

IN THE MATTER OF:

AGREEMENT
PERTAINING TO DISTAL CHAT

[Property description and Distal Chat located
thereon] located on the Tar Creek Superfund
Site Ottawa County, Oklahoma

Owners as Listed Herein,

Owners

I. PURPOSE

This Agreement pertaining to Distal Chat (hereinafter Agreement) is made and entered into by and between the United States Environmental Protection Agency (hereinafter EPA), the United States Department of the Interior (hereinafter DOI) and those individuals who have an interest in the subject land and/or distal chat located thereon (hereinafter Owners as identified in Exhibit C, attached hereto, and incorporated herein).

Under this Agreement, Owners agree to permit the EPA to take certain actions with respect to Owners Distal Chat and underlying land pursuant to the Comprehensive, Environmental, Response, and Compensation, and Liability Act, 42 U.S.C. §§ 9601 to 9675 (hereinafter CERCLA) and EPA's Record of Decision ("ROD") for Operable Unit 4 ("OU4"), of the Tar Creek Superfund Site (hereinafter Site), issued February 20, 2008 (*see e.g.*, OU4 ROD at section 19.2.4.1 (Remedial Actions in Distal Areas) and at 19.2.2 (Chat Sales and Environmentally Acceptable Chat Use).

The Property and Distal Chat that is subject of this Agreement, more particularly described in Appendix B, attached hereto and incorporated herein, is located within the Tar Creek Superfund Site, and is therefore subject to the provisions contained in *See* OU4 ROD at section 19.2.4.1 (Remedial Actions in Distal Areas) and at Figure 3 (Tar Creek Distal Zones and Watersheds).

EPA believes that the excavation and relocation of Owners distal chat may increase the value of the distal chat and facilitate the remediation of the underlying land and is therefore offering Owners several options listed in Appendix D, attached hereto and incorporated herein, regarding Owners Distal Chat in order to help facilitate Owners disposition of the distal chat, in a manner the Owners prefer and to facilitate the remediation of the underlying land at no expense to the Owners. In order to help Owners make an informed decision as to which option to choose, BIA is providing Owners with a current appraisal of Owners Distal Chat, Appendix E, attached hereto and incorporated herein , which includes the value of: (1) Owner's Distal Chat in its current location; (2) Owner's Distal Chat after EPA removes and consolidates the chat with other chat; (3) the land underlying Owner's Distal Chat, with the Distal Chat in place; and (4) the land underlying Owner's Distal Chat after EPA removes the chat and restores the land as set forth in Appendix G, EPA's Surface Restoration and Response Plan.

II. BACKGROUND

The Site was mined for lead and zinc ore from approximately the late 1800s through the early 1970's. The Site is contaminated with hazardous substances including lead, cadmium, and zinc resulting from historic mining operations. Through various response actions under CERCLA, EPA, in coordination with DOI and other Federal and State agencies as provided in the National

Contingency Plan, 40 CFR Part 300, is addressing this contamination. A portion of the Site includes Indian lands that are federally restricted against alienation. In furtherance of implementing the selected Remedy for such lands, the EPA is conducting response actions in coordination with the Quapaw Tribe of Oklahoma (O-Gah-Pah) (the Tribe) the DOI, and the State of Oklahoma.

Much of the Site contamination is contained with approximately 31 million cubic yards of mine tailings known as Chat that have been disposed of on the Site, including the subject property. Most of the Chat is located in large piles (Chat piles). The Chat is also located in areas known as Chat bases that are areas that once contained larger Chat piles, but only a residual layer of Chat that may be several feet thick remains. Chat-covered haul roads, and non-operating railroad grades also contain Chat. EPA has determined that Chat piles, Chat bases, Chat-covered haul roads, and non-operating railroad grades generally may pose a risk to human health and the environment that should be addressed under CERCLA.

