

DRAFT –9/15/08

**MEMORANDUM OF AGREEMENT BETWEEN
THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 9,
U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 6,
NEW MEXICO ENVIRONMENT DEPARTMENT, AND
NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY
PERTAINING TO REGULATION OF UNDERGROUND STORAGE TANKS
IN NORTHWESTERN NEW MEXICO**

This Memorandum of Agreement (“Agreement”) is entered into by and between the U.S. Environmental Protection Agency, Region 9 (“Region 9”), U.S. Environmental Protection Agency, Region 6 (“Region 6”), New Mexico Environment Department (“NMED”), and Navajo Nation Environmental Protection Agency (“NNEPA”) (collectively, “Parties”), regarding the regulation of underground storage tanks (“UST”s) in where there has been no final uncontested federal agency action or final court determination of which agencies have jurisdiction.

RECITALS

Whereas Region 9 is the U.S. EPA Region charged with implementing in Navajo Indian country the provisions of Subtitle I of the Resources Conservation and Recovery Act, 42 U.S.C. §§ 6991-6991m (“Subtitle I of RCRA”), and regulations promulgated thereunder, which govern installation, operation, maintenance, and closure of USTs, clean-up of UST releases, and enforcement actions; and

Whereas Region 6 is the U.S. EPA Region charged with implementing in New Mexico the provisions of Subtitle I of RCRA and regulations promulgated thereunder, which govern installation, operation, maintenance, and closure of USTs, clean-up of UST releases, and enforcement actions; and

Whereas NMED is the environmental agency of the State of New Mexico (“State”), an EPA-approved state under Subtitle I of RCRA, *see also* 40 C.F.R. § 282.81, and is charged with developing, maintaining, and enforcing laws and regulations governing installation, operation, maintenance, and closure of USTs and clean-up of certain UST releases within the State; and

Whereas NNEPA is the environmental agency of the Navajo Nation (“Nation”) charged, under tribal law, with developing, maintaining, and enforcing laws and regulations governing installation, operation, maintenance, and closure of USTs and clean-up of UST releases within Navajo Indian country; and

Whereas Indian lands¹ within the State of New Mexico are not included within the scope

¹ EPA interprets the phrase “Indian lands,” as used in 40 CFR § 281.12, to be synonymous with the phrase “Indian country,” as defined in 18 U.S.C. § 1151.

of the State's EPA-approved RCRA Subtitle I program administered by NMED pursuant to 40 C.F.R. § 281.12 ; and

Whereas there are UST facilities located on lands within the Bureau of Indian Affairs' Eastern Navajo Agency, but outside the formal reservation, other than tribal trust or allotted lands where no jurisdictional determination has been made as to whether such land is Indian country, as that term is defined in 18 U.S.C. ' 1151; and

Whereas the Parties desire to avoid disputes and the potential for litigation to determine the jurisdictional status of these areas of the Eastern Navajo Agency; and

Whereas the Parties desire instead to work in harmony to protect from contamination and, where necessary, restore the soil, surface water, and groundwater of the State and of the Nation from releases from USTs.

Now therefore in light of the foregoing recitals, the Parties intend to work cooperatively to carry out this agreement as follows:

I. PURPOSES AND AUTHORITY

A. Purposes.

1. Generally. This Agreement is intended to establish a framework for inter- governmental cooperation and coordination, pursuant to the government-to-government relationship that exists between the Parties, that applies to UST facilities located on lands in the Eastern Navajo Agency other than tribal trust or allotted lands in areas where no determination has been made whether such land is Indian country, as that term is defined in 18 U.S.C. § 1151. By implementing this Agreement in a cooperative fashion, the Parties seek to avoid disputes concerning jurisdiction over these UST facilities, and instead work together to prevent environmental contamination from releases of regulated substance from these facilities.

