

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

IN THE MATTER OF:
Tuba City Dump Site
Tuba City, Arizona

Department of the Interior, Bureau of Indian
Affairs, Respondent

ADMINISTRATIVE SETTLEMENT
AGREEMENT AND ORDER ON
CONSENT FOR REMEDIAL
INVESTIGATION/FEASIBILITY STUDY

U.S. EPA Region 9
CERCLA Docket No. 2010-09

Proceeding Under Sections 104, 107 and
122 of the Comprehensive Environmental
Response, Compensation, and Liability Act,
as amended, 42 U.S.C. §§ 9604, 9607 and
9622.

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ADMINISTRATIVE ORDER ON CONSENT
FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent (Settlement Agreement) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and the United States Department of the Interior, Bureau of Indian Affairs (BIA). This Settlement Agreement concerns the preparation and performance of a remedial investigation and feasibility study (RI/FS) at the Tuba City Dump Site (Site) located on the Navajo Nation and Hopi Reservations near Tuba City, Arizona; and reimbursement for costs incurred by EPA in connection with the RI/FS pursuant to Section 104(a)(1) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA).

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607, and 9622, which was delegated to the Administrator of EPA on January 23, 1987 by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994 by EPA Delegation Nos. 14-14-C and 14-14-D and further redelegated to the Superfund Division Branch Chiefs (now titled Assistant Directors) by Delegation R9 1290.15.

3. In accordance with Sections 104(b)(2) and 122(j)(1) of CERCLA, 42 U.S.C. §§ 9604(b)(2) and 9622(j)(1), EPA notified the Navajo Nation, the Hopi Tribe, and the Department of the Interior, on behalf of the U.S. Fish and Wildlife Service and the Bureau of Indian Affairs on June 24, 2010 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under these

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Natural Resource Trustees' trusteeship.

4. EPA and BIA recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by BIA in accordance with this Settlement Agreement do not constitute an admission of liability. BIA does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of fact, conclusions of law and determinations of Sections V and VI of this Settlement Agreement. BIA agrees to comply with and be bound by the terms of this Settlement Agreement and further agrees that it will not contest the basis or validity of this Settlement Agreement or its terms. Both BIA and EPA have devoted substantial resources to understand and address environmental conditions at the Site. Both agencies have determined that entry into this Settlement Agreement will further those efforts and expedite the investigatory work at the Site and evaluating options for a final remediation. This Site involves unique circumstances in which both BIA and EPA have substantial interests. This Settlement Agreement is tailored to address these unique circumstances, and to accommodate the interests of both EPA and BIA at this Site, and is not intended to serve as a model for any other Site.

II. PARTIES BOUND

5. This Settlement Agreement applies to and is binding upon EPA and upon BIA and their successors and assigns.

6. BIA is responsible for carrying out all activities required by this Settlement Agreement. Each undersigned representative of BIA certifies that he or she is fully authorized

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to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind BIA to this Settlement Agreement.

7. BIA shall ensure that its contractors, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with it. BIA shall be responsible for any noncompliance with this Settlement Agreement, except as provided in Section XVIII (Force Majeure).

8. EPA and BIA agree to consult with and coordinate with the Navajo Nation and the Hopi Tribe throughout the performance of the Work and implementation of this Settlement Agreement, and to take the comments and concerns of the Navajo Nation and the Hopi Tribe into consideration. EPA's or BIA's failure to do so, however, will not affect EPA's or BIA's rights or obligations under this Settlement Agreement.

III. STATEMENT OF PURPOSE

9. In entering into this Settlement Agreement, the objectives of EPA and BIA are: (a) to determine the nature and extent of contamination and any threat to the public health, welfare, or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site, by conducting a Remedial Investigation as more specifically set forth in the Workplan which BIA has submitted, pending comments by the Navajo Nation and Hopi Tribe, for EPA approval in accordance with Sections IX (Work to be Performed) and X (EPA Approval of Plans and Other Submissions), and which shall be incorporated into this

Settlement Agreement by reference upon approval by EPA; (b) to identify and evaluate remedial alternatives to prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants, or contaminants at or from the Site, by conducting a Feasibility Study as more specifically set forth in the Workplan as approved by EPA pursuant to Section X; (c) to ensure payment of costs incurred by EPA with respect to this Settlement Agreement as required by CERCLA Section 104(a)(1); and (d) to ensure compliance with the groundwater monitoring requirements of 40 C.F.R. Part 258, as specified in the attached workplan.

10. The Work conducted under this Settlement Agreement is subject to approval by EPA and shall provide all appropriate and necessary information to assess Site conditions and evaluate alternatives to the extent necessary to select a remedy that will be consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 (NCP). BIA shall conduct all Work under this Settlement Agreement in compliance with CERCLA, the NCP, and all applicable EPA guidances, policies, and procedures.

IV. DEFINITIONS

11. Unless otherwise expressly provided herein, terms used in this Settlement 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. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

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- a. “BIA” shall mean the Bureau of Indian Affairs and any successor departments or agencies of the United States.

- b. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*
- c. “Day” shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday or federal holiday, the period shall run until the close of business the next working day.
- d. “Effective Date” shall be the effective date of this Settlement Agreement as provided in Section XXVII.
- e. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
- f. “Hopi Tribe” shall mean the Hopi Tribe, a federally recognized Indian Tribe, recognized by the United States as a sovereign Indian Tribe with legal rights and responsibilities.
- g. “Institutional controls” shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.
- 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, 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.

“Navajo Nation” shall mean The Navajo Nation, a federally recognized Indian Tribe.

- j. “Other Costs” shall mean all costs that EPA incurs to implement the work to be performed under this Settlement Agreement, excluding Oversight Costs and stipulated penalties. Other Costs include costs associated with Emergency Response actions pursuant to Paragraph 37, costs of obtaining Access pursuant to Paragraph 51, and costs associated with Work Takeover pursuant to Paragraph 85, plus any Interest.
- k. “Oversight Costs” shall mean all direct and indirect costs incurred by EPA after the Effective Date in monitoring and supervising BIA’s performance of the Work to determine whether such performance is consistent with the requirements of this Settlement Agreement, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Settlement Agreement, as well as costs incurred in overseeing implementation of the Work, and any interest that accrues on such costs pursuant to Section XIX (Payment of Costs).
- l. “Paragraph” shall mean a portion of this Settlement Agreement identified by an Arabic numeral.
- m. “Parties” shall mean EPA and BIA while “Party” shall mean either one of these entities.

