

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2006 NOV 29 AM 8:42

FILED  
EPA REGION VIII  
HEARING CLERK

IN THE MATTER OF:

EMPIRE CANYON SITE  
PARK CITY, UTAH

UNDER THE AUTHORITY OF THE  
COMPREHENSIVE ENVIRONMENTAL  
RESPONSE, COMPENSATION, AND  
LIABILITY ACT OF 1980, 42 U.S.C. §  
9601, et seq., as amended.

Docket No. CERCLA-08-2007-0001

AGREEMENT AND COVENANT  
NOT TO SUE DV LUXURY  
RESORT LLC,

SETTLING RESPONDENT

**I. INTRODUCTION**

1. This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States on behalf of the Environmental Protection Agency ("EPA") and DV Luxury Resort LLC (collectively the "Parties").

2. This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq. and the authority of the Attorney General of the United States to compromise and settle claims of the United States.

3. DV Luxury Resort LLC ("Settling Respondent") is a Delaware limited liability company with its headquarters located at 2275 Corporate Center, Suite 280, Henderson, Nevada 89074. Settling Respondent has entered into an Agreement to Lease approximately 16 acres

owned by United Park City Mines Company (“UPCM”) and located within the Empire Canyon Site as depicted in the map attached as Appendix 1 (the “Property”). Settling Respondent has proposed to construct a hotel, spa and condominium complex on the Property. In connection with Settling Respondent’s development of the Property, Settling Respondent intends to construct and, following completion of the Work, sell to the public residential condominium units (each, hereafter, a “Condominium Unit”) in portions of the building that will include the hotel and spa.

4. The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to the reservations and limitations contained in Sections X (Certification), XIII (Covenant Not To Sue By The United States), XIV (Reservation Of Rights), and XV (Covenant Not To Sue By Settling Respondent), the potential liability of Settling Respondent for the Existing Contamination at the Property which might otherwise result from Settling Respondent becoming a lessee of the Property.

5. To comply with the requirements of Section VI (Work To Be Performed), Settling Respondent may use land that is not part of the Property (e.g., to construct a wetland for managing and/or treating discharges). Settling Respondent agrees that its failure to obtain access or loss of access to this land shall not excuse Settling Respondent from performing its obligations under this Agreement.

6. The Parties agree that Settling Respondent's entry into this Agreement, and the actions undertaken by Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

7. The resolution of this potential liability, in exchange for Settling Respondent’s payment of certain costs, performance of the Work, and reimbursement of Oversight Costs, is in

the public interest.

## II. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

Whenever terms listed below are used in this Agreement, the following definitions shall apply:

a) "AOC" shall mean the Administrative Order on Consent for Non-Time Critical Removal Action (docket number CERCLA-08-2004-0003), dated December 12, 2003, between EPA and United Park City Mines Company relating to the Site.

b) "Agreement" shall mean this Agreement And Covenant Not To Sue and all appendices hereto. In the event of conflict between this Agreement and any appendix, this Agreement shall control.

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

d) "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Agreement, 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.

e) "Effective Date" shall mean the effective date of this Agreement as provided in Section XXI.

f) "EPA" shall mean the United States Environmental Protection Agency and

any successor departments or agencies of the United States.

g) "Existing Contamination" shall mean:

i) any hazardous substances, or pollutants or contaminants present or existing on or under the Property as of the Effective Date;

ii) any hazardous substances, or pollutants or contaminants that migrated from the Property prior to the Effective Date;

iii) any hazardous substances, or pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the Effective Date; and

iv) any hazardous substances, or pollutants or contaminants that are removed from the Property, transported, and disposed of within the impoundment area of the Richardson Flat Tailings Site in accordance with the Work Plan.

h) "Interest" shall mean interest at the rate specified for interest on investments of the EPA 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). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

i) "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and codified at 40 C.F.R. Part 300, and any amendments thereto.

j) "Oversight Costs" shall mean all direct and indirect costs incurred after the Effective Date by EPA or the United States in monitoring and supervising the Work,

including costs incurred reviewing plans, reports and other documents submitted pursuant to this Agreement, as well as costs incurred in overseeing implementation of the Work.

k) "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral.

l) "Parties" shall mean the United States on behalf of EPA and the Settling Respondent.

m) "Project" shall mean the hotel, spa and condominium complex, along with its associated facilities and landscaping, to be constructed by Settling Respondent on the Property.

n) "Property" shall mean that portion of the Site, encompassing approximately 16.16 acres, which is described in Appendix 2 of this Agreement.

o) "RCRA" shall mean the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq.

