

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

IN THE MATTER OF:

[Chat Pile Name] located on the Tar Creek
Superfund Site Ottawa County, Oklahoma

Chat Interest Holders/Owners as Listed
Herein,

Settlors

SETTLEMENT AGREEMENT
PERTAINING TO THE DISPOSITION OF
DISTAL CHAT

U.S. EPA Region 6
CERCLA Docket No. _____

Proceeding Under the Comprehensive
Environmental Response, Compensation, and
Liability Act, as amended, 42 U.S.C. § 9601 *et*
seq.

I. INTRODUCTION

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, and the authority of the Attorney General of the United States to compromise and settle claims of the United States. This Settlement Agreement Pertaining to the Disposition of Distal Chat (“Agreement”) is made and entered into by and between the United States on behalf of the Environmental Protection Agency (“EPA”) and the United States Department of the Interior (“DOI”), and Settlers [signatories are identified on Appendixes D and E] (collectively the “Parties”).

Each Settlor is an interest holder in the Property and/or the Distal Chat which is/are a part of Operable Unit 4 (“OU4”) of the Tar Creek Superfund Site (the “Site”) located in Ottawa County, Oklahoma (*see* Site map, Appendix A attached). In the Act of March 3, 1921, 41 Stat. 1225, 1248 (“1921 Act”), the Congress authorized the Secretary of DOI to execute and approve mineral leases

for restricted lands of certain Quapaw Indians who had been determined not competent to handle their own affairs. The 1921 Act has not been repealed by the Congress and, in fact, the restrictions upon alienation set forth therein have been extended indefinitely.

The Site was mined for lead and zinc ore from approximately the late 1800's 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 is addressing this contamination.

Much of the Site contamination is contained in approximately 49 million cubic yards of mine tailings known as "chat" that have been disposed of on the Site, including the Property. Much of the distal chat is spread through out the Site and not located in larger chat piles. EPA has determined that the distal chat 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 lands upon which distal chat located is to excavate, remove and consolidate the distal chat for use in a manner that will not present a threat to human health or to the environment. EPA's OU4 ROD establishes acceptable uses of Site chat and proscribes uses of Site chat other than those uses described in the ROD at section 19.2.2 (Chat Sales and Environmentally Acceptable Chat Use) and at 19.2.4.1 (Remedial Actions in Distal Areas). The purpose of this Agreement is to encourage the excavation and removal of distal chat located on the Property as of the Effective Date of this Agreement, pursuant to and consistent with the OU4 ROD, by resolving, subject to reservations and limitations contained in Sections V, VI, VII, and VIII, liability that the Settlers might otherwise incur under

CERCLA Sections 106 or 107, 42 U.S.C. §§ 9606 or 9607, arising from the sale of chat on the Property.

In consideration of and in exchange for the United States' Covenant Not to Sue in Section V herein, each Settlor agrees: 1) if an interest holder in the Distal Chat, to sign and execute the Excavation Agreement (Appendix C) in accordance with Section III and to provide access to the Distal Chat for the United States and authorized persons for conducting the excavation and removal of the Distal Chat as provided in Section III; 2) if an interest holder in the Property, to provide access to the Property for the United States and authorized parties for conducting the sale of chat as provided in Section III; and 3) to undertake the other actions required by this Agreement. The resolution of this potential liability in exchange for Settlers' actions required herein is a substantial benefit to both the Settlers and the United States and is in the public interest.

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The Parties agree that the Settlers' entry into this Agreement, and the actions undertaken by the Settlers in accordance with the Agreement, do not constitute an admission of any liability by the Settlers.

II. DEFINITIONS

1. 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 (whether or not they are capitalized):

a. "Chat" shall mean gravel-like mine refuse or mine tailings (greater than 1/4 inch diameter) plus smaller intermingled material such as sands (sands means #20-65 mesh size or 0.033-

0.008 inches in diameter) and fine tailings (fine tailings mean tailings less than 0.008 inches in diameter).

b. “distal chat” generally means chat that is located in the distal zones of the Tar Creek Superfund Site as identified in the ROD at Figure 3 (Tar Creek Distal Zones and Watersheds); however, for the purposes of the covenants in this Agreement “Distal Chat” shall mean the chat that is located on the surface of the Property as described in Appendix B. That is, the Distal Chat that is the subject of the covenants in this Agreement is only the Distal Chat that is described in Appendix B.

c. “Excavation Agreement” means the document attached as Appendix C.

d. “Existing Contamination” shall mean any hazardous substances, pollutants or contaminants present or existing on or under the Property as of the Effective Date of this Agreement;

e. “Parties” shall mean the United States on behalf of EPA and DOI, and the Settlers.

f. “Property” shall mean the land on which the Distal Chat is located and which is within the area known as the Tar Creek Superfund Site. Appendix B includes a map and legal description of the Property and also describes the Distal Chat that is the subject of the covenants in this agreement.

g. “Settlers” shall mean the interest holders in the Distal Chat and/or the Property underlying the Distal Chat who are signatories to this Agreement and are identified in Appendix D.

h. “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 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.

i. “United States” shall mean the United States of America, its departments, agencies, and instrumentalities.