EPA, in its February 20, 2008, Record of Decision (ROD) for Tar Creek Superfund Site Operable Unit 4 (OU4) determined that one of the best ways to address contaminated chat piles and bases on the Site is to sell and remove the Chat for use in a manner that will not present a threat to human health or to the environment. EPA's OU4 ROD and 40 CFR Part 278 establish acceptable uses of Site Chat and proscribe uses of Site Chat other than those uses described in the ROD and Part 278 including its preamble.

Although sale and appropriate use of chat is one of the best ways to clean up the chat, the EPA believes some chat, such as Owners Distal Chat, may not be currently marketable and has nominal or no value in its current location because it is located in a chat pile that is too small or because there are issues related to the quality of the chat. EPA believes that if the Owners Distal

Chat is relocated to a place where it can be consolidated into one or more larger pile(s) of like substance with the Chat from other small piles and areas, then it is more likely, but not certain, to sell. Further, EPA believes that the removal of the chat at no expense to the Owners and EPA's response action with respect to the surface of the Property constitutes a beneficial and positive value in and of itself and may constitute a form of just compensation to the Chat and Land Owners.

III. AUTHORITY

The EPA and DOI hereby undertake the actions set forth herein pursuant to response and enforcement authorities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Sections 9601-9675, and in a manner consistent with the United States trust responsibility to the Owners with an interest in the subject land which is imposed by restrictions upon alienation pursuant to the Act of March 3, 1921, 41 Stat. 1225, 1248 (1921 Act).

The Owners hereby voluntarily agree to authorize the EPA [insert authorized actions chosen by Owners] as set forth in Appendix D, attached hereto and incorporated herein. Owners understand that if Owners deny EPA access to the property and the opportunity to excavate and remove Owners Distal Chat and remediate the underlying land, that Owners will be responsible for the disposition of the Distal Chat at Owners expense or may become subject to enforcement actions by EPA as authorized by CERCLA.

IV. DEFINITIONS

Unless otherwise expressly provided in this Agreement, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA will have the

meaning assigned to them in CERCLA or the regulations. Whenever terms listed below are used in this Agreement, the following definitions apply for the purposes of this Agreement:

a. Chat shall mean gravel-like mine refuse or mine tailings plus smaller intermingled material such as sands and fine tailings.

b. Chat Rule shall mean the EPA's regulations adopted as 40 CFR Part 278 including without limitation its preamble

c. DOI shall mean the United States Department of the Interior (DOI) and its bureaus and agencies including without limitation the Bureau of Indian Affairs, the United States Geological Survey and the Bureau of Land Management and also including its officers, employees, contractors and authorized parties.

d. EPA shall mean the United States Environmental Protection Agency, its officers, employees, contractors, and EPA-authorized parties.

e. Fine Tailings shall mean sand-like tailings from mining, milling processes including chat washing and flotation.

f. Owner or Owners shall mean the interest holder(s) in the Distal Chat and/or the Property underlying the Distal Chat who are signatories to this Agreement and are identified in Appendix C.

g. Distal Chat shall mean any and all Chat located in small chat piles, Chat bases, Chat-covered haul roads, and non-operating railroad grades on the Property, whether or not it is in contiguous piles, bases, chat-covered haul roads, or non-operating railroad grades, as more particularly described in Appendix B.

h. Parties shall mean EPA and DOI, and the Owners.

i. Property shall mean the land on which the Owners Chat is located and which is within the area known as the Tar Creek Superfund Site and which is described in Appendix B of this Agreement. Appendix B includes a map and legal description of the Property and the Distal Chat located thereon. Appendix B contains an estimated tonnage as determined by EPA of the Distal Chat to be excavated and removed by the EPA. The tonnage listed in Appendix B is only an estimate because changing moisture content in chat can cause the tonnage to vary over time. For example, a given quantity of Chat may weigh more after a rainfall than it will after a dry period.

