications, registrations and rights of registration, reissues, divisions, continuations, continuations-in-part, substitutes, renewals and extensions); and (d) all trademarks (including all applications, registrations, reissues, divisions, renewals, and extensions, and all common law trademark rights).

**2.2 Reservations.** Notwithstanding the foregoing, PVMI and GROWER acknowledge and agree that this Agreement is subject to: (a) certain obligations to the United States Government as set forth in 35 U.S.C. §§ 202(c)(4) and 209(d)(1), pursuant to which the United States Government has an irrevocable, non-exclusive, nontransferable, royalty-free license to practice (or have practiced) certain of the Intellectual Property Rights in research for or on behalf of the United States Government; and (b) the terms of the Exclusive License Agreements between PVMI and the Tri-State Partner Institutions. For the purposes of this Agreement, "Tri-State Partner Institutions" means Oregon State University, the University of Idaho, Washington State University, and the United States Department of Agriculture's Agricultural Research Service.)

**2.3. No Assignment/Sublicensing/Sub-contracting; Unauthorized Propagation.** GROWER shall not assign, sublicense, or sub-contract any of its rights under this Agreement, without prior written consent of PVMI. By executing this Agreement and/or using Licensed Products subject to this Agreement, GROWER acknowledges and agrees that each variety subject to this Agreement is a protected variety. Specifically, GROWER acknowledges notice of and knowledge that unauthorized propagation is prohibited and that unauthorized propagation could subject the GROWER to damages, including those under the Plant Variety Protection Act and/or under applicable Plant Breeder Rights. GROWER shall be jointly liable with any assignee, sublicense, or contract or affiliate grower for all royalty and license fees or any other amounts owing to PVMI by any such assignee, sublicense, or contract or affiliate grower that directly or indirectly asserts rights by or through GROWER.

**2.4 Plant Variety Protection.** The parties agree that the Plant Variety Protection Act of 1970, 7 U.S.C. section 2321 *et seq*, applies to this Agreement irrespective of whether a PVP certificate is still pending and has not yet issued. The parties agree that this Agreement will be interpreted and enforced under the laws of the State of Idaho (see Section 9 below) and pursuant to the Plant Variety Protection Act, and additionally, where applicable, pursuant to any pending or issued Plant Breeder Rights. The parties agree that this Agreement has been specifically bargained for. ***GROWER acknowledges and agrees that there is no assurance that any PVP certificate, Plant Breeder Rights, or other Intellectual Property Rights will issue for a particular variety of License Product(s).***

**3. Payments.** Payments to PVMI shall be payable, in U.S. dollars, to Potato Variety Management Institute, Inc. at PO BOX 1670, 661 Rivershore Lane, Suite 230, Eagle, ID 83616 U.S.A, or such other address as PVMI may instruct by notice to GROWER. In the event any amounts due hereunder are not paid within thirty (30) days from the date due, GROWER shall pay interest accruing at the rate of twelve percent (12%) per annum from the date originally due until paid in full.

**4. Reporting and Records of Licensed Product Sales.**

**4.1 Reporting.** GROWER shall, on or before the date payment of the Annual Royalty is due pursuant to Section 1.3 above, provide PVMI with an accurate written report (in a form designated by or acceptable to PVMI) of the location and acreage and number of units (e.g., cwt) of all Licensed Product produced, sold and/or otherwise transferred in each applicable country, and in each applicable U.S. state, as seed by GROWER. All Licensed Product sold or otherwise transferred by GROWER shall be presumed to have been sold as seed, and GROWER shall have the burden to document and to establish (to PVMI's satisfaction) that any Licensed Product transferred was not used as seed. Where GROWER transfers or uses Licensed Product (e.g., Licensed Product seed) for internal purposes of GROWER or its affiliated entities, Annual Royalties shall nonetheless be paid to PVMI as indicated above and reported as if such transfers or uses were Licensed Product seed sales under an arm's-length transaction. Upon request by PVMI, GROWER shall additionally provide PVMI with the name and address of each buyer or transferee of Licensed Product seed potatoes from GROWER, and PVMI agrees to hold such information in confidence, except to the extent required to establish the amounts due and owing under this Agreement or unless disclosure is otherwise required by applicable law.

**4.2 Records.** GROWER shall keep accurate and correct records of Licensed Product made, used, sold, or otherwise Commercialized by Grower under this Agreement appropriate to determine the amount of royalties due and compliance with the terms and conditions hereunder. Such records shall be retained for at least three (3) years

following a given reporting period. Such records shall be made available during normal business hours for inspection, upon at least five (5) days prior notice, by PVMI or a Tri-State Institution, or by a Certified Public Accountant selected by PVMI or a Tri-State Institution and approved by GROWER, for the sole purpose of verifying reports and payments hereunder. Such accountant shall not disclose any information other than information relating to accuracy of reports and payments made under this Agreement. In the event that any such inspection shows an underreporting and underpayment, then GROWER shall pay any additional sum that would have been payable to PVMI had GROWER reported correctly, with interest at the rate provided in Section 3, plus any out-of-pocket costs associated with the audit.

