

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

COPY

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IN THE MATTER OF)	Docket No. RCRA-08-2008-002
)	
The Three Affiliated Tribes)	ANSWER AND REQUEST FOR
And Yolanda Bear Tail, individually)	HEARING
)	
(White Shield Rec Store)	
A Sesame Frontage Road)	
White Shield, ND 58775)	
EPA ID Number 3010039)	
)	
Respondents)	

Pursuant to 40 C.F.R. Part 22, Respondents Three Affiliated Tribes and Yolanda Bears Tail, individually, hereby answers the Complaint filed by the United States Environmental Protection Agency Region 8 as follows:

ANSWER

1. An answer is not necessary for this paragraph.
 2. An answer is not necessary for this paragraph.
 3. An answer is not necessary for this paragraph.
 4. An answer is not necessary for this paragraph.
 5. An answer is not necessary for this paragraph.
 6. Admit in part. The Respondent Three Affiliated Tribes ("Tribe") admits it owns the facility known as White Shield Rec Store. However, Ms. Bears Tail is employed as the manager of the facility and the Tribe through its governmental subdivision the White Shield Community Board legally operates the facility.
 7. Admit
 8. Admit
-

9. Admit in part and deny in part. Respondent Tribe admits that it, through its governmental sub-entity the White Shield Community Board is the legal owner and operator of the facility. Deny that Ms. Bears Tail is either an owner or operator under 42 U.S.C. §6991 (3) and (4).
10. Admit
11. Admit in part and Deny in part. Sharon Jacobs was the operator of the Twin Buttes – Highway 8 Facility. Yolanda Bears Tail is the manager of the White Shield Rec Store.
12. Admit
13. Admit
14. Admit
15. Admit
16. Admit.
17. An answer is not necessary for this paragraph.
18. An answer is not necessary for this paragraph.
19. An answer is not necessary for this paragraph.
20. An answer is not necessary for this paragraph.

COUNT 1
Failure to monitor every 30 days.

21. An answer is not necessary for this paragraph.
22. Deny in part. The White Shield facility did attempt to monitor through use of incomplete or non-compliant log sheets. *Respondent Exhibit I*. While not specifically compliant with the methods provided in 40 C.F.R. §280.43(d), there was no intent to deliberately circumvent the requirements of 40 C.F.R. §280.40.

23. Deny.

COUNT 2

Failure to perform monthly monitoring on pressurized piping.

24. Admit.

25. Admit.

26. Admit.

COUNT 3

Failure to Comply with Financial Responsibility Requirements.

27. An answer is not necessary for this paragraph.

28. Admit in part and deny in part. The Tribe has completed all necessary preliminary testing and has submitted an application for the State Petroleum Tank Release Compensation Fund. *Respondent Exhibit 2.*

29. Admit.

COUNT 4

Failure to operate and maintain corrosion protection system continuously.

30. An answer is not necessary for this paragraph.

31. Admit.

32. Admit.

PROPOSED CIVIL PENALTY

The Respondent Three Affiliated Tribes hereby contends that the total proposed penalty amount of \$48,125.00 is inappropriate and excessive. Respondent Tribe contends that EPA failed to sufficiently and equitably address the Violator Specific Adjustments when calculating the proposed penalty amount as provided in *U.S. EPA Penalty Guidance for Violations of UST Regulations, November 1990*. Specifically, Respondent Tribe contends the following:

COUNT 1: Failure to monitor tanks every 30 days - 40 C.F.R. §280.41(a).