- n. “RCRA” shall mean the Resource Conservation and Recovery Act, also known as the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.*
- o. “Section” shall mean a portion of this Settlement Agreement identified by a Roman numeral.
- p. “Settlement Agreement” shall mean this Administrative Settlement Agreement and Order on Consent, the Workplan, all appendices attached hereto (listed in Paragraph 93) and all documents incorporated by reference into this document, including, without limitation, EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become part of the Settlement Agreement upon approval by EPA. In the event of a conflict between this Settlement Agreement and any appendix or other incorporated document, this Settlement Agreement shall control over such appendix or other incorporated document.
- q. “Site” shall mean the dump of approximately 30 acres size located just south of Arizona State Highway 160 approximately one mile east of the Highway 264 and 160 intersection. The Site includes all areas where a hazardous waste or a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located at, in or from said dump.
- r. “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); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous waste” under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5).

- s. “Work” shall mean all activities the BIA is required to perform under this Agreement except those required by Section XIV (Retention of Records).
- t. “Workplan” shall mean a work planning document, prepared specifically under Section IX of this Settlement Agreement, approved by EPA pursuant to Section X and incorporated herein by reference, that contains a timetable, plan, or schedule which indicates the time and sequence of events. The Workplan will be used as a management tool in planning, reviewing and setting priorities for the RI/FS and is an enforceable part of this Settlement Agreement as are any modifications made thereto in accordance with this Settlement Agreement.
- u. “Engineering Controls” shall mean constructed containment barriers or systems that control one or more of the following: downward migration, infiltration or seepage of surface runoff or rain; or natural leaching migration of contaminants through the subsurface over time. Examples include caps, engineered bottom barriers, immobilization processes, and vertical barriers.

V. FINDINGS OF FACT

12. The Site is located near Tuba City, Arizona. It is adjacent to Arizona State

Highway 160, approximately one mile east of the Highway 264 and 160 intersections. The Site is approximately 30 acres, of which 28 acres are on the Hopi Tribe's Reservation and two acres are on the Navajo Nation Reservation.

13. The Site is comprised of two cells or areas in which waste was disposed. From the late 1950s to approximately 1980, 10 acres were used for waste disposal – this is the “old cell”. In the 1980s, waste was disposed in a “new cell”, an additional 20 acres adjacent to the “old cell”. The Site was in use until 1997 as an uncontrolled and unregulated dump site.

14. During some years of its operation, trenches were excavated at the Site and then filled with trash. Surface trash was frequently burned on-site. Periodically, waste was covered with soil. Very limited documentation exists on the types of waste disposed of at the Site, although the majority of the waste appears to be ordinary household trash. The Site was not secured during its operation and, in 1997, the Site stopped receiving waste. In 1998, BIA undertook various activities to close the Site, including stabilization, fencing and posting of signs to restrict access, compacting of waste and backfilling, site grading, conducting periodic security surveillance, and issuing notifications to the public.

15. From 1998 to date, with the active participation of EPA, the Hopi Tribes and the Navajo Nation, BIA has engaged in numerous activities to characterize Site conditions. BIA has incurred costs, to date, of more than \$4.5 million to investigate and address environmental conditions at the Site. During 2008 BIA committed to conduct an RI/FS at the Site. More recently, BIA conducted a study of potential interim actions that may be needed to address risks to public health and the environment prior to the completion of the RI/FS. That study, completed in June 2009, concluded that fencing of the unfenced portion of the Site was prudent to prevent risks arising from direct contact with exposed waste. Soon thereafter, BIA fenced the unfenced

portion of the Site. In addition, using funding provided by BIA, EPA has completed an investigation of a portion of the Site located near one monitoring well installed in the shallow groundwater downgradient of the Site (MW-07). All of this work has improved the agencies' and the public's understanding of Site conditions, and the data developed as a result of this work will be incorporated into the remedial investigation portion of the RI/FS.

16. Groundwater sampling conducted to date in the area of the Site has identified in the shallow groundwater certain constituents above federal drinking water standards, including total dissolved solids (TDS), arsenic, selenium, uranium, radium 226/228, sulfate and chloride. Concentrations of uranium, TDS, chloride, and sulfate in groundwater samples taken from MW-07 are elevated relative to the surrounding groundwater. The concentration of uranium in MW-07, for example, has ranged from 222 to 322 parts per billion (ppb), compared to an EPA-promulgated maximum contaminant level for uranium of 30 ppb. EPA's investigation of approximately 2.25 acres around MW-07 did not detect a potential source of uranium contamination in trenches and surface soils excavated near MW-07. The RI/FS will continue to investigate groundwater conditions at the Site, including groundwater conditions in the vicinity of MW-07.

17. EPA and BIA have agreed that the conduct of an RI/FS, as reflected in this Settlement Agreement, will help foster a consensus on technical issues, ensure prompt resolution of disputes, and enhance public confidence in the ultimate remedy.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

Based on the Findings of Fact set forth above, EPA has determined that:

18. The Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

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19. The contamination found at the Site, as identified in the Findings of Fact above, includes a “hazardous substance” as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

20. The conditions described in Paragraphs 12-17 above constitute an actual and/or threatened “release” of a hazardous substance from the Site as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

21. The BIA is a “person” as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

22. The BIA is a responsible party under Sections 104, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607 and 9622.

23. The actions required by this Settlement Agreement are necessary to protect the public health, welfare or the environment, are in the public interest, 42 U.S.C. § 9622(a), are consistent with CERCLA and the NCP, 42 U.S.C. §§ 9604(a)(1), 9622(a), 40 C.F.R. Part 300, and will expedite effective remedial action.

24. EPA has determined that BIA is qualified to conduct the RI/FS within the meaning of Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), and will carry out the Work properly and promptly, in accordance with Sections 104(a) and 122(a) of CERCLA, 42 U.S.C. §§ 9604(a) and 9622(a), if BIA complies with the terms of this Settlement Agreement.

VII. SETTLEMENT AGREEMENT AND ORDER

25. Based upon the foregoing Findings of Fact and Conclusions of Law and Determinations, it is hereby agreed that BIA shall comply with all provisions of this Settlement Agreement, including, but not limited to, all appendices to this Settlement Agreement and all

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documents incorporated by reference into this Settlement Agreement.