2. Joint implementation.

a. This Agreement establishes joint implementation by the Parties of the regulation of UST facilities covered by the Agreement. The Parties with an active role in implementing all aspects of this Agreement are Region 9, NMED, and NNEPA ("Implementing Parties"). Region 6 as a signatory to this Agreement, should be kept informed by the Implementing Parties as to the status of activities conducted under the Agreement, and may participate in any dispute resolution pursuant to § V(G) of the Agreement.

b. A list of UST facilities covered by this Agreement is attached as Exhibit A. The Implementing Parties intend to review the list in Exhibit A at least once each year, at the same time as they agree on the schedule for compliance inspections pursuant to ' IV(A)(1) of this Agreement, to determine whether the list needs to be revised. The Implementing Parties intend to revise Exhibit A by mutual agreement upon learning of any of the following:

- i.** the construction of new UST facilities or identification of additional existing UST facilities on lands within the Eastern Navajo Agency;
- ii.** binding federal land status determinations regarding UST facility sites listed on Exhibit A; and
- iii.** changes in the law or other circumstances making revisions to Exhibit A appropriate.

B. Pertinent Laws.

This Agreement provides procedures for coordinating the Parties= laws and regulations regarding USTs, including without limitation inspection, enforcement, operation, corrective action, and cost recovery, as set out in Subtitle I of RCRA, 42 U.S.C. §§6991-6991m, and regulations promulgated thereunder; the New Mexico Hazardous Waste Act, NMSA 1978 §§74-4-1 to -14, the New Mexico Groundwater Protection Act, NMSA 1978 §§ 74-6B-1 to -14, and the New Mexico Petroleum Storage Tank Regulations, 20.5 NMAC; the Navajo Nation UST Act, 4 N.N.C. §§ 1501- 1575, and regulations promulgated thereunder; and all future and successor laws and regulations of the Parties (“pertinent laws”). To the extent feasible and consistent with law, the pertinent laws of all the Parties will be applied to all facilities listed on Exhibit A, except as otherwise provided and subject to the conditions set forth below.

C. Authority.

Region 9 and Region 6 are authorized to enter into this Agreement pursuant to Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991m. In addition, EPA’s November 8, 1984 Policy for the Administration of Environmental Programs on Indian Reservations (reaffirmed on September 26, 2005 by Administrator Johnson), although not providing EPA with any direct authority, recognizes that EPA works with federally recognized tribes on a government-to-government basis to enhance environmental protection under the federal environmental statutes and regulations. NMED is authorized to enter into this Agreement by the New Mexico Environmental Improvement Act, NMSA 1978 §§74-1-4 to -10, in fulfillment of its regulatory authority under the New Mexico Hazardous Waste Act, NMSA 1978 §§ 74-4-1 to 14, and the New Mexico Groundwater Protection Act, NMSA 1978 § 74-6B-5. NNEPA is authorized to enter into this Agreement by the Navajo Nation Environmental Policy Act, 4 N.N.C. § 902, *see also* the Navajo Nation

Underground Storage Tank Act, 4 N.N.C. § 1506(A).

D. Stringency.

It is presumed that the pertinent laws of the State and the Nation are at least as stringent as the pertinent federal laws. If the pertinent law(s) of either the State or the Nation is more stringent than those of the other Parties, the inspector for that Party may attempt to obtain voluntary compliance with the more stringent law(s) and the other inspectors intend to allow such efforts to obtain voluntary compliance to take place.

II. JURISDICTION

This Agreement is not intended and shall not be deemed to: (1) change any existing jurisdiction of the Parties, including over the facilities listed on Exhibit A; (2) be a concession by any of the Parties as to the others' legal claims, an admission of the same, or a waiver of the right to challenge such claims at any time; or (3) serve as a basis or a precedent for resolution of any dispute regarding the jurisdictional authority of the Parties. Neither this Agreement nor the activities of the Parties under this Agreement shall be construed to affect the equitable or legal claims of the Parties in any present or future litigation or other negotiation or agreement concerning the jurisdiction of the Parties.