**4.3 Notice of Infringement.** GROWER shall notify PVMI of any apparent or likely infringement of the licensed Intellectual Property Rights that comes to the attention of GROWER.

**5. Performance and Diligence.** GROWER shall take reasonable steps, and shall incorporate reasonable practices to insure the quality and reputation of the Licensed Product, which steps and provisions will include, as applicable: (a) the Licensed Products may be sold only as foundation, registered, or certified seed (or equivalent); (b) GROWER must mark all packages and/or invoices for Licensed Products with applicable indicators of identity (i.e., variety name, certificate numbers); (c) GROWER's applicable catalogs, advertising and/or other commercial documents must include a notice that the Licensed Products are protected under applicable certificate number(s) (or equivalent); (d) GROWER will implement and monitor quality assurance standards for all contract growers authorized for Commercial Use of Licensed Product; (e) GROWER will ensure that any Licensed Products it uses, sells, transfers or otherwise disposes of are not defective and satisfy all applicable federal, state, and local statutes, rules, and regulations. PVMI, or its authorized representatives, have reasonable rights of inspection over GROWER's operations for the purpose verifying GROWER's compliance with the terms of this Agreement.

## **6. Term and Termination.**

**6.1 Term.** This Agreement shall commence on the Effective Date, and unless sooner terminated under this Section 6, shall remain for the year 2008, and shall automatically terminate as of December 31, 2008.

**6.2 Termination by PVMI.** This Agreement may be modified or terminated by PVMI if it is determined that any one of the following has occurred: (i) GROWER fails to meet the obligations set forth in Section 5 above; (ii) GROWER is in default on payment of Annual Royalties (iii) GROWER has willfully made a false statement or willfully omitted a material fact in any report required by this Agreement; (iv) GROWER commits a substantial breach of any other covenant or agreement contained in this Agreement; and (v) GROWER is adjudged bankrupt or has its assets placed in the hands of receiver or makes any assignment or other accommodation for the benefit of creditors. Prior to any modification or termination of this Agreement under this Section 6.2, PVMI shall furnish GROWER a written notice of intention to modify or terminate, and GROWER shall be allowed thirty (30) days after the date of such notice to remedy any breach or default of any covenant or agreement of this Agreement to PVMI's satisfaction.

**6.3 Events following Termination.** Upon termination of this Agreement, all sums due to PVMI pursuant to Section 1.2 and 1.3 shall become immediately payable. GROWER shall, however, pay any further royalties accruing in accordance with the provisions of Section 1.3.

## **7. Limitations; Indemnification by GROWER.**

**7.1 Disclaimer of Warranties.** PVMI MAKES NO REPRESENTATIONS AND EXTENDS NO WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, WITH REGARD TO ANY INTELLECTUAL PROPERTY RIGHTS OR CULTIVARS OR LICENSED PRODUCTS HEREUNDER. PVMI EXPLICITLY DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY AND WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OF THE CULTIVARS OR LICENSED PRODUCTS UNDER THIS AGREEMENT.

**7.2 Limits on Damages.** IN NO EVENT SHALL PVMI OR ITS OFFICERS, MEMBERS, AGENTS OR EMPLOYEES BE LIABLE FOR ANY INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING ECONOMIC DAMAGE OR INJURY TO PROPERTY AND LOST PROFITS, REGARDLESS OF WHETHER SUCH PARTY SHALL BE ADVISED, SHALL HAVE OTHER REASON TO KNOW OR IN FACT KNOW OF THE POSSIBILITY.

**7.3 No Representations or Warranties.** Nothing in this Agreement will be construed as: (a) a warranty or representation by PVMI as to the validity or scope of any Intellectual Property Rights; or (b) a warranty or representation that anything made, used, sold or otherwise disposed of under any license granted in this Agreement is or will be free from infringement of any intellectual property of third parties; or (c) an obligation to bring or prosecute actions or suits against third parties for infringement; or (d) an obligation to furnish any manufacturing or technical information outside the scope of this Agreement; or (e) conferring a right to use in advertising, publicity, or otherwise any trademark or trade name of PVMI or any of the Tri-State Partner Institutions.