p) "Richardson Flat Tailings Site" shall mean the Richardson Flat Tailings Site, CERCLIS ID # UTD980952840, which is located approximately 1.5 miles northeast of Park City, Utah and is part of a 650 acre property owned by UPCM. The Richardson Flat Tailings Site is the location of a mine tailings impoundment that covers approximately 160 acres in the northwest corner of UPCM's property and includes diversion ditches, wetlands and other features. A Remedial Investigation/Feasibility Study of the Richardson Flat Tailings Site was completed in 2004. The Richardson Flat Tailings Site has been used as a repository for mining wastes from the Silver Creek Watershed, including the Property. Moreover, Remedial Design and Remedial Action at the Richardson Flat Tailings Site are

expected to begin shortly. The Richardson Flat Tailings Site is depicted generally on the map attached as Appendix 3.

q) "Section" shall mean a portion of this Agreement identified by a capitalized Roman numeral.

r) "Settling Respondent" shall mean DV Luxury Resort LLC.

s) "Site" shall mean the Empire Canyon Site (EPA ID UT0002005981) located in and around Park City, Summit County, Utah. The Site shall include the Property and all areas to which hazardous substances or pollutants or contaminants have come to be located.

t) "Site Stabilization" shall mean the taking of such actions at the Site, not inconsistent with the National Contingency Plan, as are necessary, in EPA's discretion, to abate, contain, or otherwise address contamination at the Site such that the Site poses no risk to human health or the environment greater than the risk posed by the Site assuming the response action selected in the Action Memorandum for the Empire Canyon Site, dated November 6, 2003, had been completed.

u) "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

v) "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33), and (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

w) "Work" shall mean all work and other activities Settling Respondent is required to perform under this Agreement, except those required by Section XVII (Record

Retention, Documentation, and Availability Of Information).

x) "Work Plan" shall mean the Construction Work Plan For Montage Hotel Empire Canyon, dated September 6, 2006 and attached as Appendix 4, as well as any approved modifications thereto.

### **III. STATEMENT OF FACTS**

9. The Empire Canyon Site is an area of historic mining operations located in and around Park City, Summit County, Utah.

10. The Property is within the geographic boundaries of the Empire Canyon Site as depicted on the map attached as Appendix 1.

11. The Property was historically used as a dump for mine waste and other materials containing elevated levels of various hazardous substances, including lead and arsenic. This use contributed to lead and arsenic contamination in the soil and zinc and cadmium contamination in surface waters at and near the Property.

12. In December 2003, EPA and United Park City Mines Company ("UPCM") entered into an Administrative Order on Consent ("AOC") to conduct a Non-time Critical Removal Action under CERCLA at the Site, including the Property. In general terms, the part of the Removal Action relating to the Property involves re-routing surface water away from contaminated mine wastes and covering the Property with clean material to isolate mine waste and other contaminated material on the Property from surface water to minimize any adverse impacts associated with this waste on Silver Creek. This portion of the Removal Action is ongoing.

13. Settling Respondent has expressed its interest in negotiating an agreement with EPA pursuant to which it would obtain a covenant not to sue and contribution protection and then enter

into a long-term (999-year) ground lease for the Property.

14. Settling Respondent intends to construct a hotel, spa, and condominium complex on the Property. In connection with the construction of this project, Settling Respondent intends to excavate soil and other material on the Property (hereinafter "Excavated Material"). Some of this Excavated Material will be re-used on the Property (e.g. in connection with the construction of on-Property retaining walls) and some will need to be exported from the Property. EPA has determined, as more fully set forth in the Amended Action Memorandum, that such development will be at least as protective of public health and the environment as the remedy in the AOC in light of the Work To Be Performed hereunder.

15. By signing this Agreement, Settling Respondent represents, and for the purposes of this Agreement EPA relies on those representations, that Settling Respondent (a) has had no involvement with the Site except insofar as Settling Respondent has entered into an Agreement to Lease and conducted certain investigations of the Property in connection with and in contemplation of entering the Agreement to Lease, and (b) has not caused or contributed to Existing Contamination.

#### IV. AGREEMENT

16. In consideration of and in exchange for the United States' Covenant Not To Sue in Section XIII, Settling Respondent agrees to comply with all provisions of this Agreement, including but not limited to all attachments to this Agreement and all documents incorporated by reference into this Agreement. Notwithstanding the foregoing or any other provision of this Agreement, this Agreement shall be null and void in the event that Settling Respondent does not acquire a leasehold interest in the Property.



## V. PAYMENT

17. In consideration of and in exchange for the United States' Covenant Not To Sue, Settling Respondent agrees to pay to EPA, within 30 days of the Effective Date, the sum of \$38,000.