1. **Degree of Cooperation/Non-Cooperation:** The Tribe and its White Shield facility should be found to exhibit a significant degree of cooperation as it did attempt to comply with the reporting requirement through use of log sheets after the violations were determined by EPA. However, while the form and procedure of those logs were incorrect, the Tribe contends that the White Shield facility did not intend to deliberately circumvent the requirements under 40 C.F.R. §280.41(a) but in fact did attempt to cooperate with EPA and the regulations. *Respondent Exhibit 1.*
2. **Degree of Willfulness or Negligence:** The Tribe and its White Shield facility should not be found to exhibit a high degree of willfulness in its actions. There are no indications or allegations made by EPA that the facility or the Tribe willfully attempted to not comply with the regulations.
3. **History of non-compliance:** The Tribe does admit that due to various circumstances including lack of communication, significant staff turnover and internal tribal disputes, the facility was in non-compliance for a significant period. A significant factor in our non-compliance was a tribal council chairman election dispute that did not resolve itself in the courts until June 2007. In that time period, tribal correspondence and communications was severely limited and in many cases, completely stalled. However, in the past few months, the Tribe has made significant strides to correct its internal procedures and address the violations in a timely manner.

4. **Other unique factors:**

a. **No Actual Harm.** The White Shield facility, while legally owned by the Tribe exists for the purpose of providing badly needed services to a low-income, under serviced, rural population on the Fort Berthold Indian Reservation. The facility itself and the tanks in question have been tested and soil samples have revealed below method detection levels for BETX, TPH as gasoline and fuel, and MTBE. Therefore, no significant negative impact has been determined at or near the facility's USTs. *Respondent Exhibit 3.*

b. **Inability to Pay.** The White Shield facility, while intended to be a source of revenue for the White Shield Community, has not produced any significant profit during the period of non-compliance as stated in the Administrative Order. According to monthly financial statements provided by the White Shield School, the current "operator" through its "School to Work" program, the facility from November 2003 to December 2007 had an average monthly profit of \$741.00. *Respondent Exhibit 4.* Further, according to the White School's "School to Work" program advisor, the revenue totals due not take into account such expenses as 1) depreciation, 2) theft, 3) uncollectible accounts, 4) advisor's salary and 5) manager's benefits. *Respondent Exhibit 5.* The White Shield facility, like other community facilities, while legally owned by the Tribe are managed and operated for the benefit of the tribal communities in which they are located. The Tribe allocates a yearly budget to provide community based services (ready access to fuel and limited grocery items) to these rural, low-income and under serviced communities as a function of the tribal

government. As the facilities are under the direct supervision and responsibility of those tribal communities, the costs of bringing the community facilities into compliance, including expenses and any proposed penalties will be borne by those communities themselves.

COUNT 2: Failure to perform monthly monitoring on pressurized piping, 40 C.F.R. §280.41(b)(1)(ii).

1. **Degree of Cooperation/Non-Cooperation:** The Tribe and its White Shield facility should be found to exhibit a significant degree of cooperation as it did attempt to comply with the monitoring requirements after the violations were determined by EPA. The Tribe contends that the White Shield facility did not intend to deliberately circumvent the requirements under 40 C.F.R. §280.41(a) but in fact did attempt to cooperate with EPA and the regulations.
2. **Degree of Willfulness or Negligence:** The Tribe and its White Shield facility should not be found to exhibit a high degree of willfulness in its actions. There are no indications or allegations made by EPA that the facility or the Tribe willfully attempted to not comply with the regulations.
3. **History of non-compliance:** The Tribe does admit that due to various circumstances including lack of communication, significant staff turnover and internal tribal disputes, the facility was in non-compliance for a significant period. A significant factor in our non-compliance was a tribal council chairman election dispute that did not resolve itself in the courts until June 2007. In that time period, tribal correspondence and communications was severely limited and in many cases, completely stalled. However, in the past few months, the Tribe has

made significant strides to correct its internal procedures and address the violations in a timely manner.

4. **Other unique factors:**

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community based services (ready access to fuel and limited grocery items) to these rural, low-income and under serviced communities as a function of the tribal government. As the facilities are under the direct supervision and responsibility of those tribal communities, the costs of bringing the community facilities into compliance, including expenses and any proposed penalties will be borne by those communities themselves.