**7.4 Indemnification by GROWER.** GROWER agrees to indemnify, hold harmless and defend PVMI and the Tri-State Partner Institutions, and their officers, employees, and agents from and against any and all liability, claims, suits, losses, damages, costs, fees, and expenses for personal injury or damage to life or property arising from: (i) the production,

manufacture, sale, use, lease or consumption or advertisement of the Licensed Products; (ii) the practice or exercise by GROWER or any Affiliate or sublicensee of the Intellectual Property Rights; (iii) any obligation of GROWER hereunder; or (iv) any of GROWER'S acts under this Agreement. This indemnification will include, but not be limited to, any product liability. PVMI agrees to notify GROWER promptly and in writing of any claim or suit brought against it in respect of which it intends to invoke the provisions of this Section 7.4. GROWER agrees to keep PVMI informed on a current basis of its defense of any claims to this Section 7.4.

**8. Final Agreement and Severability.** This Agreement supersedes all prior agreements and understandings between the parties and may not be changed or terminated orally, and no change, termination, or attempted waiver of any or all of the provisions shall be binding unless in writing and signed by the party against whom the same is to be enforced. The provisions of this Agreement are severable, and the illegality or invalidity of any provision of this Agreement shall not impair, affect, or invalidate any other provisions of this Agreement.

**9. Applicable Law and Venue.** This Agreement shall be interpreted and enforced according to the internal laws of the State of Idaho, USA, without regard to its conflict of laws principles. Any case or controversy arising out of performance of this Agreement shall be brought in a court of competent jurisdiction in Boise, Idaho, USA.

**10. Attorney's Fees.** In the event a suit, action, arbitration, or other proceeding is instituted to enforce or interpret any provision of this Agreement, the prevailing party will be entitled to recover such amount as the court or arbitrator may adjudge reasonable as attorney's fees and expenses in arbitration, litigation at trial, or on any appeal, in addition to all other amounts provided by law.

**11. Waiver.** No waiver of any provision of this Agreement will be effective unless in writing, signed by the party against whom the waiver is asserted. Any such waiver will apply only to the specified instance, and will not constitute a waiver of such provision or of any other provision thereafter.

**12. Incorporation of Exhibits.** All schedules and exhibits referenced in and attached to this Agreement are by this reference incorporated into and made a part of this Agreement.

**13. Amendment.** This Agreement may be modified or amended in part or in its entirety only by the signed, written agreement of the parties.

**14. Notices.** All notices required by this Agreement shall be in writing and will be mailed by certified mail or delivered in person or sent by facsimile or other reliable electronic transmission equipment to the addresses first given above, or such other address as may be given by written notice to the other. Notice will be effective when delivered if in person or by facsimile or other electronic transmission (with written confirmation report), or on the third business day after depositing as certified mail.

**15. Further Assurances.** Each party agrees, at the reasonable request of the other, to promptly execute and deliver all such further documents, and to promptly take or forbear from all such action, as may be reasonably necessary or appropriate in order to more effectively confirm or carry out the provisions of this Agreement.

**16 Counterparts.** This Agreement may be executed in any number of counterparts, all of which when taken together will constitute one agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart.

[Exhibits A & B on following pages; signatures appear on Page 1]

**EXHIBIT A**  
(University of Idaho Potato Varieties)

<u>Potato Variety</u>	<u>Designation</u>	<u>PVP Filing Date</u>	<u>PVP application no. and/or certificate no.</u>	<u>Elected</u>	<u>Not Elected</u>	<u>Territory (state/country)</u>
Ivory Crisp	NDO1496-1	2002	200200157 pending			
GemStar Russet	A9014-2	2004	200400139 pending			
Gem Russet	A8495-1	2000	200100010 pending			
Summit Russet	A84118-3	2004	200400138 issued			
Ida Rose	A82705- 1R	2000	200100009 pending			
Defender	A90586-11	2004	200400140 issued			
Alturas	A82360-7	2002	200200158 pending			
Blazer Russet	A8893-1	2006	200600201 pending			
NDA5507-3Y		2007	200700287 pending			
A93157-6LS		2007	200700286 pending			
A9045-7		2007	200700285 pending			

**EXHIBIT B**  
(Oregon State University Potato Varieties)

<u>Potato Variety</u>	<u>Designation</u>	<u>PVP Filing Date</u>	<u>PVP application no. and/or certificate no.</u>	<u>Elected</u>	<u>Not Elected</u>	<u>Territory (state/country)</u>
Klamath Russet	A085165-1	02-02-01	200100094 Issued			
Mazama	ND02686-6R	02-02-01	200100092 Issued			
Modoc	ND04300-IR	04-01-06	200600175 pending			
Russet Legend	C0083008-1	05-24-99	9900336 Issued			
Wallowa Russet	A087277-6	08-19-02	200200252 Issued			
Willamette	A091812-1	04-11-06	200600176 pending			
Winema	ND02438-6R	02-02-01	200100093 Issued			