18. Settling Respondent's payment under this Section includes an amount for: (a) its estimated share of any potential un-reimbursed future response costs incurred at or in connection with the Richardson Flat Tailings Site, which Settling Respondent intends to use for disposal of Waste Material from the Property; and (b) a premium to cover the risks and uncertainties associated with this settlement, including but not limited to the risk that total response costs incurred or to be incurred at or in connection with the Richardson Flat Tailings Site will exceed the estimated total response costs upon which Settling Respondent's payment is based.

19. Settling Respondent shall make all payments required by this Section by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing EPA Site/Spill ID Number 0894, and DOJ Case Number 90-11-3-08764. Payments shall be made in accordance with instructions provided to Settling Respondent by the Financial Litigation Unit of the United States Attorney's Office for the District of Utah following the Effective Date. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited to the next business day.

20. At the time of payment, Settling Respondent shall send notice that payment has been made to the United States, EPA, and to the Regional Financial Management Officer, in accordance with Section XX (Notices and Submissions).

21. Amounts due and owing pursuant to the terms of this Agreement but not paid in

accordance with the terms of this Agreement shall accrue Interest.

22. The total amount to be paid by Settling Respondent pursuant to Paragraph 17 shall be deposited in the Richardson Flat Tailings Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Richardson Flat Tailings Site or to be transferred by EPA to the EPA Hazardous Substance Superfund.

## VI. WORK TO BE PERFORMED

### 23. Implementation of the Work Plan.

- a) The Work Plan is incorporated into and fully enforceable under this Agreement.
- b) Settling Respondent shall implement the Work Plan in accordance with a schedule to be approved by EPA following the Effective Date.
- c) In general terms, the Work Plan requires Settling Respondent *inter alia* to (1) safely manage soil and groundwater during construction, (2) comply with a Stormwater Pollution Prevention Plan, (3) install a cover consisting of clean material over all impacted areas of the Property not within the footprint of the hotel, spa and condominium complex, (4) construct a storm water diversion system to route run-off and storm water around the edges of the Property, (5) monitor and manage and/or treat any discharges from the Property, including all diverted and on-site storm water, so as not to cause or contribute to any violation of applicable water quality standards, (6) incorporate certain “green” features into the design, construction, and operation of the Project, and (7) operate and maintain these systems.

d) Settling Respondent shall not commence any Work except in conformance with the terms of this Agreement.

24. Modification of the Work Plan.

a) If EPA determines in writing that modification to the work specified in the Work Plan is necessary to achieve and maintain the effectiveness of the remedy for the Property set forth in the Amended Action Memorandum, EPA may require by written demand that such modification be incorporated into the Work Plan but only to the extent that it is consistent with the scope of the remedy selected in the Amended Action Memorandum.

b) If Settling Respondent objects to any modification determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XI (Dispute Resolution). The Work Plan shall be modified in accordance with final resolution of the dispute. Any subsequent modifications to the Work Plan shall be incorporated into and become fully enforceable under this Agreement.

c) Settling Respondent shall implement any work required by any modifications incorporated in the Work Plan in accordance with this Paragraph.

d) If Settling Respondent wishes to deviate from the Work Plan, or any schedule or plan relating thereto, Settling Respondent must first obtain written approval from EPA before proceeding with the deviation.

25. Quality Assurance and Sampling.

a) All sampling and analyses performed pursuant to this Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality

assurance/quality control (“QA/QC”), data validation, and chain of custody procedures.

Settling Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance.

Settling Respondent shall follow, as appropriate, “Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures” (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling.

Settling Respondent shall use only laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, “Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs” (American National Standard, January 5, 1995), and “EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001),” or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (“NELAP”) as meeting the Quality System requirements.

b) Upon request by EPA, Settling Respondent shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Settling Respondent shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c) Upon request by EPA, Settling Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. Settling Respondent shall notify EPA not less than 14 days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples

that EPA deems necessary. Upon request, EPA shall allow Settling Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Settling Respondent's implementation of the Work.

26. Post-Work Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Settling Respondent shall submit a proposal for post-Work site control consistent with section 300.415(I) of the NCP and OSWER Directive No. 9360.2-02. Upon EPA approval, Settling Respondent shall implement such controls at its cost and shall provide EPA with documentation of all post-Work site control arrangements.