III. NOTICE

Upon execution of this Agreement, the Implementing Parties intend to provide a fact sheet describing this Agreement to the owners and operators of all the facilities listed on Exhibit A and to provide a copy of the executed Agreement upon request. One purpose of the fact sheet is to identify any state or tribal requirements that are broader or more stringent than the federal requirements. The Implementing Parties also intend to provide copies of the fact sheet to contractors who notify the Implementing Parties as to work such contractors will be performing on any of the facilities listed on Exhibit A. In addition, during the first year of inspections conducted pursuant to Section II(A), the Implementing Parties intend to explain the purpose and procedures being implemented under this Agreement to those owners and operators. To the extent that additional facilities are added to Exhibit A pursuant to Section I(A)(2), the Implementing Parties intend to ensure that the owners and operators of those facilities also receive copies of the fact sheet and an explanation of the purpose and implementation of this Agreement.

IV. IMPLEMENTATION

A. Compliance Inspections.

1. Schedule. In the fourth quarter of each U.S. EPA fiscal year (October 1 – September 30) (“fiscal year”), the Implementing Parties intend to mutually agree

on the schedule for compliance inspections of the facilities listed on Exhibit A for the next fiscal year, as well as a designation of each Implementing Party's lead inspector. While discussing the schedule for inspections, the Implementing Parties intend to review and discuss the files for each facility listed on Exhibit A. Region 9 intends to distribute the schedule in writing to all of the Parties by the end of the fiscal year preceding the scheduled inspections. The Implementing Parties intend that each facility listed on Exhibit A undergo a compliance inspection at least once every two fiscal years.

2. Procedures. It is the intent of the Implementing Parties that there will be at least one inspector present from each of the Implementing Parties to conduct the compliance inspections for each facility listed on Exhibit A. NMED, on behalf of all the Implementing Parties, intends to inform a facility of the inspection in writing in advance, request the owner or operator to be on site to facilitate the inspection, and include with the notice a copy of the fact sheet referenced in ' III. If an inspector needs to reschedule an inspection due to an emergency, the inspection may be rescheduled if the inspector provides notice to the other Implementing Parties= inspectors no later than 48 hours prior to the date scheduled for the inspection; otherwise, it is the intent of the Implementing Parties that each inspection take place as scheduled with whichever inspectors are available. If a facility owner or operator or their representative denies access to an inspector during a compliance inspection, the inspection may be performed by the Region 9 inspector, provided that only the Region 9 inspector remains on-site even if the facility owner or operator or their representative does not object to one of the other inspectors being present, and provided that the Region 9 inspector consults with both the other Implementing Parties' inspectors as to all issues that arise regarding the inspection in advance of the issuance of a citation, if any.

3. Records. If notice of the inspection has been provided to the facility, the Implementing Parties intend to require that all necessary records be present on-site in time for the inspection. If notice was not provided or was not received and the records are not on site, the Implementing Parties intend that any notice of deficiency regarding the availability of records be withdrawn if the records are produced as provided on the Notice of Inspection within 48 hours of the inspection. *See* 40 C.F.R. § 280.34(c)[add State and Nation equivalent].

4. Compliance issues. During an inspection each inspector evaluates whether the facility being inspected is in compliance with the pertinent laws of its own jurisdiction. The inspectors intend to resolve at the site any differences of opinion with respect to compliance. The Implementing Parties intend that the inspectors issue to the facility owner/operator or representative documentation, listing the pertinent laws of the Parties and signed by an inspector from each party, at the close of the inspection. **[add sentence about what happens if EPA inspects alone and other inspectors are near-by]**

B. Enforcement.

1. Field citations. If a field citation is issued in accordance with this agreement, it will be issued by Region 9 by mutual consent of the inspectors attending an inspection. Region 9 will use the federal field citation form but will include references to all pertinent laws. Any penalties imposed pursuant to a field citation will be imposed pursuant to federal authority, and any penalties collected will be deposited in the U.S. Treasury. Field citations may be issued in the field or by the Region 9 inspector once he or she has returned to the office, based on the mutual agreement of the inspectors attending any given inspection.

