



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 WYNKOOP STREET
DENVER, CO 80202-1129

Phone 800-227-8917

http://www.epa.gov/region08

DOCKET NOS.: RCRA-08-2008-0001
RCRA-08-2008-0002
RCRA-08-2008-0003

IN THE MATTER OF:)
)
THREE AFFILIATED TRIBES)
and SHARON JACOBS, individually,)
Highway 8 Convenience Store,)
)
THREE AFFILIATED TRIBES)
and YOLANDA BEARS TAIL, individually)
White Shield Ree Store,)
)
THREE AFFILIATED TRIBES)
and DAVE WILLIAMS, individually)
West Dakota Service,)
)
RESPONDENTS)

FINAL ORDER

Pursuant to 40 C.F.R. §22.18, of EPA's Consolidated Rules of Practice, the Consent Agreement resolving these matters is hereby approved and incorporated by reference into this Final Order. The Respondents are hereby **ORDERED** to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondents of this Consent Agreement and Final Order.

SO ORDERED THIS 7th DAY OF July, 2008.



Elyana R. Sutin
Regional Judicial Officer

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

The Three Affiliated Tribes
and Sharon Jacobs, individually,
Highway 8 Convenience Store,

The Three Affiliated Tribes
and Yolanda Bears Tail, individually,
White Shield Ree Store,

The Three Affiliated Tribes
and Dave Williams, individually,
West Dakota Service,

Respondents,

) Docket No. RCRA-08-2008-0001

) Docket No. RCRA-08-2008-0002

) Docket No. RCRA-08-2008-0003

) **CONSENT AGREEMENT**

Complainant, United States Environmental Protection Agency, Region 8 (EPA), and Respondent Three Affiliated Tribes (Tribe), Sharon Jacobs, Yolanda Bears Tail, and Dave Williams, by their undersigned representatives, hereby consent and agree as follows:

BACKGROUND

1. On December 14, 2007, Complainant issued Administrative Complaints and Notices of Opportunity for Hearing (Complaints) to the above-named Respondents alleging certain violations of Section 9006 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6991e, and the Underground Storage Tank regulations set forth at 40 C.F.R. Part 280, at the West Dakota Service, Highway 8 Convenience Store, and White Shield Ree Store facilities (hereafter referred to collectively as the "facilities"). The Complaints proposed civil penalties for the violations alleged.

2. Pursuant to the Order Granting Motion to Consolidate Proceedings issued by the Honorable Susan L. Biro, Chief Administrative Law Judge, on June 19, 2008, the above-referenced proceedings were consolidated pursuant to 40 C.F.R. § 22.12(a).

3. Respondents admit the jurisdictional allegations of the Complaints and neither admit nor deny the specific factual allegations of the Complaints.

4. Respondents waive their rights to a hearing before any tribunal, to contest any issue of law or fact set forth in the Complaints or this Consent Agreement.

5. This Consent Agreement, upon incorporation into a final consent order, applies to and is binding upon EPA and upon Respondents and Respondents' employees and/or successors. This Consent Agreement contains all terms of the settlement agreed to by the parties. The Tribe shall provide a copy of this Consent Agreement to council members and all program officers, directors, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Agreement, as well as to any person or entity retained to perform work required under this Consent Agreement. The Tribe shall ensure that any contract entered into to perform work required under this Consent Agreement conforms to its terms and conditions.

6. In any action to enforce this Consent Agreement, the Tribe shall not raise as a defense the failure by any of its elected leaders, officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Agreement.

7. Any transfer of ownership or operation of the facilities to any other person or

entity must be conditioned upon the transferee's agreement to undertake the obligations required by this Consent Agreement, as provided in a written agreement between the Tribe and the proposed transferee, enforceable by the United States as third-party beneficiary of such agreement. The Tribe shall give notice of this Consent Agreement to any subsequent owner or operator prior to such transfer. The Tribe shall provide a copy of such notice together with a copy of the proposed written agreement to the EPA representative identified in paragraph 12(c) prior to such transfer.

TERMS OF SETTLEMENT

Civil Penalty

8. Respondents consent and agree to pay a civil penalty in the amount of five thousand dollars (\$5,000), in the manner described below in this paragraph:

- a. Payment is due within 30 calendar days from the date written on the Final Consent Order, issued by the Regional Judicial Officer, that adopts this Consent Agreement. If the due date falls on a weekend or legal federal holiday, then the due date becomes the next business day. The date the payment is made is considered to be the date processed by Mellon Bank described below. Payments received by 11:00 AM EST are processed on the same day, those received after 11:00 AM are processed on the next business day.
- b. The payment shall be made by remitting a cashier's or certified check, referencing the name and docket number of this case for this amount, payable to "**Environmental Protection Agency,**" to:

US checks by **regular**
US postal service mail:

US EPA Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Federal Express, Airborne,
or other commercial carrier:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Wire transfers:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire
message should read "D 68010727
Environmental Protection Agency "

On Line Payment:

WWW.PAY.GOV
Enter sfo 1.1 in the search field

Open form and complete required
fields.