27. Reporting.

a) Settling Respondent shall submit a written progress report to EPA concerning actions undertaken pursuant to this Agreement at the end of every quarter (i.e. March 31, June 30, September 30, and December 31) after the Effective Date until completion of the Work, unless otherwise directed in writing by EPA's Project Coordinator. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b) Settling Respondent shall submit two copies of all plans, reports or other submissions required by this Agreement or the Work Plan. Upon request by EPA, Settling Respondent shall submit such documents in electronic form.

28. Final Report. Within 30 days after completion of all Work required by this Agreement, Settling Respondent shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Agreement. The final report shall conform, at a minimum, with the requirements set forth in section 300.165 of the NCP entitled "OSC Reports." The final report shall include a statement of actual costs incurred in complying with the Agreement, a listing of quantities and types of materials removed off-Property or handled on-Property, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the Work (*e.g.*, manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by the Supervising Contractor who supervised or directed the preparation of said report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

29. Off-Site Shipments.

a) Settling Respondent shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-State waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to EPA's Project Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i) Settling Respondent shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Settling Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii) The identity of the receiving facility and state will be determined by Settling Respondent following the award of the contract for the Removal Action. Settling Respondent shall provide the information required above as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b) Before shipping any hazardous substances, or pollutants, or contaminants from the Property to an off- Property location, Settling Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Settling Respondent shall send hazardous substances, or pollutants, or contaminants from the Property only to an off- Property facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence. EPA approves the use of the impoundment area of the Richardson Flat Tailings Site and the Anchor Mine Dump Site for receiving Waste Material from the Property, so long as such

Waste Material is removed, transported, and disposed of in accordance with the Work Plan.

Due to the close proximity of the Richardson Flat Tailings Site and the Anchor Mine Dump Site, as well as the continuous nature of contamination through the Silver Creek corridor, EPA has determined that consolidating Waste Material from the Property at Richardson Flat Tailings Site and the Anchor Mine Dump Site does not constitute an off-property disposal or transfer for purposes of this sub-Paragraph.

30. All aspects of the Work to be performed by Settling Respondent pursuant to this Agreement shall be performed by contractors subject to all applicable legal requirements regarding the practice of professional engineering within the State of Utah.

31. During the implementation of the Work under this Agreement, Settling Respondent and its contractors and subcontractors shall be available for conferences with and inspections by EPA and/or its contractors as EPA may determine are necessary to adequately oversee the Work being carried out under this Agreement. Settling Respondent, its employees, agents, contractors, and consultants shall cooperate with EPA in its efforts to oversee Settling Respondent's implementation of the Work.

## **VII. PAYMENT OF OVERSIGHT COSTS**

32. Settling Respondent shall pay to EPA all Oversight Costs not inconsistent with the NCP. On a periodic basis, EPA will send Settling Respondent a bill requiring payment that includes an EPA-prepared cost summary. Settling Respondent shall make all payments within 30 days of Settling Respondent's receipt of each bill requiring payment, except as provided in Paragraph 35. Settling Respondent shall make all payments required by this Paragraph by certified or cashier's check payable to "EPA Hazardous Substance Superfund," referencing Settling



Respondent's name and address, the Site name (i.e. Empire Canyon), EPA Region, Site/Spill ID Number 08CP, and the EPA docket number associated with this Agreement. Settling Respondent shall send payment to:

Regular Mail:

Mellon Bank  
EPA Region 8  
Attn: Superfund Accounting  
Lockbox 360859  
Pittsburgh, PA 15251-6859

Express Mail:

EPA 360859  
Mellon Client Service Center, Room 670  
500 Ross Street  
Pittsburgh, PA 15262-0001

or to such other address as EPA may designate in writing.

33. The total amount to be paid by Settling Defendant pursuant to Paragraph 32 shall be deposited in the Empire Canyon Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

34. At the time of each payment, Settling Respondent shall send notice that such payment has been made to EPA in accordance with Section XX (Notices and Submissions).

35. Settling Respondent may dispute all or part of a bill for Oversight Costs only if Settling Respondent alleges that EPA has made an accounting error or if Settling Respondent alleges that EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Settling Respondent

shall pay the full amount of uncontested costs to EPA as specified in Paragraph 32 on or before the due date. Within the same time period, Settling Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Settling Respondent shall simultaneously transmit a copy of both checks to the persons listed in Section XX (Notices and Submissions). Settling Respondent shall ensure that the prevailing party in the dispute receives the amount upon which it prevailed from the escrow funds plus any interest accrued within 20 calendar days after the dispute is resolved.

**VIII. ACCESS / CONVEYANCE OF PROPERTY / NOTICE TO SUCCESSORS IN INTEREST**

36. Commencing upon the date that it acquires a leasehold interest in the Property, Settling Respondent agrees to provide to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Property, to the extent access to such other property is controlled by the Settling Respondent, for the purpose of performing and overseeing response actions at the Property under federal law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property.

Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. ("RCRA"), and any other applicable statute or regulation, including any amendments thereto.

37. Within 30 days after the Effective Date or the date of lease of the Property, whichever date is later, Settling Respondent shall submit to EPA for review and approval a notice

to be filed with the Recorder's Office, Summit County, State of Utah, which shall provide notice to all successors-in-title that the Property is part of the Site, that EPA selected a response action for the Site on November 6, 2003, that UPCM agreed pursuant to an Administrative Order On Consent to implement the response action selected by EPA, that EPA amended the Action Memorandum for the Site to allow for redevelopment of the Property by Settling Respondent, and that Settling Respondent has entered into this Agreement requiring compliance with Section VI (Work To Be Performed), Section VIII (Access / Conveyance of Property / Notice To Successors In Interest), Section IX (Due Care / Cooperation), and Section XVII (Document Retention) of the Agreement. Such notice shall identify the names and addresses of the Parties to this Agreement, the Docket Number of this Agreement, and the date this Agreement became effective. Such notice shall also recite Settling Respondent's specific obligations to provide access to and restrict use of the Property pursuant to this Agreement. Settling Respondent shall not modify or remove such notice without prior written approval of EPA. Settling Respondent shall record the notice within 10 days of EPA's approval of the notice. The Settling Respondent shall provide EPA with a certified copy of the recorded notice within 10 days of recording such notice.

38. Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees of the Property (other than the owners of Condominium Units) shall provide the same access and cooperation. Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the Effective Date and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Sections VI (Work To Be Performed) and XVI (Parties Bound/Transfer of Covenant) of the Agreement.

## **IX. DUE CARE / COOPERATION**

39. Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. Settling Respondent recognizes that the implementation of response actions at the Site may interfere with Settling Respondent's use of the Property and may require closure of its operations or a part thereof. Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, or pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release.

## **X. CERTIFICATION**

40. By entering into this agreement, Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all material information known to Settling Respondent and all material information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, or pollutants or

contaminants at or from the Site and to its qualification to perform the requirements of this Agreement. Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States reserves all rights it may have.

#### **XI. DISPUTE RESOLUTION**

41. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between EPA and Settling Respondent arising under or with respect to Settling Respondent's obligations under this Agreement. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of Settling Respondent that have not been disputed in accordance with this Section.

42. Any dispute which arises under or with respect to this Agreement shall in the first instance be the subject of informal negotiations. The period for informal negotiations shall not exceed thirty (30) days from the time the dispute arises, unless it is extended by written agreement of the Parties. The dispute shall be considered to have arisen when Settling Respondent sends EPA a written Notice of Dispute. Any agreement relating to a Notice of Dispute which is reached as a result of informal negotiations shall be in writing signed by EPA and Settling Respondent.

43. In the event that a Notice of Dispute relates to EPA's disapproval or modification of a submission, any such Notice of Dispute shall be submitted to EPA by Settling Respondent within fourteen (14) days of receipt of EPA's disapproval or modification of such submission and shall set

forth the specific points of dispute and the position which Settling Respondent asserts should be adopted as consistent with the requirements of this Agreement.

44. In the event that the Parties cannot resolve a dispute by informal negotiations, EPA shall provide Settling Respondent a written decision on the dispute. Thereafter, EPA may pursue whatever remedies it may have under law, including the right to seek judicial enforcement of this Agreement.

45. The existence of a dispute, as defined in this Section, and EPA's consideration of matters placed into dispute shall not excuse, toll or suspend any other compliance obligation or deadline required pursuant to this Agreement during the pendency of the dispute resolution process.

46. Notwithstanding any other provision of this Agreement, any action or decision by EPA pursuant to this Agreement shall not constitute final agency action giving rise to any rights to judicial review prior to EPA's initiation of judicial action to compel Settling Respondent's compliance with this Agreement.

## **XII. FINANCIAL ASSURANCE**

47. The Parties agree and acknowledge that, in the event Settling Respondent ceases implementation of or otherwise fails to complete the Work in accordance with this Agreement, Settling Respondent shall ensure that EPA is held harmless from and reimbursed for all costs required for Site Stabilization. For these purposes, Settling Respondent shall establish and maintain Financial Assurance for the benefit of EPA in the amount of \$1,200,000 (hereinafter "Estimated Cost of Site Stabilization") in one or more of the following forms, each of which must be satisfactory in form and substance to EPA:

- a) A surety bond unconditionally guaranteeing payment and/or performance of Site Stabilization;
- b) One or more irrevocable letters of credit, payable to or at the direction of EPA;
- c) A trust fund established for the benefit of EPA;
- d) A policy of insurance that provides EPA with acceptable rights as a beneficiary;
- e) A demonstration by Settling Respondent that it meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of Site Stabilization, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied; and/or
- f) A written guarantee to fund or perform Site Stabilization executed in favor of EPA by one or more of the following: (i) a direct or indirect parent company of Settling Respondent, or (ii) a company that has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with Settling Respondent; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of Site Stabilization that it proposes to guarantee hereunder.