2. Administrative and civil judicial enforcement actions. If other administrative or civil judicial enforcement action is deemed appropriate by the Implementing Parties, they will mutually agree as to whether Region 9 will refer the case to the U.S. Department of Justice for civil judicial enforcement or whether Region 9 will bring an administrative proceeding. In addition, if Region 9 fails to take either administrative or judicial enforcement action, NMED and/or NNEPA may bring a citizen suit pursuant to RCRA § 7002, 42 U.S.C. § 6972, to enforce against a violation of RCRA or the implementing regulations. NMED and NNEPA will not base their interest in such a suit on a claim of jurisdiction over any facility listed on Exhibit A.

a. Administrative actions. If Region 9 brings an administrative action, it is limited by 40 C.F.R. Part 22 to enforcing claims under RCRA.

b. Judicial enforcement. If judicial enforcement is taken, the Implementing Parties intend to seek agreement as to the most efficient and effective means and legally available forum for pursuing judicial action. The Implementing Parties may consider requesting a federal court to exercise supplemental jurisdiction over a state or tribal claim(s).

3. Information Sharing Between the Parties in Anticipation of, Preparation for, or During an Enforcement Action. The Parties intend to consult with each other at every stage of the enforcement process to the greatest extent practicable without divulging privileged or confidential information to help ensure that all the Implementing Parties' concerns are addressed. The Parties intend to keep certain information shared under this MOU confidential. To avoid interference with a potential enforcement proceeding in which the parties have a common interest, the parties will protect from disclosure any law enforcement records exchanged in anticipation of litigation. The Parties agree to protect these privileges, to the full extent permissible under applicable law.

C. Delivery Prohibition.

If non-compliance at any of the facilities listed on Exhibit A rises to the level that any of the Implementing Parties would prohibit deliveries to such facility in accordance with 42 U.S.C. §6991k and/or the U.S. EPA Delivery Prohibition Grant Guidelines, the Implementing Parties intend to address such underlying non-compliance in accordance with the enforcement provisions set forth in Section IV(B), above. In all such circumstances, the Implementing Parties shall intend to seek agreement on a strategy for addressing the underlying non-compliance which would give rise to a prohibition against deliveries.

D. Registration.

The Implementing Parties intend to have each UST facility listed on Exhibit A register its tanks with both NMED and NNEPA, if it has not already done so. Registration with NNEPA involves payment of a one-time registration fee pursuant to 4 N.N.C. § 1575.

E. Tank Fees.

The Implementing Parties intend to have each UST facility listed on Exhibit A that does not have another means of meeting the RCRA financial responsibility requirements pays annual tank fees to NMED, in which case NNEPA would waive any requirement for the payment of tank fees to NNEPA. Payment of tank fees to NMED is necessary but not sufficient for eligibility for first party financial responsibility coverage from NMED and for access to the New Mexico corrective action fund.

F. Notifications.

The Implementing Parties intend to have facilities provide notifications described in the pertinent laws to all of the Implementing Parties and indicate that they have done so. If any Implementing Party receives a notification or other information from a facility listed on Exhibit A that appears not to have been shared with the other Implementing Parties, that Implementing Party intends to immediately inform the other Implementing Parties of this information. The following list describes the notifications in the pertinent laws to be submitted by owners and operators:

1. Notifications for Suspected and confirmed releases:

A release or suspected release of petroleum of more than 25 gallons or of a hazardous substance equal to or exceeding its reportable quantity under CERCLA shall be reported to the Implementing Parties as soon as practicable but no later than 24 hours after the release or suspected release is detected (40 C.F.R. §§ 280.50, 280.53; 20.5.7.700.a NMAC; 4 N.N.C. § 1544(A)). The initial notification shall be followed within 14 days by a

written report to the Implementing Parties (4 N.N.C. § 1544(C)). A suspected release includes the discovery of released petroleum or hazardous substances at a UST site or in the surrounding area; unusual operating conditions; and monitoring results that indicate that a release may have occurred, all as set forth in 40 C.F.R. § 280.50 and 205.7.700.a NMAC.