Copies of the check or wire transfer shall be simultaneously sent to:

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

Tina Artemis, Regional Hearing Clerk
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

- c. In the event payment is not received by the specified due date, interest accrues from the date of the final order, not the payment due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until the payment is received in full (i.e., on the 1st late day, 30 days of interest accrues).

- d. In addition to the accrual of interest specified in subsection c above, a handling charge of fifteen dollars (\$15.00) shall be assessed on the 31st day from the date of the final order, and each subsequent 30-day period that the penalty, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if the penalty payment is not received within 90 days of the due date (i.e., the 121st day from the date the final order is signed). Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.
- e. Respondents agree that the penalty shall never be claimed as a federal or other tax deduction or credit.

Supplemental Environmental Project

9. Respondents shall implement the two supplemental environmental projects (SEPs) described below in accordance with the provisions of this Consent Agreement. The two SEPs are intended to secure environmental or public health protection and improvements at the tribally-owned community facilities. Specifically, the Tribe agrees to: (1) purchase and install Automatic Tank Gauge (ATG) systems and sensors to sense the interstice of the tanks and piping sumps for the Highway 8, White Shield Ree, and MEC Store community facilities at a minimum cost of \$30,000 (the ATG SEP); and 2) to establish a budget line item in the amount of \$1,500 to maintain financial assurance with the North Dakota Petroleum Tank Release Compensation Fund (State Fund) for the Highway 8, White Shield Ree and MEC Store UST systems for five years beginning July 1, 2008 (FR SEP).

The Tribe will commence performance of the SEPs upon issuance of the Final Order by the Regional Judicial Officer. With regard to the ATG SEP, the Tribe will complete the project within six months of the Final Order. Funding for the FR SEP will be set aside and the financial responsibility payment for 2008 made to the State Fund within thirty (30) days of the Final

Order, with annual payments made thereafter to the State Fund no later than June 30 through Calendar Year 2012. The Respondents are responsible for the satisfactory completion of the SEPs in accordance with the provisions of this Consent Agreement. Respondents may use contractors in planning and implementing the ATG SEP.

10. Respondents hereby certify that, as of the date of this Consent Agreement, they are not required to perform or develop the SEPs by any federal, state or local law or regulation; nor are Respondents required to perform or develop the SEPs by agreement, grant or as injunctive relief in this or any other case or in compliance with state or local requirements. Respondents further certify that they have not received, and are not presently negotiating to receive, credit in any other enforcement action for the SEPs.

11. Any public statement, oral or written, made by Respondents making reference to the SEPs shall include the following language, "This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of RCRA."

12. SEP Reports

- a. Respondents shall submit a SEP Completion Report to EPA within thirty (30) days following completion of the final SEP. The SEP Completion Report shall contain the following information:
 - (i) A detailed description of the SEP(s) as implemented;
 - (ii) A description of any operating problems encountered and the solutions thereto;
 - (iii) Itemized costs, documented by copies of purchase orders and receipts or canceled checks;
 - (iv) Certification that the SEPs have been fully implemented pursuant to the provisions of this Consent Agreement.

- b. Respondents agree that failure to submit the SEP Completion Report shall be deemed a violation of this Consent Agreement and Respondents shall become liable for stipulated penalties in accordance with paragraph 17 below.
- c. Respondents shall submit all notices and reports required by this Consent Agreement by first class mail to:

Francisca Chambus
Environmental Engineer
Technical Enforcement Program (8P-W-GW)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

13. Respondents agree that EPA may inspect the facilities, review leak detection results, and/or contact the State Fund, at any time in order to confirm that the SEPs are consistent with the terms and conditions set forth herein.

14. EPA acceptance of SEP Completion Report.

- a. Following receipt of the SEP Completion Report described in paragraph no. 12(a) above, EPA will do one of the following: (i) accept the SEP Completion Report; (ii) reject the SEP Completion Report, notify the Respondent, in writing, of deficiencies in the SEP Completion Report and grant Respondent an additional thirty (30) days in which to correct any deficiencies; or (iii) reject the SEP Completion Report and seek stipulated penalties in accordance with paragraph 17 herein.
- b. If EPA elects to exercise option (ii) above, EPA shall permit Respondent the opportunity to object in writing to the notification of deficiency or disapproval given pursuant to this paragraph within ten (10) days of receipt of such notification. EPA and Respondents shall have an additional thirty (30) days to reach agreement from the receipt by the EPA of the notification of objection. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision to Respondent, which shall be final and binding upon Respondent. Respondent agrees to comply with any requirements imposed by EPA as a result of any such deficiency or failure to comply with the terms of this Consent Agreement. In the event the one or more

SEP is not completed as contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by Respondent to EPA in accordance with paragraph 17.

Corrective Action Order
(West Dakota Service Facility Only)

15. EPA requests that the Tribe perform a Tier 2 Evaluation based on the information in the Tier 1 evaluation submitted on April 1, 2008.