48. Settling Respondent has selected, and EPA has approved, as an initial Financial Assurance mechanism a surety bond pursuant to Paragraph 47(a) in the form attached hereto as Appendix 6. Prior to beginning Work under this Agreement, Settling Respondent shall submit all executed and/or otherwise finalized instruments and other documents required in order to make the selected Financial Assurance mechanism legally binding, in a form substantially identical to the

documents attached hereto as Appendix 6, to EPA Financial Analyst Daniela Golden at U.S. Environmental Protection Agency, Region 8, 999 18<sup>th</sup> Street, Suite 300, Mail Code 8ENF-RC, Denver, CO 80202, with a copy to EPA in accordance with Section XX (Notices and Submissions).

49. The commencement of any Work Takeover pursuant to Paragraph 56 of this Agreement (Work Takeover) shall trigger EPA's right to receive the benefit of any Financial Assurance mechanism(s) provided pursuant to Paragraph 47(a), (b), (c), (d), (f), or (g), and at such time EPA shall have immediate access to resources guaranteed under any such Financial Assurance mechanism(s), whether in cash or in kind, as needed to complete Site Stabilization. In the event that the Financial Assurance mechanism involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 47(e), then, after the commencement by EPA of any Work Takeover pursuant to Paragraph 56 of this Agreement (Work Takeover), Settling Respondent shall immediately upon written demand from EPA deposit into an account specified by EPA a cash amount up to but not exceeding the Estimated Cost of Site Stabilization as of such date, as determined by EPA and notified to Settling Respondent.

50. If Settling Respondent desires to reduce the amount of any Financial Assurance mechanism(s), change the form or terms of any Financial Assurance mechanism(s), or release, cancel or discontinue any Financial Assurance mechanism(s) because the Work has been fully and finally completed in accordance with this Agreement, Settling Respondent shall make this request to EPA in writing and EPA shall either approve or disapprove the request in writing. EPA agrees that the term Work, as used in this Paragraph only, does not include operation and maintenance. Therefore, while Settling Respondent is required under this Agreement to perform operation and



maintenance in perpetuity at its cost (including a post-construction management plan for maintenance of the constructed wetland), it is not required to maintain separate financial assurances under this Section for this ongoing operation and maintenance.

### **XIII. COVENANT NOT TO SUE BY UNITED STATES**

51. Subject to Sections XIV (Reservation of Rights) and XXV (Public Comment and Related Subsequent Modifications), upon payment of the amounts specified in Sections V (Payment) and VII (Payment of Oversight Costs) and upon completion of the Work specified in Section VI (Work to Be Performed) to the satisfaction of EPA, the United States covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), with respect to the Existing Contamination.

### **XIV. RESERVATION OF RIGHTS**

52. The covenant not to sue set forth in Section XIII above does not pertain to any matters other than those expressly specified in Section XIII (Covenant Not To Sue By United States). The United States reserves and this Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

- a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section VI (Work to be Performed), Section VII (Payment of Oversight Costs), Section VIII (Access/Notice to Successors in Interest), and Section IX (Due Care/Cooperation);
- b) any liability resulting from past or future releases of hazardous substances, or pollutants or contaminants, at or from the Site caused or contributed to by Settling

Respondent, its successors, assignees, lessees or sublessees;

c) any liability resulting from the release or threat of release of hazardous substances, or pollutants or contaminants at the Site after the effective date of this Agreement, not within the definition of Existing Contamination, other than any liability under Sections 106 or 107 of CERCLA relating to hazardous substances, or pollutants, or contaminants contained in the water managed and/or diverted pursuant to the storm and groundwater management requirements of the Work Plan so long as Settling Respondent completely and satisfactorily performs the Work required by Section VI of this Agreement;

d) criminal liability;

e) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and

f) liability for violations of local, State or federal law or regulations.

53. With respect to any claim or cause of action asserted by the United States, the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

54. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a party to this Agreement.

55. Nothing in this Agreement is intended to limit the right of EPA to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent to

perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA in exercising its authority under federal law. Settling Respondent acknowledges that it is leasing Property where response actions may be required.