2. Thirty-day notifications: The Implementing Parties intend to have a thirty-day notification provided to the Implementing Parties in the following instances:

a. Prior to a new UST installation, including replacement of a UST (40 C.F.R. § 280.22; 20.5.5.21(B), 5.4.36 NMAC; 4 N.N.C. §§ 1531, 1540);

b. Prior to upgrading or modifying a UST (20.5.5.21(B) NMAC; 4 N.N.C. § 1540);

c. Prior to a critical juncture in the replacement, repair, or modification (including internal lining or changes to cathodic protection systems) of a UST. The term “critical juncture” means completion of the excavation of existing tanks or piping, actual performance of the repair, lining or modification, any time during which components of piping are connected, and any time during which a tank or its associated piping is tested, as defined in 20.5.5.21(A) NMAC;

d. Prior to permanent closure of a UST, unless the closure is in response to a corrective action (40 C.F.R. § 280.71; 20.5.8.8 NMAC), and only if the UST is not removed pursuant to 4 N.N.C. § 1542(A);

e. Prior to a change in service, unless the change in service is in response to a corrective action or change in use (“change in service” includes continued use of a UST to store a non-regulated product) (40 C.F.R. § 280.71; 20.5.8.8 NMAC; 4 N.N.C. §1540);

f. Prior to a return to service (20. 5.8.8 NMAC); and

g. Prior to a temporary closure of a UST (20.5.8.8 NMAC).

3. Emergency Notifications:

The Implementing Parties intend to have emergency repairs reported twenty-four (24) hours in advance of commencement of the procedure (20.5.5.21NMAC) and also as soon as possible after completing the

repairs (20.5.5.18 NMAC).

4. Seller Notifications: The Implementing Parties intend to have a seller of a UST notify the purchaser of the notification requirement listed in subparagraph IV(F)(2)(a) of this Agreement (20.5.2.9 NMAC; 4 N.N.C. § 1537) upon notice of sale.

G. Oversight.

The Implementing Parties intend to have any requests for witnessing of activities such as, but not limited to, installations, modifications, upgrades, repairs, and removals of USTs made to all the Implementing Parties with as much notice as possible but no fewer than thirty (30) days in advance of the planned activity, with periodic updates to the Implementing Parties as to the precise date that the activity will take place. A representative of each Implementing Party intend to be present to witness the activity, unless an Implementing Party has informed the others, by email or other written form, that its representative is not able to attend but it is willing to have the activity take place without his or her presence.

H. Financial Responsibility.

The Implementing Parties intend that Facilities found by NMED to be in compliance with NMED law and regulations, and therefore eligible for the New Mexico corrective action fund, be viewed as having satisfied the financial responsibility requirements of all the Parties for first party liability. The Implementing Parties intend that facilities also comply with the financial responsibility requirements for third party liability. The Implementing intend that facilities that are not eligible for the New Mexico corrective action fund maintain compliance with the UST financial responsibility requirements for both first and third party liability.

I. Closure Requirements.

The Implementing Parties intend that all facilities listed on Exhibit A that are undergoing tank closure be requested to remove USTs and product lines, as provided by 4 N.N.C. ' 1542(A), in lieu of closure in place.

J. Clean-up.

[Language from discussion with Kathryn, Mimi and Rebekah on 9/4/08 inserted below]

The Implementing Parties intend NMED to be the lead party on the clean-up unless NMED makes a determination that the owner or operator is not eligible to access the Corrective Action Fund, pursuant to NMSA 1978, §74-6B-9, at which time the Implementing Parties intend to agree on whether Region 9 seeks approval from EPA headquarters to use federal LUST funds or whether Region 9 pursues an enforcement action against the owner, operator, or responsible

party. The Implementing Parties intend that whenever an Implementing Party finances a remedial action pertaining to a facility listed on Exhibit A, that Implementing Party is the lead party on the remedial action. The lead party will conduct the action pursuant to its pertinent laws, except that the lead party shall endeavor to ensure that the other Implementing Parties are provided with the opportunity to comment within the relevant timeframes at every decision point of the relevant remedial action and contractor selection process and on notifications, reports, and other documentation when appropriate. The lead party also shall endeavor to ensure that Region 6 is provided with initial notice of the remedial action.