III. ACTIONS TO BE PERFORMED BY SETTLOR

3. In consideration of and in exchange for the United States' Covenant Not to Sue in Section V herein, Settlers agree that:

a. Each Settlor who is an interest holder in the Distal Chat shall sign and execute the agreement for the sale of the Distal Chat entitled “Excavation Agreement” (Appendix C).

b. Each Settlor who is an interest holder in the Property shall, commencing on the Effective Date of this Agreement, provide to the United States and its contractors and authorized parties access at all reasonable times to the Property for the purpose of conducting distal chat excavation and removal operations and assessing compliance with the Excavation Agreement and EPA’s Surface Restoration Response Plan incorporated therein.

c. Each Settlor who is an interest holder in the Distal Chat, shall, commencing on the Effective Date of this Agreement, provide to the United States and its contractors and authorized parties access at all reasonable times to the Distal Chat for the purpose of conducting chat sales and assessing compliance with the Excavation Agreement and EPA’s Surface Restoration Response Plan incorporated therein.

d. Each Settlor shall, commencing on the Effective Date of this Agreement, refrain from using the Property or the Distal Chat in any manner that would interfere with or adversely affect the

excavation and removal of distal chat.

e. At least 30 days prior to the conveyance of any interest in the Property, each Settlor who is conveying an interest in the Property shall give the grantee written notice of this Agreement. At least 30 days prior to such conveyance, each Settlor shall also give written notice to EPA and DOI of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Agreement was given to the grantee.

4. The Parties recognize that EPA and DOI can invoke authorities under CERCLA, regulations at 25 C.F.R. Part 169, and other applicable law, to access the Property or Chat Pile in order to conduct response actions.

IV. CERTIFICATION

5. Each Settlor certifies that to the best of his/her knowledge and belief that he/she has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site.

V. UNITED STATES' COVENANT NOT TO SUE

6. Subject to the United States' Reservation of Rights in Section VI of this Agreement and satisfactory performance of the actions described in Section III (Actions to be Performed by Settlor), the United States covenants not to sue or take civil judicial or administrative action against Settlers pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, or other applicable law, for liability for response actions and/or claims for natural resource damages arising from the sale of the Distal Chat that was located on the Property as of the Effective Date of this Agreement in accordance with Section III.

VI. UNITED STATES' RESERVATION OF RIGHTS

7. The covenant not to sue set forth in Section V above does not pertain to any matters other than those expressly specified in Section V (United States' Covenant Not to Sue). The United States reserves, and the Agreement is without prejudice to, all rights against Settlers with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by a Settlor to meet a requirement of this Agreement;
- b. any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site, or the exacerbation of existing contaminants, unless such liability arises from the sale of the Distal Chat that was located on the Property as of the Effective Date of this Agreement in accordance with the provisions of Section III;
- c. criminal liability;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA, unless such liability arises from the sale of chat that was located on the Property as of the Effective Date of this Agreement in accordance with the provisions of Section III; and
- e. liability for violations of applicable federal law or regulations not subject to the covenant in Paragraph 6.

8. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person not a party to this Agreement.

9. 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.

VII. SETTLORS' COVENANT NOT TO SUE

10. In consideration of the United States' Covenant Not To Sue in Section V of this Agreement, each Settlor hereby covenants not to sue and not to assert against the United States, its authorized officers, employees, or representatives any of the following claims or causes of action arising from, or related to the following: a) the excavation of the Distal Chat, the removal of the Distal Chat from the property, and the subsequent sale of Distal Chat taken from the Property and occurring after the Effective Date of this Agreement, b) any claims arising from environmental conditions and/or damages, c) any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, d) any claim under CERCLA Sections 107 or 113, or under any citizen suit provision of CERCLA, 42 U.S.C. § 9659, the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, the Clean Air Act, 42 U.S.C. § 7604, the Clean Water Act, 33 U.S.C. § 1365, or any other similar statutes or other applicable environmental laws.

