

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

UNITED STATES OF AMERICA

Plaintiff,

Civil No. 00-1536-BR

v.

CONSENT DECREE

ERWIN GRANT AND REAL PROPERTY
LOCATED AT 3368 N.E. MARTIN LUTHER
KING, JR. BOULEVARD

Defendants.

I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“U.S. EPA”), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (“CERCLA”), seeking reimbursement of response costs incurred in connection with the response action taken in connection with the release and threatened release of hazardous substances at the Grant Warehouse Superfund Site in Portland, Multnomah County, Oregon (“the Defendant Property”).

B. The United States asserted in the complaint, and continues to assert, that Erwin Grant, the sole owner of the Defendant Property, (“Settling Owner”), is jointly and severally liable for all response costs incurred by the United States in connection with the response action conducted at the Defendant Property pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607. The United States also asserted in the complaint, and continues to assert, that the Defendant Property is liable in rem.

C. Prior to filing the case, the United States noticed, and on March 3, 2000 perfected, a

lien on Defendant Property pursuant to Section 107(l) of CERCLA, 42 U.S.C. § 9607(l).

D. On December 26, 2001, Ken Grant was appointed conservator of Settling Owner's financial affairs by the Circuit Court for the State of Oregon for the County of Multnomah, Probate Department.

E. The United States District Court for the District of Oregon dismissed Settling Owner from this case without prejudice on December 20, 2002 for lack of jurisdiction because of Settling Owner's apparent incompetency at the time this action was commenced. The United States has refiled its case against Settling Owner simultaneously with the filing of this Consent Decree.

F. Settling Owner, by his conservator, is entering into this Consent Decree on his own behalf and on behalf of the Defendant Property.

G. Settling Owner denies any personal liability to the United States arising out of the transactions or occurrences alleged in the complaint.

H. On October 17, 2003, the United States District Court for the District of Oregon entered summary judgment against the Defendant Property, finding it liable to the United States under 42 U.S.C. § 9607 for \$469,312.08 in response costs.

I. The United States and Settling Owner agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

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

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Owner and Defendant Property. Settling Owner consents to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon Settling Owner and his heirs, successors and assigns. Any transfer of assets or real or personal property, or any change in legal status, including but not limited to any change in Settling Owner's conservatorship, shall in no way alter the status or responsibilities of Settling Owner under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between the body of this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "Defendant Property" shall mean the real property located at 3368 NE Martin Luther King, Jr. Blvd., Portland, Oregon, also known as the Grant Warehouse Superfund Site, and consisting of Lots 29, 30, and 31 in Block 13, Albina, City of Portland, as depicted generally on the map attached as Attachment A.

e. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

g. "Escrow Holder" shall mean the escrow holder identified in the Sale Agreement.

h. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

i. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

j. "Parties" shall mean the United States and Settling Owner, acting, through his conservator, on Settling Owner's behalf and on behalf of the Defendant Property.

k. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that U.S. EPA or DOJ on behalf of U.S. EPA has paid at or in connection with

the Defendant Property through the date of lodging of this Consent Decree, plus accrued Interest on all such costs through such date.

l. "PDC" shall mean the Portland Development Commission.

m. "Sale Agreement" shall mean a purchase and sale agreement entered into between Settling Owner, through his conservator, and the PDC, in which Settling Owner agrees to sell the Defendant Property to the PDC for at least \$88,500.

n. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

o. "Settling Owner" shall mean Erwin Franklin Grant, the sole owner of the Defendant Property, acting through his conservator, Ken Grant.

p. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

q. "U.S. EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

V. REIMBURSEMENT OF RESPONSE COSTS

4. By December 30, 2003, Settling Owner shall enter into a purchase and sale agreement ("Sale Agreement") with the PDC to sell the Defendant Property to the PDC for at least \$88,500.

The Sale Agreement shall provide for a closing date of no later than January 30, 2004. The Sale Agreement shall provide that upon closing, the Escrow Holder identified therein shall deposit \$88,500 of the escrow deposit created by the sale into the U.S. EPA Hazardous Substance Superfund; that the Escrow Holder shall make the payment by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT

procedures provided by the Financial Litigation Unit, U.S. District Court for the District Of Oregon, referencing the name and address of the Settling Owner, the USAO Number 2000V00884, the U.S. EPA Region and Site Spill ID Number 105Z, and the DOJ Case Number 90-11-3-06611/1; and that the Escrow Holder shall notify U.S. EPA and DOJ, in accordance with the procedure set forth in Section XII (Notices and Submissions), that the payment has been made.