VIII. DESIGNATION OF CONTRACTORS AND PROJECT COORDINATORS

26. Selection of Contractors, Personnel. No later than September 30, 2010, and before the Work outlined below is awarded, BIA shall notify EPA in writing of the technical requirements to be used in carrying out such Work. If EPA disapproves of the technical requirements proposed by BIA, EPA shall provide, in writing, the basis for its objections and submit recommendations for revising the technical requirements to BIA. Within thirty (30) days of receipt of EPA's objections, BIA will either provide EPA with revised technical requirements or notify EPA that it intends to retain the technical requirements in their original form. If EPA disapproves of BIA's response, EPA reserves the right to terminate this Settlement Agreement and to conduct a complete RI/FS, and to seek reimbursement for Other Costs and penalties from BIA. BIA will notify EPA of the identity of the proposed contractor within thirty (30) days of selection and BIA shall demonstrate to EPA that the proposed contractor has a quality system in place, which complies with ANSI/ASQC E4-1994, Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs, (American National Standard, January 5, 1995, or most recent version). The Quality Management Plan must be prepared in accordance with EPA Requirements for Quality Management Plans (QA/R-2), (EPA/240/B-01/002, March 2001 or subsequently issued guidance) or equivalent documentation as determined by EPA. BIA shall provide copies of this Agreement to all contractors performing work under this Agreement. Under no condition shall a party under this Agreement utilize the services of any consultant, prime contractor, or subcontractor who has been suspended, debarred, or voluntarily excluded within the scope of

the Federal Acquisition Regulation, 48 CFR Subpart 9.4 *et seq.*

27. Within ten (10) days after the Effective Date, BIA shall designate a Project Coordinator who shall be responsible for administration of all actions by BIA required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site Work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, BIA shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number and qualifications within five (5) days following EPA's disapproval. BIA shall have the right to change its Project Coordinator, subject to EPA's right to disapprove. BIA shall notify EPA ten (10) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notification. Receipt by BIA's Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by BIA. Documents to be submitted to BIA shall be sent to John Krause, Regional Environmental Scientist, U.S. Bureau of Indian Affairs, Western Region, 2600 North Central Avenue, 4th Floor Mailroom, Phoenix, Arizona 85004-3050; telephone (602) 379-6750, facsimile (602) 379-3833.

28. EPA has designated Richard Muza of the Region 9 Superfund Division as its Project Coordinator. EPA will notify BIA of a change of its designated Project Coordinator. Except as otherwise provided in this Settlement Agreement, BIA shall direct all submissions required by BIA to the Project Coordinator at 75 Hawthorne Street, SFD-6-2, San Francisco, CA, 94105.

29. EPA's Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and On-Scene Coordinator (OSC) by the NCP. In addition, EPA's

Project Coordinator shall have the authority consistent with the NCP, to halt any Work required by this Settlement Agreement, and to take any necessary response action when s/he determines that conditions at the Site may present an immediate endangerment to public health or welfare or the environment. The absence of the EPA Project Coordinator from the area under study pursuant to this Settlement Agreement shall not be cause for the stoppage or delay of Work.

30. EPA shall arrange for a qualified person to assist in its oversight and review of the conduct of the RI/FS, as required by Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). Such person shall have the authority to observe Work and make inquiries in the absence of EPA, but not to modify the RI/FS Work Plan.

IX. WORK TO BE PERFORMED

31. BIA shall conduct activities and submit plans, reports or other deliverables as provided in the approved Workplan, which is incorporated herein by reference, for the development of the RI/FS, which shall comply with CERCLA, the NCP and EPA guidance, including, but not limited to the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive # 9355.3-01, October 1988 or subsequently issued guidance), "Guidance for Data Useability in Risk Assessment" (OSWER Directive #9285.7-05, October 1990 or subsequently issued guidance), and guidance referenced therein, and guidances referenced in the Workplan, as may be amended or modified by EPA. BIA will provide plans, reports or other deliverables to EPA as set forth in the Work Plan. At the same time that it provides plans, reports or other deliverables to EPA, BIA shall forward copies of such plans, reports or other deliverables to designated representatives of the Hopi Tribe and Navajo Nation for review and comment. BIA's failure to do so, however, will not affect BIA's rights or

obligations under this Settlement Agreement. The Remedial Investigation (RI) shall consist of collecting data to characterize site conditions, determining the nature and extent of the contamination at or from the Site, assessing risk to human health and the environment and conducting treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered. The Feasibility Study (FS) shall determine and evaluate (based on treatability testing, where appropriate) alternatives for remedial action to prevent, mitigate or otherwise respond to or remedy the release or threatened release of hazardous substances, pollutants, or contaminants at or from the Site. The alternatives evaluated must include, but shall not be limited to, the range of alternatives described in the NCP, and shall include remedial actions that utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. In evaluating the alternatives, BIA shall address the factors required to be taken into account by Section 121 of CERCLA, 42 U.S.C. § 9621, and Section 300.430(e) of the NCP, 40 C.F.R. § 300.430(e). Upon request by EPA, BIA shall submit in electronic form all portions of any plan, report or other deliverable BIA is required to submit pursuant to provisions of this Settlement Agreement.

32. Upon receipt of the draft FS report, EPA will evaluate, as necessary, the estimates of the risk to the public and environment that are expected to remain after a particular remedial alternative has been completed and will evaluate the durability, reliability and effectiveness of any proposed Institutional Controls.

33. Modification of the RI/FS Work Plan.

BIA has submitted to EPA a draft Workplan. The Workplan is subject to comments by the Navajo Nation and Hopi Tribe and then approval by EPA. Upon being approved by EPA

pursuant to Section X (EPA Approval of Plans and Other Submissions), the Workplan shall be incorporated into and become enforceable under this Settlement Agreement.

a. If at any time during the RI/FS process, BIA identifies a need for additional data, BIA shall submit a memorandum documenting the need for additional data to the EPA Project Coordinator within thirty (30) days of identification. EPA in its discretion will determine whether the additional data will be collected by BIA and whether it will be incorporated into plans, reports and other deliverables.

b. In the event of unanticipated or changed circumstances at the Site, BIA shall notify the EPA Project Coordinator by telephone within 24 hours of discovery of the unanticipated or changed circumstances. BIA shall also notify designated representatives of Hopi Tribe and Navajo Nation. In the event that EPA determines that the immediate threat or the unanticipated or changed circumstances warrant changes in the RI/FS Work Plan, EPA shall modify or amend the RI/FS Work Plan in writing accordingly. BIA shall perform the RI/FS Work Plan as modified or amended.

c. EPA may determine that in addition to tasks defined in the initially approved RI/FS Work Plan, other additional Work may be necessary to accomplish the objectives of the RI/FS. BIA agrees to perform Work in addition to the Work required by the initially approved RI/FS Work Plan, including any approved modifications, if EPA determines that such actions are necessary for a complete RI/FS.

d. BIA shall confirm its willingness to perform the additional Work in writing to EPA within seven (7) days of receipt of the EPA request. If BIA objects to any modification determined by EPA to be necessary pursuant to this Paragraph, BIA may seek dispute resolution pursuant to Section XV (Dispute Resolution). The Workplan shall be modified in accordance

with the final resolution of the dispute.

e. BIA shall complete the additional Work according to the standards, specifications, and schedule set forth or approved by EPA in a written modification to the RI/FS Work Plan or written RI/FS Work Plan supplement. EPA reserves the right to conduct the Work itself at any point, to seek reimbursement from BIA, and/or to seek any other appropriate relief.

f. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions at the Site.