COUNT 3: Failure to comply with financial responsibility requirement, 40 C.F.R. §280.93(a).

1. **Degree of Cooperation/Non-Cooperation:** The Tribe and its White Shield facility should be found to exhibit a significant degree of cooperation as it has attempted to comply with the financial responsibility requirements. However, the Tribe has completed the necessary preliminary test and has submitted an application to the North Dakota Insurance Department – Petroleum Tank Release Compensation Fund. *Respondent Exhibit 2.*
2. **Degree of Willfulness or Negligence:** The Tribe and its White Shield facility should not be found to exhibit a high degree of willfulness in its actions. There are no indications or allegations made by EPA that the facility or the Tribe willfully attempted to not comply with the regulations.
3. **History of non-compliance:** The Tribe does admit that due to various circumstances including lack of communication, significant staff turnover and internal tribal disputes, the facility was in non-compliance for a significant period. A significant factor in our non-compliance was a tribal council chairman election dispute that did not resolve itself in the courts until June 2007. In that time

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COUNT 4. Failure to operate and maintain a corrosion protection system continuously, 40 C.F.R. §280.31(a).

1. **Degree of Cooperation/Non-Cooperation:** The Tribe and its White Shield facility should be found to exhibit a significant degree of cooperation as it has attempted to comply with the 40 C.F.R. §280.31(a).
2. **Degree of Willfulness or Negligence:** The Tribe and its White Shield facility should not be found to exhibit a high degree of willfulness in its actions. There are no indications or allegations made by EPA that the facility or the Tribe willfully or negligently attempted to not comply with the regulations.
3. **History of non-compliance:** The Tribe does admit that due to various circumstances including lack of internal communication, significant staff turnover and internal tribal disputes, the facility was in non-compliance for a significant period. A significant factor in our non-compliance was a tribal council chairman election dispute that did not resolve itself in the courts until June 2007. In that

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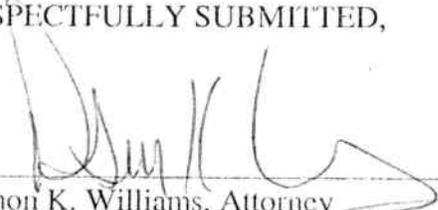
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REQUEST FOR HEARING

As provided in RCRA §9006(b), 42 U.S.C. §6991e(b), Respondent Three Affiliated Tribes is requesting a public hearing on this matter. Additionally, as the Respondent Tribe has contacted the Agency through its legal counsel to begin negotiations as to the Administrative Order, compliance measures and the proposed penalties, Respondent Tribe requests a stay in the proceedings for the parties to meet and begin settlement negotiations.

RESPECTFULLY SUBMITTED,

Date: 2/1/08

By: 
Damon K. Williams, Attorney
Respondent Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763
Telephone 701-627-8262
Facsimile 701-627-3626

CERTIFICATE OF SERVICE

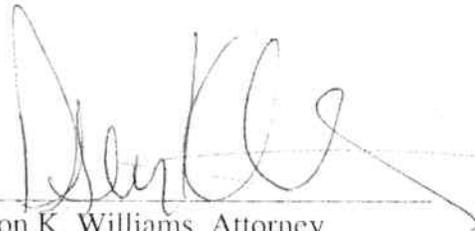
The undersigned hereby certifies that that the original and one copy of the ANSWER AND REQUEST FOR HEARING with Respondent Exhibits 1-5 were delivered via FEDERAL EXPRESS to the **Regional Hearing Clerk, EPA -REGION VIII, Wynkoop Street, Denver, Colorado, 80202-1129**, and a true copy was send via certified mail to:

Amy Swanson, Enforcement Attorney
U.S. EPA - Region VIII
1595 Wynkoop St. (8ENF-L)
Denver, CO 80202-1129

Date: _____

2/1/08

By: _____



Damon K. Williams, Attorney
Respondent Three Affiliated Tribes