5. The payment of \$88,500 to the U.S. EPA Hazardous Substance Superfund by the Escrow Holder shall constitute Settling Owner's reimbursement of the United States' Past Response Costs on behalf of the Defendant Property.

VI. FAILURE TO COMPLY WITH REQUIREMENTS OF CONSENT DECREE

6. In the event that Settling Owner does not enter into a Sale Agreement in accordance with Paragraph 4, or that the Sale Agreement does not proceed to closing, or that the Escrow Agent does not transfer \$88,500 to the U.S. EPA Hazardous Substance Superfund in accordance with the Sale Agreement immediately after closing, the United States, at its sole discretion, may choose to make this Consent Decree null and void. The United States shall notify Settling Owner of that decision in writing in accordance with Section XII (Notices and Submissions). The decision of the United States to make the Consent Decree null and void shall take effect at such time as the United States provides Settling Owner written notification.

VII. RELEASE OF LIEN BY THE UNITED STATES

7. Pursuant to Section 107(1)(2) of CERCLA, 42 U.S.C. § 9607(1)(2), the payment of \$88,500 to the U.S. EPA Hazardous Substance Superfund by the Escrow Holder will fully satisfy the United States' lien on Defendant Property perfected March 3, 2000. The lien will thereby be

released and extinguished.

VIII. COVENANT NOT TO SUE BY THE UNITED STATES

8. Covenant Not to Sue by United States. Except as specifically provided in Paragraph 9 (Reservation of Rights by United States), the United States covenants not to sue Settling Owner or Defendant Property pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon the payment of \$88,500 to the U.S. EPA Hazardous Substance Superfund by the Escrow Holder. This covenant not to sue is conditioned upon the satisfactory performance by Settling Owner of his obligations under this Consent Decree. This covenant not to sue extends only to Settling Owner and Defendant Property and does not extend to any other person, organization, or property.

9. Reservation of Rights by United States. The covenant not to sue set forth in Paragraph 8 does not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Owner and Defendant Property with respect to all other matters, including but not limited to:

- a. liability for failure of Settling Owner to meet a requirement of this Consent Decree;
- b. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- c. criminal liability;
- d. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606; and
- e. liability for costs incurred or to be incurred by the United States that are not

within the definition of Past Response Costs.

IX. COVENANT NOT TO SUE BY SETTLING OWNER

10. Settling Owner covenants not to sue and agrees not to assert any claims or causes of action against the United States or its contractors or employees with respect to Past Response Costs or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions at the Defendant Property for which the Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

11. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

12. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Defendant Property against any person not a Party hereto.

13. As part of this settlement, it is the intent of the Parties that \$88,500 shall be paid to the United States in satisfaction of the United States' past cost claim and the CERCLA lien perfected against the Defendant Property on March 3, 2000, and filed with the Multnomah County Recorder. Settling Owner expressly agrees that the United States is entitled to receive \$88,500 of the Sale Proceeds from the Escrow Holder upon entry of this Consent Decree.

14. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Owner is entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs.

15. Settling Owner agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify U.S. EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Owner also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify U.S. EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Owner shall notify U.S. EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

16. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Defendant Property, Settling Owner shall not assert, and may not maintain, any defense or claim based

upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by the United States set forth in Section VIII.

XI. RETENTION OF RECORDS

17. Until 5 years after the entry of this Consent Decree, Settling Owner shall preserve and retain all records and documents now in his possession or control, or which come into his possession or control, that relate in any manner to response actions taken at the Defendant Property or to the liability of any person for response actions conducted and to be conducted at the Defendant Property, regardless of any retention practice or policy to the contrary.

18. After the conclusion of the document retention period in the preceding paragraph, Settling Owner shall notify U.S. EPA and DOJ at least 90 days prior to the destruction of any such records or documents, and, upon request by U.S. EPA or DOJ, Settling Owner shall deliver any such records or documents to U.S. EPA. Settling Owner may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Owner asserts such a privilege, he shall provide the United States with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of

this or any other consent decree with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to the United States in redacted form to mask the privileged information only. Settling Owner shall retain all records and documents that he claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Owner's favor.