34. Off-Site Shipment of Waste Material. BIA 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 and tribal environmental official in the receiving facility's state and to EPA's Designated 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.

a. BIA 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. BIA 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.

b. The identity of the receiving facility and state will be determined by BIA following the award of the contract for the remedial investigation and feasibility study. BIA shall provide the information required by Subparagraph 34.a and 34.c as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

c. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, BIA 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. BIA shall only send hazardous substances, pollutants, or contaminants or hazardous waste from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

35. Meetings. BIA shall make presentations at, and participate in, meetings at the request of EPA during the initiation, conduct, and completion of the RI/FS. In addition to discussion of the technical aspects of the RI/FS, topics will include anticipated problems or new issues. Either Party may request a meeting. The requesting Party shall schedule meetings in consultation with the other Party.

36. Progress Reports. In addition to the plans, reports and other deliverables set forth in this Settlement Agreement, BIA shall provide to EPA monthly progress reports by the fifteenth (15th) day of the following month. At a minimum, with respect to the preceding month, these progress reports shall (1) describe the actions which have been taken to comply with this Settlement Agreement during that month, (2) include all results of sampling and tests and all other data received by BIA, (3) describe Work planned for the next two months with schedules relating such Work to the overall project schedule for RI/FS completion, and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.

37. Emergency Response and Notification of Releases

a. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or

may present an immediate threat to public health or welfare or the environment, BIA shall immediately take all appropriate action. BIA shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. BIA shall also immediately provide notice of the incident or Site conditions to the EPA Project Coordinator or, in the event of his/her unavailability, the On Scene Coordinator ("OSC") or the Regional Duty Officer for EPA Region 9 at the EPA Region 9 Emergency 24-hour telephone number ((800) 300-2193). BIA shall also notify [designated representatives of Hopi Tribe and Navajo Nation]. In the event that BIA fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, BIA shall, pursuant to Section XIX (Payment of Costs), reimburse EPA all Other Costs incurred by EPA to conduct the response action that are not inconsistent with the NCP.

b. In addition, in the event of any release of a hazardous substance from the Site, BIA shall immediately notify the EPA Project Coordinator, the OSC or Regional Duty Officer at (800) 300-2193, and the National Response Center at (800) 424-8802. BIA shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. BIA shall also notify [designated representative of Hopi Tribe and Navajo Nation]. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, et seq.

X. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

38. After review of any plan, report or other item that is required to be submitted for approval pursuant to this Settlement Agreement, in a notice to BIA EPA shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that BIA modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing BIA at least one notice of deficiency and an opportunity to cure within thirty (30) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects.

39. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Subparagraph 38(a), (b), (c) or (e), BIA shall proceed to take any action required by the plan, report or other deliverable, as approved or modified by EPA subject only to its right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA approval or modification of a submission or portion thereof, BIA shall not thereafter alter or amend such submission or portion thereof unless directed by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Subparagraph 38(c) and the submission had a material defect, EPA reserves the right to seek stipulated penalties, as provided in Section XVI (Stipulated Penalties).

40. Resubmission

a. Upon receipt of a notice of disapproval, BIA shall, within thirty (30) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. Any stipulated penalties applicable to the submission, as

provided in Section XVI, shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 38 and 39.

b. Notwithstanding the receipt of a notice of disapproval, BIA shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by EPA. Implementation of any non-deficient portion of a submission shall not relieve BIA of any liability for stipulated penalties under Section XVI (Stipulated Penalties).

c. BIA shall not proceed further with any subsequent activities or tasks until receiving EPA approval, approval on condition, or modification of the following deliverables: RI/FS Work Plan and Sampling and Analysis Plan, Draft Remedial Investigation Report and Treatability Testing Work Plan and Sampling and Analysis Plan and Draft Feasibility Study Report. While awaiting EPA approval, approval on condition, or modification of these deliverables, BIA shall proceed with all other tasks and activities which may be conducted independently of these deliverables, in accordance with the schedule set forth under this Settlement Agreement

d. For all remaining deliverables not listed above in subparagraph 40.c, BIA shall proceed with all subsequent tasks, activities and deliverables without awaiting EPA approval on the submitted deliverable. EPA reserves the right to stop BIA from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS.

41. If EPA disapproves a resubmitted plan, report or other deliverable, or portion thereof, EPA may again direct BIA to correct the deficiencies. EPA shall also retain the right to modify or develop the plan, report or other deliverable. BIA shall implement any such plan, report, or deliverable as corrected, modified or developed by EPA, subject only to BIA's right to invoke the procedures set forth in Section XV (Dispute Resolution).

42. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA due to a material defect, BIA shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately unless BIA invokes the dispute resolution procedures in accordance with Section XV (Dispute Resolution) and EPA's action is revoked or substantially modified pursuant to a Dispute Resolution decision issued by EPA or superseded by an agreement reached pursuant to that Section. The provisions of Section XV (Dispute Resolution) and Section XVI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is not otherwise revoked, substantially modified, or superseded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XV, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVI.

43. In the event that EPA takes over some of the tasks, but not the preparation of the RI Report or the FS Report, BIA shall incorporate and integrate information supplied by EPA into the final reports.

44. All plans, reports, and other deliverables submitted to EPA under this Settlement Agreement shall, upon approval or modification by EPA, be incorporated into and enforceable under this Settlement Agreement. In the event EPA approves or modifies a portion of a plan, report, or other deliverable submitted to EPA under this Settlement Agreement, the approved or modified portion shall be incorporated into and enforceable under this Settlement Agreement.

45. Neither failure of EPA to expressly approve or disapprove of BIA's submissions within a specified time period, nor the absence of comments, shall be construed as approval by EPA. Whether or not EPA gives express approval for BIA's deliverables, BIA is responsible for

preparing deliverables acceptable to EPA.

XI. QUALITY ASSURANCE, SAMPLING, AND ACCESS TO INFORMATION

46. Quality Assurance. BIA shall assure that Work performed, samples taken, and analyses conducted conform to the requirements of the Workplan, the QAPP and guidances identified therein. BIA will assure that field personnel used by BIA are properly trained in the use of field equipment and in chain of custody procedures. BIA shall only use laboratories which have a documented quality system that complies with “EPA Requirements for Quality Management Plans (QA/R-2)” (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA.

47. Sampling.

a. All results of sampling, tests, modeling or other data (including raw data) generated by BIA, or on BIA's behalf, during the period that this Settlement Agreement is effective, shall be submitted to EPA in the next monthly progress report as described in Paragraph 36 of this Settlement Agreement. EPA will make available to BIA validated data generated by EPA unless it is exempt from disclosure by any federal or state law or regulation.

b. BIA shall verbally notify EPA and the Navajo Nation and Hopi Tribe (collectively referred to as the Tribes) at least seven (7) days prior to conducting significant field events as described in the Workplan or Sampling and Analysis Plan. At EPA's verbal or written request, or the request of EPA's oversight assistant, BIA shall allow split or duplicate samples to be taken by EPA (and its authorized representatives) or the Tribes of any samples collected in implementing this Settlement Agreement. All split samples shall be analyzed by the methods

identified in the QAPP.