- a. The evaluation should fully determine the potential current and future receptors and the actual or potential exposure pathways.
- b. If there is a risk to receptors because of actual or potential completed exposure pathways, you must do additional work to determine the extent of the contamination.
- c. The Tribe shall submit the Tier 2 Evaluation required by this Consent Agreement by first class mail within 45 days of this Consent Agreement to:

Francisca Chambus
Environmental Engineer
Technical Enforcement Program (8P-W-GW)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

16. If the Tier 2 Evaluation indicates that active remediation is necessary, the EPA may require the Tribe to submit a corrective action plan for responding to contaminated soils and ground water. If a plan is required, the Tribe must submit it along with a schedule to EPA for approval prior to commencing work. The final plan upon approval shall be referenced and incorporated into this Consent Agreement as Exhibit A. All corrective action work shall be performed by the Tribe in accordance with the final plan and schedule.

STIPULATED PENALTIES

17. The Tribe shall be liable for stipulated penalties in the amounts set forth below to EPA for failure to comply with the SEP and Corrective Action Order sections of this Consent Agreement. A violation includes, but is not limited to, failing to perform an obligation in accordance with any approved work plan or time schedule under the Corrective Action Order section. "Compliance" by the Tribe shall include full and satisfactory completion of the activities under this Consent Agreement.

Violation	Stipulated Penalty
Late Payment of any/all Stipulated Penalties	\$25 per day per outstanding stipulated penalty from due date
Failure to Satisfactorily Complete SEP (unless the respondent made good faith and timely efforts to complete the project and can certify that at least 90% of the amount required to be spent was expended on the SEP).	\$22,500
Failure to Spend 91% or more of the amount of money required to be spend for the project	\$3,000
Failure to Perform Tier II Evaluation within 45 days of the Final Order	\$25 per day from due date
Failure to Submit Corrective Action Plan within 45 days, if required	\$50 per day

Failure to Perform Corrective Action According to the Work Plan or Time Schedule	\$50 per day
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18. All stipulated penalties shall begin to accrue on the first day that performance is delinquent or a violation of this Consent Agreement occurs, and continue to accrue through the final day of correction of the violation.

19. Stipulated penalties shall become owing upon written demand by the EPA and are due on or before the 15th (fifteenth) of the month following the month the written demand is received. The Tribe shall, as directed by EPA, pay stipulated penalties owing to EPA in accordance with Paragraph 8.

20. EPA may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Agreement.

GENERAL PROVISIONS

21. Nothing in this Consent Agreement shall relieve Respondents of the duty to comply with the Act and its implementing regulations.

22. Failure by Respondents to comply with any of the terms of the Consent Agreement shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of the Consent Agreement and for such other relief as may be appropriate in federal district court.

23. Nothing in the Consent Agreement shall be construed as a waiver by the EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated with

any collection action instituted as a result of Respondents' failures to perform pursuant to the terms of the Consent Agreement.

24. The undersigned representative certifies on behalf of the Respondents that he/she is fully authorized to enter into and bind the Respondents to the terms and conditions of this Consent Agreement.

25. The parties agree to submit this Consent Agreement to the Regional Judicial Officer, with a request that it be incorporated into a final order.

26. Each party shall bear its own costs and attorney fees in connection with this matter.

27. The Consent Agreement, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete and full civil settlement of the specific violations alleged in the Complaint. Because the Corrective Action Order component of this Consent Agreement only pertains to the West Dakota Service facility, EPA may, upon notice to and approval by the Presiding Officer, close this matter as pertains to the Highway 8 and/or White Shield Ree facilities upon payment of the civil penalty and full and satisfactory performance of the SEPs set forth herein. In this event, the Consent Agreement and its terms will remain open only against the West Dakota Service facility until such time as the Corrective Action Order is successfully complied with and EPA moves the Presiding Officer to close the case.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

Date: 7/3/08

By: Michael T. Risner
Michael T. Risner, Director
Matthew S. Cohn, Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Date: 7-5-08

By: Sharon Kercher
Sharon Kercher, Director
RCRA-CERCLA Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

THREE AFFILIATED TRIBES,
Respondents

Date: 7-1-08

By: Marcus Wells, Jr.
Marcus Wells, Jr.
Chairman

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT/FINAL ORDER** in the matters of **THREE AFFILIATED TRIBES** and **SHARON JACOBS, individually**, Highway 8 Convenience Store, **YOLANDA BEARS TAIL, individually**, White Shield Ree Store, and **DAVE WILLIAMS, individually** West Dakota Service, **DOCKET NOS.: RCRA-08-2008-0001; 0002; AND 0003** was filed with the Regional Hearing Clerk on July 7, 2008.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Amy Swanson, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on July 7, 2008, to:

Damon Williams, Attorney
Legal Department
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763


E-mailed to:

Honorable Susan L. Biro
Chief Administrative Law Judge
U. S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1900L)
Washington, DC 20460

And

Michelle Angel
U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, Ohio 45268

July 7, 2008


Tina Artemis
Paralegal/Regional Hearing Clerk