56. Work Takeover. In the event EPA determines that Settling Respondent has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Before taking over the Work, EPA will issue written notice to Settling Respondent specifying the grounds upon which such notice was issued and providing Settling Respondent with 30 days within which to remedy the circumstances giving rise to EPA's issuance of the notice. Settling Respondent may invoke the procedures set forth in Section XI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. After commencement and for the duration of any Work Takeover, EPA shall have immediate access to and benefit of any performance guarantee(s) provided pursuant to Section XII (Financial Assurance) of this Agreement. Notwithstanding any other provision of this Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

**XV. COVENANT NOT TO SUE BY SETTLING RESPONDENT**

57. In consideration of the United States' Covenant Not To Sue in Section XIII of this Agreement, Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States, its authorized officers, employees, or representatives with

respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

58. Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute 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).

#### **XVI. PARTIES BOUND / TRANSFER OF COVENANT**

59. This Agreement shall apply to and be binding upon the United States and shall apply to and be binding upon Settling Respondent, its officers, directors, and employees. The United States' Covenant Not to Sue in Section XIII and Contribution Protection in Section XXIII shall apply to Settling Respondent's officers, directors, or employees to the extent that the alleged liability of the officer, director, or employee is based on its status and in its capacity as an officer, director, or employee of Settling Respondent and not to the extent that the alleged liability arose independently of the alleged liability of the Settling Respondent. Each signatory of a Party to this

Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

60. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA in its sole discretion.

61. The Settling Respondent agrees to pay the reasonable costs incurred by EPA to review any requests for consent to assign or transfer the benefits conferred by this Agreement.

62. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property (other than the sale or transfer of a Condominium Unit), the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneously with any assignment or transfer of the Property (other than the sale or transfer of a Condominium Unit), the assignee or transferee must consent in writing to be bound by the terms of this Agreement, including but not limited to the certification requirement in Section X of this Agreement in order for the Covenant Not to Sue in Section XIII to be available to that party. The Covenant Not To Sue in Section XIII shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA.

#### **XVII. DOCUMENT RETENTION**

63. Settling Respondent agrees to retain and make available to EPA all business and operating records, contracts, Site studies and investigations, and documents relating to operations at the Property, for at least ten years, following the Effective Date of this Agreement unless

otherwise agreed to in writing by the Parties. At the end of ten years, Settling Respondent shall notify EPA of the location of such documents and shall provide EPA with an opportunity to copy any documents at EPA's expense.

### **XVIII. PAYMENT OF COSTS**

64. If Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to the provisions of Section VI (Work To Be Performed), it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

### **XIX. PROJECT COORDINATORS**

65. The EPA Project Coordinator for this Property is:

Kathryn Hernandez  
U.S. Environmental Protection Agency, Region 8  
999 Eighteenth Street, Suite 300 (8EPR-SR)  
Denver, CO 80202-2466

66. The Settling Respondent's Project Coordinator for this Property is:

David Zimmerman  
Athens Development DV, LLC  
136 Heber Avenue, Suite 204  
Park City, UT 84060

67. EPA may designate other representatives, including, but not limited to, EPA employees and federal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Agreement.

68. Settling Respondent's legal counsel shall not serve as its Project Coordinator. Instead, Settling Respondent's Project Coordinator shall be an individual employed by Settling Respondent who has a technical background in environmental science and engineering.

69. Settling Respondent shall notify EPA in writing 10 days prior to any change of its Project Coordinator.

**XX. NOTICES AND SUBMISSIONS**

70. Whenever under the terms of this Agreement written notice is required to be given by one Party to another, it shall be directed to the individuals or office at the addresses specified below, unless those individuals or their successors give written notice of a change to the other Party. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to the United States, EPA, and DV Luxury Resort LLC, respectively.

**As to the United States:**

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
Re: DJ # 90-11-3-08764/1

**As to EPA:**

Kathryn Hernandez  
EPA Project Coordinator  
U.S. Environmental Protection Agency, Region 8  
999 Eighteenth Street, Suite 300 (8EPR-SR)  
Denver, CO 80202-2466

And

Margaret J. (Peggy) Livingston  
Senior Enforcement Attorney  
U.S. Environmental Protection Agency, Region 8  
999 Eighteenth Street, Suite 300 (8-ENFL)  
Denver, CO 80202-2466

**As to DV Luxury Resort LLC:**

David Zimmerman  
Athens Development DV, LLC  
136 Heber Avenue, Suite 204  
Park City, UT 84060

And

Christopher D. Thomas, Esq.  
Squire, Sanders & Dempsey, LLP  
40 North Central Avenue, Suite 2700  
Phoenix, AZ 85004

And

Richard F. Ross, Esq.  
Sonnenschein Nath & Rosenthal LLP  
2415 East Camelback Road  
Suite 700  
Phoenix, AZ 85016

71. All other written documents required under the terms of this Agreement to be sent by one Party to another shall be directed to the respective Project Coordinator identified pursuant to Section XIX (Project Coordinators) of this Agreement.