j. Restricted when used as an adjective herein refers to the restrictions on alienation that the United States Congress has placed on the property of certain Indians, thereby making certain actions related to such property subject to approval by the Secretary of the Interior or his authorized representative. Appendix C shows the percentage of interest of ownership of each Indian Owner in the restricted Property and in the Chat located on the Property. [Note: to be redacted as necessary when provided to co-owners.]

k. Site shall mean the Tar Creek Superfund Site. The Site is located in an undefined area of approximately 40 square miles in Ottawa County, Oklahoma. The Site includes, but is not limited to, the Oklahoma portion of a former lead and zinc mining area (Picher Mining Field), and any area where a hazardous substance from mining or milling in Ottawa County has been deposited, stored, disposed of, placed, or otherwise come to be located. OU4 is part of the Site. The principal communities on the Site are Commerce, Cardin, Picher, Quapaw, and North Miami, Oklahoma. The Site is described in the attached site map (Appendix A). However, it

may be determined by EPA that the Site is somewhat larger or somewhat differently shaped than the area described in the attached map. The Property is part of the Site.

l. Transition zone soil shall mean the soil found around and under chat piles, chat bases, or fine tailings deposits extending outward from the piles, bases or deposits. The areal extent of the contaminated Transition Zone soil is described in Appendix G.

m. Tribe shall mean the Quapaw Tribe of Oklahoma (O-Gah-Pah),

m. United States shall mean the United States of America.

V. AGREEMENT BY OWNERS

As of the Effective Date of this Agreement, each of the Owners hereby consents to EPA entering and having continued access to the subject Property and undertaking the following actions: [the remainder is applicable if Owners choose the option to have EPA excavate/relocate distal chat]

- a. Estimating the volume and other physical attributes of Chat, Fine Tailings and contaminated Transition Zone Soil on the Property;
- b. Taking photographs or digital recordings of the Chat, Fine Tailings and contaminated Transition Zone Soil on the Property, and taking photographs or digital recordings of EPAs sampling and excavation activities on the Property;
- c. Sampling the Owners Chat , Fine Tailings, and Transition Zone Soil on the Property by removing small quantities of those materials (not to exceed 150 one gallon bags) from the Property for laboratory analysis (the purpose of this sampling is to determine whether contaminant concentrations in the materials exceed the remediation goals identified in the ROD);

- d. Measuring and/or re-measuring the total volume of the Owners Distal Chat (this information will be provided to the Owners, to the Tribes realty office, and to the Bureau of Indian Affairs), the Fine Tailings, and contaminated Transition Zone Soil;
- e. Excavating the Owners Distal Chat, and any Fine Tailings, and any contaminated Transition Zone Soil (where that Transition Zone Soil has concentrations of contaminants that exceed the remediation goals established in the ROD at Section 15.1 (Remedial Action Objectives for the Site)) using excavation equipment, placing it in a truck, and removing it from the Property, using dust control measures to prevent contamination;
- f. Transporting the Owners Distal Chat excavated hereunder to another location, as specified in Appendix F hereto (Appendix F contains a map showing the location where Owners Distal Chat will be relocated under this Agreement);
- g. Soil cover will not be hauled in to backfill the excavated areas once occupied by Chat, Fine Tailings, or contaminated Transition Zone Soil on the Property. Rather, soils at the bottom of the excavated area will be rebuilt naturally to sustain vegetation using standard land preparation practices such as ripping, contouring, adding amendments, disking, fertilizing, planting, and seeding. In areas that are excavated, nearby Transition Zone Soils that do not contain concentrations of contaminants that exceed the remediation goal will be used in the natural soil rebuilding process that is implemented after excavation.

As of the Effective Date of this Agreement, Owners hereby agree that EPA may, in any manner provided in the ROD and as specified in the attached Appendix G, dispose of any Fine Tailings and contaminated Transition Zone Soil which EPA excavates and removes from the Property.

Owners shall, commencing on the Effective Date of this Agreement, refrain from using the Property or the Owners Distal Chat in any manner that would interfere with or adversely affect EPA's operations on the Property. EPA will notify Owners when EPA has completed the response action at the property.