11. The Settlers reserve, and this Agreement is without prejudice to, claims against the United States not listed in Paragraph 10, including but not limited to, claims based on the United States' accounting to restricted Indian Settlers for any sales of chat, all claims arising before the Effective Date of this Agreement, and claims for negligence, not including oversight or approval of the Settlers' plans or activities, when such claims are brought pursuant to any statute other than CERCLA or RCRA, 42 U.S.C. §§ 6901 *et seq.*, and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute 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).

12. Nothing in this Agreement in any way releases or affects any causes of action, rights, or benefits any of the Settlers may have in the event any of them are members of the plaintiff class in *Cobell v. Norton*, Civ. No. 96-1285 (RCL) (D. D.C.).

VIII. EFFECT OF SETTLEMENT

13. The Parties agree that Settlers are entitled, as of the Effective Date of this Agreement, to protection from contribution actions or claims as provided 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 Agreement. The “matters addressed” in this Agreement are any response actions taken or costs incurred, and any claims for natural resource damages, arising from the sale of the Distal Chat that was located on the Property as of the Effective Date of this Agreement in accordance with the provisions of Section III of this Agreement.

IX. PARTIES BOUND/TRANSFER OF COVENANT

14. This Agreement shall apply to and be binding upon the United States, and shall apply to and be binding upon the Settlers and their heirs, successors and assigns. Any change in ownership or other legal status of Settlers, including but not limited to, any transfer of assets or real or personal property, shall in no way alter Settlers’ 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.

15. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settlers 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.

16. In the event of an assignment or transfer of the Property or an assignment or transfer of

an interest in the Property, 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 assignee or transferee must consent in writing to be bound by the terms of this Agreement including, but not limited to, the certification requirement in Section IV of this Agreement in order for the Covenant Not to Sue in Section V to be available to that assignee/transferee. The Covenant Not To Sue in Section V shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA and DOI.

X. NOTICES

17. Settlers 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

Office of the Tulsa Field Solicitor
United States Department of the Interior
7906 East 33rd Street, Suite 100
Tulsa, Oklahoma 74145

Miami Agency
Bureau of Indian Affairs
P.O. Box 391
Miami, Oklahoma 74355

Chief
Environmental Enforcement Section
United States Department of Justice
P.O. Box 7611 Ben Franklin Station
Washington, D.C. 20044

The United States' communications with each Settlor shall be directed to:

[See Appendix D.]

XI. EFFECTIVE DATE

18. The Effective Date of this Agreement shall be the date upon which EPA issues written notice to Settlers that the Attorney General of the United States or the Attorney General's delegate has fully executed the Agreement and that the public comment period pursuant to Paragraph 20 has closed and that comments received, if any, do not require modification of or the United States' withdrawal from this Agreement.

XII. INTEGRATION/APPENDICES

19. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendices are attached to and incorporated into this Agreement:

"Appendix A" is the map of the Site.

"Appendix B" is the legal description and map of the Property. The map in Appendix B also describes the Distal Chat that is the subject of the covenants in this agreement.

"Appendix C" is the Excavation Agreement entered into by the Parties Under the Authority of the Tar Creek Superfund Site Operable Unit 4 Record of Decision (February 20, 2008)

"Appendices D" is the list of Settlers under this Agreement.

XIII. PUBLIC COMMENT

20. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XIV. TERMINATION

21. This Agreement shall terminate upon written agreement of EPA, DOI and Settlers.

MODEL

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

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

MODEL

IT IS SO AGREED:

UNITED STATES DEPARTMENT OF JUSTICE

BY:

_____ Date _____

Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

MODEL

IT IS SO AGREED:

UNITED STATES DEPARTMENT OF THE INTERIOR

BY:

Assistant Secretary - Indian Affairs
United States Department of the Interior

Date _____

MODEL

IT IS SO AGREED:

BY THE SETTLORS:

[Settlers' Names, addresses, and signatures indicating agreement are contained in Exhibit D.]

MODEL

APPENDIX "A"

SITE MAP

A map of the site on which the chat is located follows this page.

MODEL

APPENDIX "B"

PROPERTY DESCRIPTION

MODEL

APPENDIX "C"

EXCAVATION AGREEMENT

The Excavation Agreement referenced herein follows this page.

MODEL

APPENDIX "D"

SETTLORS' SIGNATURES AND CONTACT INFORMATION

By signing and dating this Appendix, each Settlor hereby agrees to the terms and conditions of the above and foregoing Settlement Agreement:

INTEREST HOLDERS/OWNERS

Name

Address

Signature

Date Signed

MODEL