48. Access to Information.

a. BIA shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, assessing implementation of quality assurance and quality control practices, correspondence, or other documents or information related to the Work. BIA shall also make available to EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

b. BIA may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to EPA, or if EPA has notified BIA that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7) or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to BIA. BIA shall segregate and clearly identify all documents or information submitted under this Settlement Agreement for which BIA asserts business confidentiality claims.

c. BIA may assert that certain documents, records and other information are privileged

under the attorney-client privilege or any other privilege recognized by federal law. If the BIA asserts such a privilege in lieu of providing documents, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by BIA. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

d. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

49. In entering into this Settlement Agreement, BIA waives any objections to any data gathered, generated, or evaluated by EPA or BIA in the performance or oversight of the Work that has been verified according to the quality assurance/quality control (QA/QC) procedures required by the Settlement Agreement or any EPA-approved RI/FS Work Plans or Sampling and Analysis Plans. If BIA objects to any other data relating to the RI/FS, BIA shall submit to EPA a report that specifically identifies and explains its objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. The report must be submitted to EPA within fifteen (15) days of the monthly progress report containing the data.

XII. SITE ACCESS AND INSTITUTIONAL CONTROLS

50. If the Site, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by BIA, BIA shall, commencing on the Effective Date, provide EPA, and its representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Settlement Agreement. Because access to the Site requires coordination with the Hopi Tribes or the Navajo Nation, BIA will inform EPA of such requirement and coordinate any such access with the Hopi Tribes or the Navajo Nation and with EPA.

51. Except for lands held in trust by the United States on behalf of the Navajo Nation or Hopi Tribes, where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than BIA, BIA shall use its best efforts to obtain all necessary access agreements within thirty (30) days after the Effective Date, or as otherwise specified in writing by the EPA Project Coordinator. BIA shall immediately notify EPA if after using its best efforts it is unable to obtain such agreements. BIA shall describe in writing its efforts to obtain access, including efforts to obtain funds to pay reasonable sums of money in consideration of access, in accordance with Paragraph 79(b). If BIA cannot obtain access agreements, EPA may either (i) obtain access for BIA or assist BIA in gaining access, to the extent necessary to effectuate the Work described herein, using such means as EPA deems appropriate; (ii) perform those tasks or activities with EPA contractors; or (iii) terminate the Settlement Agreement. BIA shall reimburse EPA as Other Costs all costs and attorney's fees incurred by EPA in obtaining such access, in accordance with Paragraph 79(b). If EPA performs those tasks or activities with EPA contractors and does not terminate the Settlement Agreement, BIA shall perform all other tasks or activities not requiring access to that property, and shall reimburse EPA as Other Costs all costs incurred by EPA in performing such tasks or activities,

in accordance with Paragraph 79(b). BIA shall integrate the results of any such tasks or activities undertaken by EPA into its plans, reports and other deliverables.

52. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XIII. COMPLIANCE WITH OTHER LAWS

53. BIA shall comply with all applicable local, state, tribal and federal laws and regulations when performing the RI/FS. No local, state, tribal or federal permit shall be required for any portion of any action conducted entirely on-site, including studies, if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621. It is anticipated that all Work conducted pursuant to this Settlement Agreement will be conducted on-site. Where any portion of the Work is to be conducted off-site and requires a federal, tribal or state permit or approval, BIA shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. This Settlement Agreement is not, and shall not be construed to be, a permit issued pursuant to any federal, tribal or state statute or regulation.

XIV. RETENTION OF RECORDS

54. During the pendency of this Settlement Agreement and for a minimum of ten (10) years after commencement of construction of any remedial action, BIA shall preserve and retain all non-identical copies of documents, records, and other information (including documents, records, or other information in electronic form) now in its possession or control or which come

into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any BIA retention policy to the contrary. Until ten (10) years after commencement of construction of any remedial action, BIA shall also instruct its contractors and agents to preserve all documents, records, and other information of whatever kind, nature or description relating to performance of the Work.

55. At the conclusion of this document retention period, BIA shall notify EPA and [designated representatives of Hopi Tribe and Navajo Nation] at least ninety (90) days prior to the destruction of any such documents, records or other information, and, upon request by EPA, the Hopi Tribe or the Navajo Nation BIA shall deliver any such documents, records, or other information to EPA. BIA may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If BIA asserts such a privilege, it shall provide EPA with the following: 1) the title of the document, record, or other information; 2) the date of the document, record, or other information; 3) the name and title of the author of the document, record, or other information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or other information; and 6) the privilege asserted by BIA. However, no documents, records or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

56. BIA hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for

information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XV. DISPUTE RESOLUTION

57. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally. The Parties express their understanding that disputes should, in the first instance, be resolved informally at the Project Manager or immediate supervisor level. If resolution cannot be resolved informally, the procedures in this Section shall be used.

58. If BIA objects to any EPA action taken pursuant to this Settlement Agreement, including billings for Oversight Costs, Other Costs or stipulated penalties as defined in Section XIX (Payment of Costs) , BIA shall notify EPA in writing of its objection(s) within thirty (30) days of such action, unless the objection(s) has/have been resolved informally. EPA and BIA shall have thirty (30) days from EPA's receipt of BIA's written objection(s) to resolve the dispute (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Such extensions may be granted orally, but must be confirmed in writing.

59. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, BIA may, within thirty (30) days of the end of the Negotiation Period, submit a written statement of dispute to the Dispute Resolution Committee (DRC), including a statement of the

nature of the dispute, the work affected by the dispute, BIA's position with respect to the dispute and the technical, legal and factual information in support of its position. EPA and BIA shall each designate one individual to serve on the DRC. The EPA representative to the DRC shall be the Superfund Assistant Director and the BIA representative to the DRC shall be the BIA Regional Director, Western Region. Written notice of any delegation of authority from a Party's representative on the DRC shall be provided to the other Party's Project Manager. The DRC shall have twenty-one (21) days to either resolve the dispute and issue a written determination or submit the written statement of the dispute to the Senior Executive Committee (SEC) for resolution. EPA and BIA shall each designate one individual employed at the policy level Senior Executive Service (SES) or equivalent to serve on the SEC. The EPA representative to the SEC shall be the Superfund Division Director, EPA Region 9 and the BIA representative to the SEC shall be BIA's Deputy Bureau Director, Field Operations. Written notice of any delegation of authority from a Party's representative on the SEC shall be provided to the other Party's Project Manager. The SEC shall have twenty-one (21) days to resolve the dispute and issue a written determination. If agreement cannot be reached within this twenty-one (21)-day period, the Superfund Division Director of EPA Region 9 shall issue a written decision. The BIA's Deputy Bureau Director, Field Operations may, within twenty-one (21) days of the Superfund Division Director's issuance of a written decision, issue a written notice elevating the dispute to the EPA Regional Administrator and DOI's Assistant Secretary, Indian Affairs. In the event that BIA elects not to elevate the dispute to the Regional Administrator and DOI's Assistant Secretary, Indian Affairs, the decision of the Superfund Division Director shall be the final resolution of the dispute. Upon elevation of the dispute, the EPA Regional Administrator and the DOI's Assistant Secretary, Indian Affairs may meet and/or confer to discuss the issue. Upon resolution of the