Owners recognize that EPA can invoke authorities under CERCLA and other applicable law, to access the Property or Owners Distal Chat in order to conduct response actions, and that those authorities are unaffected by this Agreement.

Owners recognize that excavation and removal and consolidation of the Distal Chat from the Property may provide protection of human health and the environment from the contaminants found in the Distal Chat. Each Owner recognizes that the excavation and removal of Fine Tailings and contaminated Transition Zone Soil from the Property provide protection of human health and the environment from the contaminants found in the Fine Tailings and Transition Zone Soil.

Owners agree that, under the terms of this Agreement, the Owners of Distal Chat will not be requesting or receiving any monetary compensation from the United States for any value that the Owners Distal Chat may have prior to removal and consolidation.

Further, Owners agree that the actions that EPA will undertake to excavate, transport, and relocate the Distal Chat will be carried out at EPA's expense, and that no payment or reimbursement will be owed by the Owners in the event the distal chat is subsequently sold, regardless of the value the Distal Chat may have.

Owners recognize and agree that any monetary compensation they may receive will come from the possible sale of their chat to another person or entity, once the chat is consolidated in

larger piles. Further, Owners recognize that the sale of Owners Distal Chat, even after relocation by EPA, is not certain and may never happen.

Owners recognize and agree that EPA's relocation of Owners Distal Chat may affect the value of the Chat positively or negatively.

Owners recognize that this Agreement is entered into voluntarily with the knowledge of their right to refuse this Agreement without threats of any kind.

VI. AGREEMENT BY EPA AND DOI

EPA will excavate the Owners Distal Chat on the Property, to the underlying native soil, consistent with the Surface Restoration Response Plan, attached in Appendix G. EPA shall take confirmation samples in the Transition Zone Soil to ensure that the remediation goal is met. EPA will rebuild the soils at the bottom of the excavated area naturally to sustain vegetation using standard land preparation practices such as ripping, contouring, adding amendments, disking, fertilizing, planting, and seeding as provided in Section 19.2.4.1 (Remedial Actions in Distal Areas) of the ROD. Soil cover will not be hauled in to backfill the excavated areas once occupied by chat or contaminated soil on the Property. Rather, soils at the bottom of the excavated area will be rebuilt naturally to sustain vegetation using standard land preparation practices such as ripping, contouring, adding amendments, disking, fertilizing, planting, and seeding. In areas that are excavated, nearby transition zone soils that do not contain concentrations of contaminants that exceed the remediation goals will be used in the natural soil rebuilding process that is implemented after excavation.

EPA will transport the excavated Owners Distal Chat to a new location within the Site. The location to which the Owners Distal Chat is to be transported is identified in Appendix F.

At the time the Owners Distal Chat is excavated, the EPA shall be responsible for ensuring that all Distal Chat excavated from the Property is accurately weighed before it is transported from the subject Property to the new location described in Appendix F and attached hereto, and that all such chat is actually transported and deposited at the new location. The EPA shall ensure that accurate records of the Distal Chat excavated and removed from the Property are maintained, and that such records are provided in a timely manner to the BIA.

If Owners Distal Chat is subsequently sold, the DOI will approve such sales when in the best interest of the Indians and will collect and distribute the proceeds of such sales to the appropriate Owners. The DOI is not responsible for payments and contracts relating to non-Indian owned chat and unrestricted land.

EPA will excavate Fine Tailings, and contaminated Transition Zone Soil (where that Transition Zone Soil has concentrations of contaminants that exceed the remediation goals established in the ROD at Section 15.1 (Remedial Action Objectives for the Site)), and EPA will remove the Fine Tailings and Transition Zone Soil from the Property and dispose of it in a manner consistent with the ROD and as specified in Appendix G.

