



Three Affiliated Tribes
Mandan, Hidatsa and Arikara Nation
Legal Department

Tribal Administration Building
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New Town, North Dakota 58763

2008 FEB -6 PM 2:03
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February 1, 2008

Amy Swanson, Attorney
U.S. EPA Region VIII
Legal Enforcement Program
1595 Wynkoop Street
Denver, CO 80202-1129

RE: Answers and Requests for Hearings: Docket No. RCRA-08-2008-0001
Docket No. RCRA-08-2008-0002
Docket No. RCRA-08-2008-0003

Dear Ms. Swanson:

Please find enclosed 1 copy each of the Respondent Three Affiliated Tribes Answer and Request for Hearing in the above cited matters. If you have any questions, please contact this office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Damon K. Williams'.

Damon K. Williams
Attorney for Respondent Three Affiliated Tribes

CC: File

COPY

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2008 FEB -6 PM 12: 01

IN THE MATTER OF)	Docket No. RCRA-08-2008-0001
)	
The Three Affiliated Tribes)	ANSWER AND REQUEST FOR
And Sharon Jacobs, individually)	HEARING
)	
(Highway 8 Convenience Store)	
8098 BIA Route 22)	
Halliday, ND 58636)	
EPA ID Number 3010040)	
)	
Respondents)	

Pursuant to 40 C.F.R. Part 22, Respondents Three Affiliated Tribes and Sharon Jacobs, 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.
7. Admit
8. Admit in part. The Twin Buttes facility is no longer in operation as of November 2007. However, Sharon Jacobs was the lessee and operator of the facility up to that time.
9. Admit
10. Admit.

11. Admit
12. Admit
13. Admit
14. Admit
15. Admit.
16. Admit.
17. Admit.
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. Admit.
23. Admit.

COUNT 2
Failure to perform monthly monitoring on pressurized piping.

24. An answer is not necessary for this paragraph.
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 the required preliminary testing and has applied for the State Insurance Plan. *Respondent Exhibit 1.*

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 \$48,126.00 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 Twin Buttes facility should be found to exhibit a significant degree of cooperation as it did not intend to deliberately circumvent the requirements under 40 C.F.R. §280.41(a).
2. **Degree of Willfulness or Negligence:** The Tribe and its Twin Buttes 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 Twin Buttes 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 Twin Buttes 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 2*

b. **Inability to Pay.** The Twin Buttes facility, while intended to be a source of revenue for the Twin Buttes Community, has not produced any significant profit during the period of non-compliance as stated in the Administrative Order. The Twin Buttes community board has stated that it was their understanding that the facility did not produce significant revenue to its operator, Sharon Jacobs or the community. The Tribe and the community have attempted contact Ms. Jacobs to secure financial records for the facility but have been unable to do so.

However, the Twin Buttes 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 each tribal community or segment to provide badly needed community based services (ready access to fuel, limited grocery items and limited employment) to these rural, low-income and under serviced reservation 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 operating and compliance expenses and any proposed civil 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 Twin Buttes 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 Twin Buttes facility did not intend to deliberately circumvent the requirements under 40 C.F.R. §280.41(b)(1)(ii) but in fact did attempt to cooperate with EPA and the regulations.
2. **Degree of Willfulness or Negligence:** The Tribe and its Twin Buttes 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 Twin Buttes 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 2.*

b. **Inability to Pay.** The Twin Buttes facility, while intended to be a source of revenue for the Twin Buttes Community, has not produced any significant profit during the period of non-compliance as stated in the Administrative Order. The Twin Buttes community board has stated that it was their understanding that the facility did not produce significant revenue to its operator, Sharon Jacobs or the community. The Tribe and the community have attempted contact Ms. Jacobs to secure financial records for the facility but have been unable to do so.

However, the Twin Buttes 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 each tribal community or segment to provide badly needed community based services (ready access to fuel, limited grocery items and limited employment) to these rural, low-income and under serviced reservation 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 operating and compliance expenses and any proposed civil 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 Twin Buttes facility should be found to exhibit a significant degree of cooperation as it has attempted to comply with the financial responsibility requirements. However, the additional costs of tests required to apply for the state insurance program have created an additional financial and administrative burden on the Tribe and the Twin Buttes Community.
2. **Degree of Willfulness or Negligence:** The Tribe and its Twin Buttes 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.

Further, the Tribe has completed the required preliminary testing on the closed Twin Buttes facility and has submitted a Petroleum Tank Registration with the North Dakota Insurance Department – Petroleum Tank Release Compensation Fund. *Respondent Exhibit 1.*

4. **Other unique factors:**

a. **No Actual Harm.** The Twin Buttes 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 2.*

b. **Inability to Pay.** The Twin Buttes facility, while intended to be a source of revenue for the Twin Buttes Community, has not produced any significant profit during the period of non-compliance as stated in the Administrative Order. The Twin Buttes community board has stated that it was

their understanding that the facility did not produce significant revenue to its operator, Sharon Jacobs or the community. The Tribe and the community have attempted contact Ms. Jacobs to secure financial records for the facility but have been unable to do so.

However, the Twin Buttes 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 each tribal community or segment to provide badly needed community based services (ready access to fuel, limited grocery items and limited employment) to these rural, low-income and under serviced reservation 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 operating and compliance expenses and any proposed civil penalties will be borne by those communities themselves.

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 Twin Buttes 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 Twin Buttes 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 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 Twin Buttes, 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 2.*

b. **Inability to Pay.** The Twin Buttes facility, while intended to be a source of revenue for the Twin Buttes Community, has not produced any significant profit during the period of non-compliance as stated in the Administrative Order. The Twin Buttes community board has stated that it was their understanding that the facility did not produce significant revenue to its operator, Sharon Jacobs or the community. The Tribe and the community have

attempted contact Ms. Jacobs to secure financial records for the facility but have been unable to do so.

However, the Twin Buttes 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 each tribal community or segment to provide badly needed community based services (ready access to fuel, limited grocery items and limited employment) to these rural, low-income and under serviced reservation 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 operating and compliance expenses and any proposed civil penalties will be borne by those communities themselves.

REQUEST FOR HEARING

As provided in RCRA §9006(b), 42 U.S.C. §6991c(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.

Date: 2/1/08

RESPECTFULLY SUBMITTED,

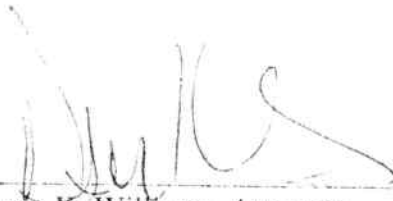
By: 
Damon K. Williams, Attorney
Respondent Three Affiliated Tribes
401 Frontage Road
New Town, ND 58763
Telephone 701-627-8262
Facsimile 701-627-3626

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-1)
Denver, CO 80202-1129

Date: 2/1/08

By: 
Damon K. Williams, Attorney
Respondent Three Affiliated Tribes