K. NNEPA UST Tariff/NMED Petroleum Products Loading Fee.

The Implementing Parties intend that each UST facility listed on Exhibit A pays the NNEPA UST tariff pursuant to the Navajo Nation UST Act, 4 N.N.C. § 1572. Nothing in this Agreement is intended to affect the generation, collection, or distribution of the New Mexico Petroleum Products Loading Fee, which is administered by the New Mexico Department of Taxation and Revenue pursuant to NMSA 1978, §§7-13A-1 *et seq.* and NMSA 1978, §7-1-6.25. Money collected from the NNEPA tariff is used by NNEPA to pay for corrective action under the Navajo Nation UST Act, *see* 4 N.N.C. § 1573, while a portion of the money collected from the New Mexico petroleum products loading fee provides revenue for the New Mexico corrective action fund administered by NMED.

V. OTHER TERMS AND CONDITIONS

A. Effective date.

This Agreement is effective upon execution on behalf of all the Parties.

B. Term.

This Agreement continues in effect until terminated by any one of the Implementing Parties or until there are no longer any questions as to land status over the UST facilities listed on Exhibit A.

C. Termination.

1. Termination of the Agreement by a Party. An Implementing Party may terminate this Agreement without cause by giving at least thirty (30) days written notice to the other Parties.

2. Partial Termination of the Agreement for a Facility Due to Enforcement and Compliance Issues. In situations where (1) Region 9 cannot enforce an NMED or NNEPA requirement regarding a UST facility listed on Exhibit A because there is no corresponding federal requirement and there are no violations capable of

enforcement, or (2) there is a threat of imminent and substantial endangerment regarding a UST facility listed on Exhibit A, an Implementing Party may terminate this Agreement with respect to only that facility if:

(a) that Implementing Party has attempted to obtain from the facility voluntary compliance with the requirements at issue;

(b) that Implementing Party has informed the facility that it may lose its eligibility, if applicable, to access the relevant corrective action fund by failing to comply with the requirements at issue and the facility nevertheless will not comply

(c) the Implementing Parties have exhausted the dispute resolution process set forth in Section V(G) without coming to a resolution of the issues regarding the facility, except that the dispute resolution process can be expedited by deleting the step outlined in V(G)(1)(c) (facilitation) and by allowing only five business days each for resolution and elevation of the dispute by the first and second levels of management (set forth in V(G)(1)(a) and (b)); and

(d) that Implementing Party wishing to terminate this Agreement with respect to a facility provides written notice at least five business days to the other Parties.

3. Partial Termination of the Agreement for a Facility Due to Petition for Land Status Determination. In situations where an Implementing Party seeks termination of this Agreement for a facility on Exhibit A, pursuant to and for the first reason set forth in Paragraph 2 above (inability of Region 9 to enforce an NMED or NNEPA requirement) the Implementing Party may, after satisfying Paragraphs 2(a) and (b), above, and instead of participating in dispute resolution pursuant to Paragraph 2(c), above, petition EPA for a land status determination regarding the UST facility at issue. In that event, this Agreement is terminated with respect to that facility.

D. Amendment.

This Agreement may not be amended, changed, modified, or altered except by written amendment executed on behalf of all the Parties.

E. Notice.

Notices provided pursuant to this Agreement shall be deemed to have been given when delivered by email or facsimile or deposited in the United States mail, postage prepaid, and addressed to the following unless a Party notifies the others by email, facsimile, or in writing of a different contact or address.

Manager, Underground Storage Tank Program Office
U.S. EPA Pacific and Southwest Region (WST-8)

75 Hawthorne Street
San Francisco, CA 94105
Phone: 415-972-3369
Fax: 415-947-3530

Chief, Underground Storage Tank Section
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202
Phone: 214-665-6444
Fax: 214-665-7263

PSTB Bureau Chief
New Mexico Environment Department
1301 Siler Road, Building B
Santa Fe, NM 87507
Phone: 505-476-4377
Fax: 505-476-4374

UST Program Manager
Navajo Nation EPA
P.O. Box 3089
Window Rock, AZ 86515
Phone: 928-871-7993
Fax: 928-871-7996

F. Cooperation.

The Parties intend to cooperate fully with each other and act reasonably, in good faith, and in a timely manner in all activities subject to this Agreement, so that each of them may obtain the benefits contemplated by this Agreement and for which they have negotiated. No Party intends to unreasonably deny, withhold, or delay any consent or approval required or contemplated for any action or transaction proposed to be taken or made pursuant to this Agreement. The Parties intend to consult with and assist each other in good faith and without delay as to all matters which require their cooperation.