EPA will facilitate activities to generally support chat sales by undertaking the following actions as provided in Section 19.2.2 (Chat Sales and Environmentally Acceptable Chat Use) of the ROD:

a) EPA will work with the DOI and the Tribe to facilitate sales of restricted Indian-owned Chat.

- b) EPA will present a workshop to assist chat/land owners and sellers with chat sales.
- c) EPA will provide sample Chat sale agreements and site operating plans to Chat/land owners and chat processors.
- d) EPA will answer questions about the Chat Rule.
- e) EPA will provide technical review to any requests for Chat use other than Chat mixed in asphalt for federal transportation projects.
- f) EPA will conduct a risk assessment on chat materials that exceed the SPLP and proposed for use in concrete as specified in the Chat Rule to support the ultimate sale of the chat.
- g) EPA will coordinate with DOJ, as outlined in the ROD, regarding liability protection for chat/land owners.

With respect to the location upon which Distal Chat is relocated and consolidated, EPA will maintain security of the location and enforce compliance of approved operations or activities at the new location, as set forth in Appendix F.

With respect to the subject property, the DOI will provide the Indian chat owners a current fair market economic appraisal, attached hereto as Appendix E, which includes the value of: (1) Owner's Distal Chat in its current location; (2) Owner's Distal Chat after EPA removes and consolidates the chat with other chat; (3) the land underlying Owner's Distal Chat, with the Distal Chat in place; and (4) the land underlying Owner's Distal Chat after EPA removes the chat and restores the land as set forth in Appendix G, EPA's Surface Restoration and Response Plan.

With respect to the possible subsequent sale of the chat piles consolidated by EPA in which Owners have an interest, the DOI will do the following:

- a) based upon EPA's excavation and relocation reports, DOI will perform engineering ownership determinations, cadastral surveys, and appraisals, if needed;
- b) DOI will undertake outreach and communication with the Indian owners of restricted Chat and land regarding chat sales and surface leasing;
- c) DOI will undertake appraisals of the fair market value of Chat and surface leases and provide copies thereof to Owners;
- d) DOI will perform necessary tasks associated with the review and possible approval of chat sales contracts and business site leases,
- e) DOI will undertake quantitative analysis of Chat removed from Indian-owned Chat piles for production verification purposes;
- f) DOI will perform tasks associated with the accounting of funds and distribution of proceeds from the sale of restricted chat to Indian owners;
- g) DOI will undertake logistics associated with competitive or negotiated sales of Indian-owned Chat;
- h) DOI will provide assistance, as appropriate in negotiations between Indian owners of restricted chat and potential Chat purchasers;
- i) DOI will coordinate Chat sales and other issues with the relevant offices of Federal, State, and Tribal governments; and
- j) DOI will review and enforce sellers compliance with approved Chat sales agreements and volumetric recording of Chat sales.

VII. DOI AND EPA RESERVATION OF RIGHTS

This Agreement does not constitute, nor should it be construed as, a covenant not to sue or waiver of prosecutorial discretion by the United States concerning any matter related to the Tar Creek Superfund Site. In addition, nothing in this Agreement is intended to waive any rights the United States may have at law or in equity concerning the Tar Creek Superfund Site against any parties associated with the Site including without limitation any of the Owners, except as set forth and agreed in the Settlement Agreement Pertaining to the Disposition of Distal Chat, Appendix H, attached hereto and incorporated herein.

Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by the United States in exercising its authority under federal law including response actions under CERCLA related to the Property.

IX. PARTIES BOUND/TRANSFER OF COVENANT

This Agreement shall apply to and be binding upon the Owners and their heirs, successors and assigns. Any change in ownership or other legal status of Owners subsequent to the Effective Date, including but not limited to, any transfer of assets or real or personal property, shall in no way alter Owners responsibilities under this Agreement. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Owners under this Agreement may not be assigned or transferred to any person without the prior written consent of the United States in its sole discretion.