**XXI. EFFECTIVE DATE**

72. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA has fully executed the Agreement after review of and response to any public comments received.



## **XXII. TERMINATION**

73. If any Party believes that any or all of the obligations under Section VIII (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

## **XXIII. CONTRIBUTION PROTECTION**

74. With regard to claims for contribution against Settling Respondent, the Parties agree that this Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Settling Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for matters addressed in this Agreement. The matters addressed in this Agreement are all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination. Notwithstanding the foregoing, nothing in this Agreement shall be interpreted as extinguishing or altering the rights and obligations between and among Settling Respondent, UPCM, and Talisker Empire Pass Hotel LLC in that certain Agreement To Lease, dated December 19, 2005.

75. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

76. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States within 10 days of service of the complaint on Settling Respondent.

#### **XXIV. APPENDICES**

77. Appendix 1 shall mean the map depicting the Property.

78. Appendix 2 shall mean the legal description of the Property which is the subject of this Agreement.

79. Appendix 3 shall mean the map depicting the Richardson Flat Tailings Site.

80. Appendix 4 shall mean the Work Plan.

81. Appendix 5 shall mean the Amended Action Memorandum.

82. Appendix 6 shall mean the form of surety bond that Settling Respondent will secure pursuant to Section XII (Financial Responsibility).

#### **XXV. PUBLIC COMMENT AND RELATED SUBSEQUENT MODIFICATIONS**

83. Through published notice, EPA shall announce the availability of this Agreement to the public for review and comment. EPA shall accept comments from the public for a period of thirty (30) days after such announcement. At the end of the public comment period, EPA shall review all comments received during the 30 day period and shall:

a) Determine that the Agreement should be made effective in its present form, in which case EPA shall notify Settling Respondent in writing and send them a copy of this Agreement executed by the Parties;

b) Withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or

inadequate; or

c) Determine that modification of the Agreement is necessary, in which case EPA shall notify Settling Respondent in writing as to the nature of all required changes. If the Parties agree in writing to such modifications, the Agreement shall be so modified.

84. In the event that, following its review of all comments received during the thirty-day period, EPA determines that modification of the Agreement is necessary and the Parties are unable to agree on modifications required by EPA as a result of public comments, this Agreement shall be withdrawn by EPA.

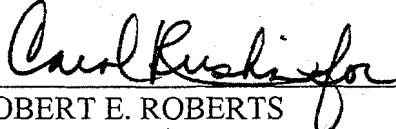
#### **XXVI. COUNTERPART ORIGINALS**

85. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

IT IS SO AGREED:

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

BY:

  
\_\_\_\_\_  
ROBERT E. ROBERTS  
Regional Administrator, Region 8  
U.S. Environmental Protection Agency  
999 Eighteenth Street, Suite 300  
Denver, CO 80202

9/29/2006  
Date



MARGARET (PEGGY) J. LIVINGSTON  
Senior Enforcement Attorney  
U.S. Environmental Protection Agency, Region 8  
999 Eighteenth Street, Suite 300 (8-ENFL)  
Denver, CO 80202-2466

Date

IT IS SO AGREED:

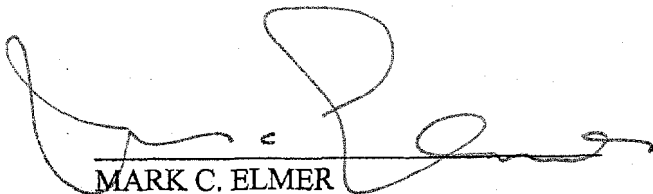
**UNITED STATES DEPARTMENT OF JUSTICE**

BY:



SUE ELLEN WOOLDRIDGE  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

10/16/06  
Date



MARK C. ELMER  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
1961 Stout Street, 8<sup>th</sup> Floor  
Denver, CO 80294

10/12/06  
Date

IT IS SO AGREED:

**DV LUXURY RESORT LLC,**  
a Delaware limited liability company

BY:

Ohana DV LLC,  
a Delaware limited liability company,  
its sole member,

BY:



MICHAEL G. MOHR  
Member, Ohana DV LLC

9/16/06  
Date