G. Dispute Resolution.

1. All Parties to this Agreement intend to make reasonable efforts to informally resolve disputes at the staff level. If resolution cannot be achieved informally, the Implementing Parties intend to use the following dispute resolution process:

a. **The Parties intend to promptly elevate to the first level of**

management any unresolved dispute:

For R9: UST Program Manager
For NMED: Bureau Chief
For NNEPA: UST/LUST Program Manager

b. If the first level of management continues to disagree, the Parties intent to promptly elevat the matter to the following level of management:

For R9: Director of Waste
For NMED: Division Director
For NNEPA: Director, Waste Regulatory Compliance Department

c. If there is still disagreement, the Regional Judicial Officer (“RJO”) in Region 6 or Region 9, depending on availability, will serve as a facilitator to the dispute.

d. If the attempts to resolve the matter pursuant to paragraph (c) is unsuccessful, the Parties intent to promptly elevate the dispute to the Regional Administrator of Region 9, the Secretary of NMED, and the Executive Director of NNEPA for resolution.

2. To avoid any significant disruption of work, disputes must be resolved as expeditiously as possible. Each level of management will endeavor to resolve the dispute within ten (10) working days and, if the dispute is not resolved, will endeavor to promptly elevate the dispute to the next level of management. If the dispute is elevated to the RJO, the RJO will have ten (10) working days to issue a written opinion on the dispute from the date the RJO is contacted by any Implementing Party. The highest level of management, listed in paragraph 1(d) above, will endeavor to resolve the dispute within ten (10) working days unless there is mutual agreement to extend the time for dispute resolution.

3. Region 9 will endeavor to provide notice to Region 6 regarding any dispute that arises under this Agreement that is elevated to the first level of management. Region 9 will also endeavor to inform Region 6 as to how the dispute is resolved.

4. The Implementing Parties intend that work that is unrelated to a dispute continue during dispute resolution or government-to government consultation. The Implementing Parties indent that work that is the subject of the dispute, or dependent on the outcome of the pending dispute, not proceed until the dispute is resolved, unless delaying the work could pose an imminent and substantial endangerment to human health, welfare, or the environment.

I. Sovereign immunity. This Agreement is not intended and shall not be construed to waive in any way the sovereign immunity of the United States, the State, the Nation, or any of their agencies or instrumentalities, including the agencies that are Parties to this Agreement.

J. Headings. The section headings and subheadings of this Agreement are used for convenience only and are not intended and shall not be construed to modify, define, limit, or expand the intent of the Parties.

L. Integration. This Agreement constitutes the complete, exclusive, and final agreement between the Parties concerning the subject matter hereof, and there is no agreement or promise by any Party to do or omit to do any act or thing not mentioned herein.

M. Confidentiality. UST owners and operators, or others, may, from time to time, submit to one or more of the Parties information that they claim as “Confidential Business Information,” (“CBI”) as that term is defined at 40 CFR Part 2. It is understood and agreed that any Party that receives information pertaining to any of the facilities listed on Exhibit A that is or has been claimed as CBI will share or disclose such information to the other Parties only as permitted by law.

N. Enforceability. Nothing in this Agreement is intended to either create any right in or grant any cause of action to any person not a Party to this Agreement or to release or waive any claim, cause of action, demand, or defense in law or equity that any Party to this Agreement may have against any person(s) or entity that is or is not a party to this Agreement.

IN WITNESS WHEREOF Region 9, Region 6, NMED, and NNEPA have caused this Agreement to be executed and approved.

Wayne Nastri
Regional Administrator, EPA Region 9

Date: _____

Richard Greene
Regional Administrator, EPA Region 6

Date: _____

_____ Date: _____
Ron Curry
Secretary, New Mexico Environment Department

_____ Date: _____
Stephen B. Etsitty
Executive Director, Navajo Nation EPA

_____ Date: _____
Joe Shirley, Jr.
President, Navajo Nation