In the event of an assignment or transfer of the Property or the Owners Chat Pile or an assignment or transfer of an interest in the Property or the Owners Chat Pile, the assignor or

transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA, DOI and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the Owner involved in the assignment or transfer must ensure that the assignee or transferee consents in writing to be bound by the terms of this Agreement.

X. NOTICES

Owners shall direct all notices required by this Agreement to the United States representatives identified below at the addresses listed below:

Ursula Lennox (6SF-LP)
Remedial Project Manager
EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Regional Director
Eastern Oklahoma Regional Office
Bureau of Indian Affairs
P.O. Box 8002
Muscogee, Oklahoma 74402

Superintendent
Miami Agency
Bureau of Indian Affairs
P.O. Box 391
Miami, Oklahoma 7354

The United States communications with each Owner shall be directed to the addresses listed in Appendix C, and any notification sent to an Owner at the address listed in Appendix C shall fulfill any notification requirement under this Agreement.

XI. EFFECTIVE DATE

This Agreement may be signed in counterparts. The Effective Date of this Agreement shall be the date upon which it is signed by all the Parties.

XII. INTEGRATION/APPENDICES

This Agreement, along with the appendices attached hereto, encompasses the entire agreement of the Parties, and supersedes all previous understandings and agreements between the Parties, whether oral or written. The Parties acknowledge and represent that they have not relied on any representation, assertion, or other assurance, except those set out in this Agreement, made by or on behalf of any other Party or any other person or entity whatsoever, prior to the execution of this Agreement. The Parties hereby waive all rights and remedies, at law or in equity, arising or which may arise as the result of a Party's reliance on such representation, assertion, or other assurance, provided that nothing herein contained shall be construed as a restriction or limitation of said Party's right to remedies associated with the gross negligence, willful misconduct or fraud of any person or party taking place prior to, or contemporaneously with, the execution of this Agreement. The following appendices are attached to and incorporated into this Agreement:

"Appendix A" is the Tar Creek Site Map;

Appendix B is the Property Description which describes the estimated quantity of Owners Distal Chat that is subject of this Agreement and a legal description of the Property on which it is currently located;

"Appendix C" is "Owners Signatures, Contact Information, and Ownership Information" which is a listing of Owners and the percentage of each of their interest in the Property and/or Distal Chat;

Appendix D is the Owners Options for the Disposition of the Distal Chat and Just Compensation;

Appendix E is the Site Specific Distal Chat Appraisal which is the estimated fair market value of : (1) Owner's Distal Chat in its current location; (2) Owner's Distal Chat after EPA removes and consolidates the chat with other chat; (3) the land underlying Owner's Distal Chat, with the Distal Chat in place; and (4) the land underlying Owner's Distal Chat after EPA removes the chat and restores the land as set forth in Appendix G, EPA's Surface Restoration and Response Plan.; [and if applicable under the chosen option]

Appendix F is EPA's Plan of Disposition of Distal Chat which describes the location(s) where the Owners Distal Chat is to be taken, by whom it will be transported and kept track of, and the manner in which EPA will secure the site(s);

Appendix G is EPA's Surface Restoration and Response Plan, describing EPA's restoration and remediation plan of Owners property, currently underlying the chat; and

Appendix H Settlement Agreement Pertaining to the Disposition of Distal Chat.

XIV. TERMINATION

Unless otherwise agreed to by the Parties in writing, this Agreement shall terminate when EPA notifies the Owners in writing that EPA has completed the response action at the property, or on _____ [date], whichever is sooner. If a court issues an order that invalidates any provision of this Agreement, the Parties shall remain bound to comply with all provisions of this Agreement not invalidated by the court's order.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

_____ Date _____
SAMUEL COLEMAN, P.E.
Superfund Division Director
Region 6

UNITED STATE DEPARTMENT OF THE INTERIOR

BY:

_____ Date _____
Superintendent Miami Agency, Bureau of Indian Affairs

OWNERS [see attached signatures in Appendix C]