19. By signing this Consent Decree, Settling Owner certifies that, to the best of his knowledge and belief, he has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to U.S. EPA, all information currently in his possession, or in the possession of his conservator, which relates in any way to the ownership, operation, or control of the Defendant Property, or to the ownership, possession, generation, treatment, transportation, storage, or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Defendant Property; and

b. not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents or other information relating to his potential liability regarding the Defendant Property, after notification of potential liability or the filing of a suit against Settling Owner regarding the Defendant Property.

XII. NOTICES AND SUBMISSIONS

20. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a

change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, U.S. EPA, DOJ, and Settling Owner, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice DJ #90-11-3-06611/1
P.O. Box 7611
Washington, D.C. 20044-7611

As to U.S. EPA:

Dean Ingemansen
Assistant Regional Counsel
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, WA 98101

Diane Norton
Superfund Accountant
Office of Management Programs
Mail Stop OMP-146
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, WA 98101

As to Settling Owner:

Ken Grant
Conservator for Erwin Grant
PO Box 19042
Portland, OR 97280

Paul Hart
Angela J. Hart
P.O. Box 67226
Oak Grove, OR 97268

XIII. RETENTION OF JURISDICTION

21. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XIV. INTEGRATION/APPENDICES

22. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendix is attached to and incorporated into this Consent Decree: “Appendix A” is the map of the Defendant Property.

XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

23. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Owner consents to the entry of this Consent Decree without further notice.

24. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVI. EFFECTIVE DATE

25. The effective date of this Consent Decree shall be the date upon which it is entered

by the Court.

XVII. SIGNATORIES/SERVICE

26. The undersigned representative of Settling Owner and the Assistant Attorney General of the Environment and Natural Resources Division of the United States Department of Justice each certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document. The undersigned representative of Settling Owner further certifies that entering into this Consent Decree is within the scope and authority of Ken Grant's conservatorship for Settling Owner.

27. Settling Owner hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Owner in writing that it no longer supports entry of the Consent Decree.

28. Settling Owner shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Settling Owner with respect to all matters arising under or relating to this Consent Decree. Settling Owner hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

SO ORDERED THIS ____ DAY OF _____, 2003.

ANNA J. BROWN
UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Erwin Grant and Real Property located at 3368 N.E. Martin Luther King, Jr. Boulevard, Civil No. 00-1536-BR, relating to the Grant Warehouse Superfund Site..

FOR THE UNITED STATES OF AMERICA

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division

CATHERINE R. McCABE
Deputy Section Chief
Environmental Enforcement Section

PAUL STOKSTAD
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KARIN IMMERGUT
United States Attorney

NEIL EVANS
Assistant United States Attorney
District of Oregon
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Erwin Grant and Real Property located at 3368 N.E. Martin Luther King, Jr. Boulevard, Civil No. 00-1536-BR (D. Or.), relating to the Grant Warehouse Superfund Site.

FOR THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

MICHAEL F. GEARHEARD
Director, Office of Environmental Cleanup

DEAN INGEMANSEN
Assistant Regional Counsel
Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, WA 98101

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Erwin Grant and Real Property located at 3368 N.E. Martin Luther King, Jr. Boulevard, Civil No. 00-1536-BR (D. Or.), relating to the Grant Warehouse Superfund Site.

FOR THE DEFENDANT PROPERTY

Date:

_____ Name

_____ Address

_____ Telephone Number

If different from above, the following is the name and address of Defendant Property's agent for service and the name and address of Defendant Property's counsel. Counsel may act as agent for service.

Agent for Service

Attorney

_____ Name

_____ Name

_____ Address

_____ Address

_____ Telephone

Defendant Property shall notify the United States Department of Justice of any change in its agent for service or its counsel.

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Erwin Grant and Real Property located at 3368 N.E. Martin Luther King, Jr. Boulevard, Civil No. 00-1536-BR (D. Or.), relating to the Grant Warehouse Superfund Site.

FOR THE SETTLING OWNER

Date:

Name

Address

Telephone Number

If different from above, the following is the name and address of Settling Owner's agent for service and the name and address of Settling Owner's counsel. Counsel may act as agent for service.

Agent for Service

Attorney

Name

Name

Address

Address

Telephone

Settling Owner shall notify the United States Department of Justice of any change in his agent for service or its counsel.