dispute, the EPA Regional Administrator shall provide the Parties with a written final decision. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. BIA's obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section except such extensions as EPA, in its discretion, may approve. Following resolution of the dispute, as provided by this Section, BIA shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs, and regardless of whether BIA agrees with the decision.

XVI. STIPULATED PENALTIES

60. BIA shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 61 and 62 for failure to comply with any of the requirements of this Settlement Agreement specified below unless excused under Section XVIII (Force Majeure). "Compliance" by BIA shall include completion of the Work under this Settlement Agreement or any activities contemplated under any RI/FS Work Plan or other plan approved under this Settlement Agreement identified below, in accordance with all applicable requirements of law, this Settlement Agreement, the Workplan, and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

61. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per day for any noncompliance identified in Subparagraph 61(b):

<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
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\$ 500 per day	1 st through 14 th day
\$ 1,000 per day	15 th day and beyond

b. Compliance Milestones:

Failure to: Perform Work as required in the approved Workplan pursuant to Paragraph 31, Pay Oversight Costs or make best efforts pursuant to Paragraph 79(b) to pay Other Costs, Establish an Escrow Account (if required pursuant to the Section XIX, Payment of Costs).

62. Stipulated Penalty Amounts - Reports.

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents as specified by EPA pursuant to Paragraph 31, including but not limited to the SAP (QAPP & FSP), Site Management Plan (including Health and Safety Plan), Data Validation Reports/Data Evaluation Summary Reports, Eco and Human Health Risk Assessments, Remedial Investigation Report, Remedial Alternatives Screening Memorandum, Feasibility Study Report:

<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
\$ 250 per day	1 st through 14 th day
\$ 500 per day	15 th day and beyond

63. In the event that EPA assumes performance of a portion of the work pursuant to Paragraph 84 of Section XXI (Reservation of Rights by EPA), BIA shall be liable for a stipulated penalty in the amount of \$100,000.

64. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section X (EPA Approval of Plans and Other

Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies BIA of any deficiency ; and (2) with respect to a decision by the EPA Management Official designated in Paragraph 59 of Section XV (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA Management Official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

65. Following EPA's determination that BIA failed to comply with a requirement of this Settlement Agreement, EPA may give BIA written notification of the same and describe the noncompliance. EPA may send BIA a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified BIA of a violation.

66. All penalties accruing under this Section shall be due and payable pursuant to Section XIX (Payment of Costs), unless BIA invokes dispute resolution procedures in accordance with Section XV (Dispute Resolution).

67. The payment of penalties shall not alter in any way BIA's obligation to complete performance of the Work required under this Settlement Agreement.

68. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

69. If BIA fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. BIA shall pay Interest on the unpaid balance, which

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shall begin to accrue on the date of demand made pursuant to Paragraph 65.

70. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of BIA's violation of this Settlement Agreement or of the statutes and regulations upon which it is based. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

XVII. EXTENSIONS

71.a. A schedule, deadline, or milestone shall be extended upon receipt of a timely request for extension and when good cause exists for the requested extension. Any request for extension by BIA shall be submitted in writing to the EPA Project Manager and to the Chief of the Arizona and Navajo Sites Section and Assistant Director, Superfund Division, Partnerships, Land Revitalization and Cleanup Branch and shall specify:

1. The schedule, deadline, or milestone that is sought to be extended;
 2. The length of the extension sought;
 3. The good cause for the extension; and
 4. Any related schedule, deadline or milestone that would be affected if the extension were granted.
- b. Good cause exists for an extension when sought in regard to:
1. An event of Force Majeure;
 2. A delay caused by another Party's failure to meet any requirement of this Settlement

Agreement;

3. A delay caused by the good faith invocation of dispute resolution or the initiation of judicial action;

4. A delay caused, or which is likely to be caused, by the grant of an extension in regard to another schedule, deadline, or milestone;

5. Any other event or series of events mutually agreed to by the Parties as constituting good cause.

c. Absent agreement of the Parties with respect to the existence of good cause, BIA may seek and obtain a determination through dispute resolution that good cause exists. Within twenty one (21) days of receipt of a request for an extension of a schedule, deadline, or a milestone, EPA shall advise BIA in writing of its position on the request. Any failure by EPA to respond within the twenty one (21) day period shall be deemed to constitute concurrence in the request for an extension. If EPA does not concur in the request for an extension, it shall include in its statement of non-concurrence an explanation of the basis for its position.

If there is agreement that the extension is warranted, the schedule, deadline, or milestone shall be extended accordingly. If there is no consensus among the Parties as to whether all or part of the requested extension is warranted, the schedule, deadline, or milestone shall not be extended except in accordance with a determination resulting from the dispute resolution process.

Within seven (7) days of receipt of a statement of non-concurrence with the request for an extension, BIA may invoke dispute resolution.

d. A timely and good faith request for an extension shall toll any assessment of

stipulated penalties of the affected schedule, deadline, or milestone until a decision is reached on whether the requested extension will be approved. If dispute resolution is invoked and the requested extension is denied, stipulated penalties may be assessed and may accrue from the date of the original schedule, deadline, or milestone. Following the grant of an extension, an assessment of stipulated penalties may be sought only to compel compliance with the schedule, deadline, or milestone as most recently extended.

XVIII. FORCE MAJEURE

72. BIA agrees to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a force majeure. Except as provided in Paragraph 79(b) and 98, force majeure does not include financial inability to complete the work.

73. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a force majeure event, BIA shall notify EPA orally within seven (7) days of when BIA first knew that the event might cause a delay. Within twenty-one (21) days thereafter, BIA shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; BIA's rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of BIA, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above

requirements shall preclude BIA from asserting any claim of force majeure for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

74. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Settlement Agreement that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation.

75. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify BIA in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify BIA in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

76. The failure of a recipient of a P.L. 98-368 contract from BIA to perform work required under this Settlement Agreement shall not constitute a force majeure, but may constitute a good cause for an extension if BIA demonstrates that it has taken all reasonable steps to fund and ensure the timely performance of the work subject to the P.L. 98-368 contract. However, EPA may require that BIA complete the work by the extended deadline using another contractor.

77. a. A Force Majeure shall mean any event arising from causes beyond the control of the Party that causes a delay in or prevents the performance of any obligation under this Agreement, including but not limited to:

- i. Acts of God;
- ii. Fire;

- iii. War;
- iv. Insurrection;
- v. Civil disturbance;
- vi. Explosion;
- vii. Unanticipated breakage or accident to machinery, equipment or lines of pipe despite reasonably diligent maintenance;
- viii. Adverse weather conditions that could not be reasonably anticipated;
- xiv. Unusual delay in transportation;
- x. Restraint by court order or order of public authority;
- xi. Inability to obtain, at reasonable cost and after exercise of reasonable diligence, any necessary authorizations, approvals, permits or licenses due to action or inaction of any governmental agency or authority other than the BIA;
- xii. Delays caused by compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures, despite the exercise of reasonable diligence; and
- xiii. Insufficient availability of appropriated funds, if the BIA shall have made a timely request for such funds as a part of the budgetary process as set forth in Section XXVIII – FUNDING.
- xiv. A Force Majeure shall also include any strike or other labor dispute, whether or not within control of the Parties affected thereby.

b. Force Majeure shall not include increased costs or expenses of response actions, whether or not anticipated at the time such response actions were initiated.

XIX. PAYMENT OF COSTS

78. The total amounts to be paid by BIA pursuant to Paragraph 79 shall be deposited in the Tuba City Dump 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, except for stipulated penalties, which shall be paid according to Paragraphs 66 and 80.

79. Payment of Costs

a. BIA agrees to pay EPA all Oversight Costs (including Interest) not inconsistent with the NCP, under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), incurred at the Site in connection with this Agreement, within sixty (60) days of a request for payment from EPA. If EPA does not receive payment within sixty (60) days of its request, Interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), will accrue.

b. Subject to subparagraph (ii) below, BIA will take all actions necessary to provide for all payment obligations for Other Costs and stipulated penalties pursuant to Section XVI (Stipulated Penalties) required in this Settlement Agreement, and to ensure funding for the performance of the Remedial Investigation/Feasibility Study and other activities required in this Settlement Agreement.

(i) Such actions shall include, but not be limited to: (1) using already appropriated money to pay for Other Costs; (2) obtaining an agreement with other Potentially Responsible Parties (PRPs) (which may include direct payment from those other PRPs to EPA and/or the payment of funds from the Judgment Fund); (3) making formal requests for authorization and appropriation,

or taking such other steps as directed by the Office of Management and Budget ("OMB"), to secure funds for this purpose; or (4) using any combination of the above.

(ii) If BIA cannot use already appropriated money to meet any obligation of this Settlement Agreement, BIA agrees to use its best efforts to meet its obligations for the payment of Other Costs. In the event that BIA must make a request for authorization and appropriation for such purpose, BIA shall submit its formal request to DOI for submission to OMB as part of the first DOI fiscal year budget submission following receipt of EPA's estimate of total payment obligations that are expected to be incurred annually with respect to Work performed by BIA under this Agreement. In the event that Congress fails to authorize and appropriate any funds after the first such request, BIA shall continue to request that DOI submit a formal request to OMB each year thereafter until such time as Congress authorizes and appropriates such funds. Any requested amount of Oversight Costs shall be based on a revised EPA cost estimate each year.

(iii) If Congress has authorized and appropriated funds for such purpose, BIA will pay such Other Costs within sixty (60) days. If EPA does not receive payment within sixty (60) days after Congress has authorized and appropriated funds for such purpose, Interest will accrue.

c. BIA and EPA agree to work cooperatively with DOJ to seek recovery of response costs incurred by the United States.

80. Method of Payment

a. Oversight Costs and Other Costs

BIA shall pay all Oversight Costs and Other Costs not inconsistent with the NCP. On a periodic basis, EPA will send BIA a bill requiring payment that includes a SCORES Report,

which includes direct and indirect Oversight Costs and Other Costs incurred by EPA and its contractors. BIA shall make payments of Oversight Costs and Other Costs pursuant to Paragraph 79(a) and (b) to “EPA Hazardous Substance Superfund,” referencing the EPA Site Spill ID number 09RF, sent to U.S. EPA Superfund Payments, Cincinnati Finance Center, P.O. Box 979076 St. Louis MO 63197-9000. At the time of payment, BIA shall send notice that the payment has been made to EPA’s Project Coordinator as provided in Paragraph 28. The total amount to be paid by BIA shall be deposited into the TCOB Special Account within the EPA Hazardous Substance Superfund, to be retained and used to conduct or finance response costs incurred by EPA at the Site.

b. Stipulated Penalties

All Stipulated Penalty payments to EPA under this Section shall be paid by a method to be prescribed by EPA and payable to “EPA Hazardous Substances Superfund”:

USEPA, Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

or as otherwise prescribed by EPA, and shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 09RF, the EPA Docket Number 2010-09, and the name and address of the party(ies) making payment. Evidence of payment paid pursuant to this Section, and any accompanying transmittal letter(s) shall be sent to the EPA Project Coordinator as provided in Paragraph 28, and to: Karen Goldberg, ORC-3, USEPA, 75 Hawthorne Street, San Francisco, CA, 94105.

81. BIA may contest payment of any Oversight Costs or Other Costs under Paragraph 79 if it determines that EPA has made an accounting error or if it believes EPA incurred excess

Oversight Costs or Other Costs as a direct result of an EPA action that was inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the EPA Project Coordinator. Any such objection shall specifically identify the contested Oversight Costs or Other Costs and the basis for objection. In the event of an objection, BIA shall pay all uncontested Oversight Costs and Other Costs to EPA in the manner described in Paragraph 79. Simultaneously, subject to Paragraph 79(b), BIA shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Arizona and remit to that escrow account funds equivalent to the amount of the contested Oversight Costs or Other Costs. BIA shall send to the EPA Project Coordinator a copy of the transmittal letter and check paying for uncontested Oversight Costs and Other Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, regardless of whether adequate funds are appropriated or authorized to pay the disputed amount into the escrow account, BIA shall initiate the Dispute Resolution procedures in Section XV (Dispute Resolution). If EPA prevails in the dispute, BIA shall pay the sums due (with accrued Interest) to EPA in the manner described in Paragraph 79. If BIA prevails concerning any aspect of the contested Oversight Costs or Other Costs, BIA shall pay that portion of the Oversight Costs or Other Costs (plus associated accrued Interest) for which they did not prevail to EPA in the manner described in Paragraph 79. BIA shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures

set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding BIA's obligation to pay or reimburse EPA for Oversight Costs or Other Costs.

XX. COVENANT BY EPA

82. In consideration of the actions that will be performed and the payments that will be made by BIA under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to take administrative action against BIA pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work and for recovery of Oversight Costs or Other Costs. This covenant shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by BIA of all obligations under this Settlement Agreement, including, but not limited to, payment of Oversight Costs and Other Costs pursuant to Section XIX. This covenant extends only to BIA and does not extend to any other person.

XXI. RESERVATIONS OF RIGHTS BY EPA

83. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking to enforce the terms of this Settlement Agreement, from taking other action as it deems appropriate and necessary, or from requiring BIA in the future to perform additional activities pursuant to CERCLA or any other applicable

law.

84. The covenant set forth in Section XX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against BIA with respect to all other matters, including, but not limited to:

- a. claims based on a failure by BIA to meet a requirement of this Settlement Agreement;
- b. liability for costs not included within the definition[s] of Oversight Costs or Other Costs in Section XIX (Payment of Costs);
- c. liability for performance of response action other than the Work;
- 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 assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site;
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site; and
- h. liability for transportation, treatment, storage or disposal of Waste Material at or in connection with the Site after the Effective Date of this Settlement Agreement.

85. Work Takeover. In the event EPA determines that BIA 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 which 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. BIA may invoke the procedures set forth in Section XV (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by EPA in performing the Work pursuant to this Paragraph shall be considered Other Costs that BIA shall pay pursuant to Section XIX (Payment of Costs).

Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXII. COVENANT BY BIA

86. BIA covenants and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Oversight Costs or Other Costs, stipulated penalties or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the Work or arising out of the response actions for which the Oversight Costs or Other Costs have or will be incurred, including any claim under the United States Constitution, the Arizona State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work or payment of Oversight Costs or Other Costs.

87. These covenants shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 84 (b), (c), and (e) - (g), but

only to the extent that BIA's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

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

XXIII. OTHER CLAIMS

89. By issuance of this Settlement Agreement, EPA assumes no liability for injuries or damages to persons or property resulting from any acts or omissions of BIA.

90. Except as expressly provided in Section XXII (Covenant by BIA), and Section XX (Covenant by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against BIA or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and Interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

91. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIV. EFFECT OF SETTLEMENT/CONTRIBUTION

92. a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that BIA is entitled, as of the Effective Date, to protection from contribution actions or claims as provided

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by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Settlement Agreement. The “matters addressed” in this Settlement Agreement are the Work, Oversight Costs and Other Costs.

b. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which the BIA has, as of the Effective Date, resolved its liability to EPA for the Work, Oversight Costs and Other Costs.

c. Except as provided in Section XXII (Covenant by BIA), nothing in this Settlement Agreement precludes EPA or BIA from asserting any claims, causes of action, or demands for indemnification, contribution or cost recovery against any person not parties to this Settlement Agreement. Nothing herein diminishes the right of EPA, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

XXV. INTEGRATION/APPENDICES

93. This Settlement Agreement and its appendices and any deliverables, technical memoranda, specifications, schedules, documents, plans, reports (other than progress reports), etc. that will be developed pursuant to this Settlement Agreement and become incorporated into and enforceable under this Settlement Agreement constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement

Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

“Appendix A” is the map of the Site.

XXVI. ADMINISTRATIVE RECORD

94. EPA will determine the contents of the administrative record file for selection of the remedial action. BIA shall submit to EPA documents developed during the course of the RI/FS upon which selection of the response action may be based. Upon request of EPA, BIA shall provide copies of plans, task memoranda for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports and other reports. Upon request of EPA, BIA shall additionally submit any previous studies conducted under state, local or other federal authorities relating to selection of the response action, and all communications between BIA and state, local or other federal authorities concerning selection of the response action. BIA shall establish a community information repository at or near the Site, to house one copy of the administrative record.

XXVII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

95. This Settlement Agreement shall be effective on the date the Settlement Agreement is signed by whichever Party signs latest.

96. This Settlement Agreement may be amended by mutual agreement of EPA and BIA. Amendments shall be in writing and shall be effective when signed by the Parties. EPA Project Coordinators do not have the authority to sign amendments to the Settlement Agreement.

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97. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by BIA shall relieve BIA of its obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXVIII. FUNDING

98. It is the expectation of the Parties that all obligations of BIA arising under this Settlement Agreement will be fully funded. BIA agrees to seek sufficient funding through its budgetary process to fulfill its obligations under this Settlement Agreement. Any requirement for the payment or obligation of funds by BIA pursuant to this Settlement Agreement shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342 and 1511-1519. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted. If funds are not available to fulfill BIA's obligations under this Settlement Agreement, EPA reserves the right to initiate an action consistent with its authorities or to take any appropriate response action. Consistent with law and applicable Office of Management and Budget (OMB) regulations and policies concerning the release of budgetary information, BIA shall timely apprise EPA of budget information available to BIA that may adversely affect project schedules. BIA shall honor all reasonable EPA requests for budget information related to requests for extensions of project schedules, claims of force majeure, or

other event based on budget limitation.

XXIX. NOTICE OF COMPLETION OF WORK

99. When EPA determines that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including but not limited to payment of Oversight Costs and Other Costs and record retention, EPA will provide written notice to BIA. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify BIA, provide a list of the deficiencies, and require that BIA modify the RI/FS Work Plan if appropriate to correct such deficiencies, in accordance with Paragraph 33 (Modification of the Work Plan). Failure by BIA to implement the approved modified RI/FS Work Plan shall be a violation of this Settlement Agreement.

Agreed this ___ day of _____, 2010.

For Bureau of Indian Affairs _____

By: _____

Rodney McVey, Acting Regional Director, Western Region, BIA

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It is so ORDERED AND AGREED this _____ day of _____, 2010.

BY: _____

Clancy Tenley

Assistant Director, Superfund Division

Partnerships, Land Revitalization and Cleanup Branch

U.S. Environmental Protection Agency, Region 9

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and record retention, EPA will provide written notice to BIA. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify BIA, provide a list of the deficiencies, and require that BIA modify the RI/FS Work Plan if appropriate to correct such deficiencies, in accordance with Paragraph 33 (Modification of the Work Plan). Failure by BIA to implement the approved modified RI/FS Work Plan shall be a violation of this Settlement Agreement.

Agreed this 30th day of August, 2010.

For Bureau of Indian Affairs

By  _____

Bryan Bowker, Regional Director, Western Region, BIA

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It is so ORDERED AND AGREED this 10th day of September, 2010.

BY: Clancy Tenley acting for

Clancy Tenley

Assistant Director, Superfund Division

Partnerships, Land Revitalization and Cleanup Branch

U.S. Environmental Protection Agency, Region 9

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