



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

OFFICE OF  
REGIONAL COUNSEL

MAY 18 2015

Tom Mariani  
Acting Section Chief  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044

**ENFORCEMENT CONFIDENTIAL  
ATTORNEY WORK PRODUCT**

Re: Referral for Entry of Consent Decree for Recovery of Past Response Costs  
**Orofino Asbestos Site, Clearwater County, Idaho**

Dear Mr. Mariani:

Please find enclosed a referral for entry of a Consent Decree resolving the litigation filed on March 13, 2015, in U.S. v. Owyhee Construction, Inc. & the Riverside Water and Sewer District, Civ. No. 15-88 (D. Idaho).

This Consent Decree provides for payment to the U.S. Environmental Protection Agency for its past costs expended in removal actions to clean up asbestos contamination from a water line construction project in Orofino, Idaho. The Orofino Asbestos Site was also the subject of a criminal plea agreement under which Owyhee Construction paid a \$100,000 fine. U.S. v. Owyhee Construction, Inc., Case No. 3:14-cr-00044-EJL (D. Idaho 2014).

The EPA staff attorney assigned to this case is Stephanie Mairs. She can be reached at (206) 553-7359 and by e-mail at [mairs.stephanie@epa.gov](mailto:mairs.stephanie@epa.gov).

Sincerely,

Allyn Stern  
Regional Counsel

Enclosures

cc: Cynthia L. Mackey, Director  
Office of Site Remediation Enforcement

Jennifer Nearhood, Regional Liaison  
Office of Site Remediation Enforcement



**10-POINT SETTLEMENT ANALYSIS**

**OROFINO, IDAHO ASBESTOS SITE  
TIME-CRITICAL REMOVAL**

PAST AND FUTURE COSTS CONSENT DECREE WITH INABILITY TO PAY,  
PURSUANT TO SECTION 107 OF THE COMPREHENSIVE ENVIRONMENTAL  
RESPONSE, COMPENSATION, AND LIABILITY ACT, AS AMENDED, 42 U.S.C. § 9607

Prepared by:  
Stephanie Mairs  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 10 (ORC-113), Suite 900  
1200 Sixth Avenue  
Seattle, Washington 98101

Dated: May 16, 2016

## I. INTRODUCTION

The enclosed Consent Decree resolves litigation filed on March 13, 2015, by the United States against Owyhee Construction, Inc. (Owyhee) and the Riverside Water and Sewer District (the District) (collectively, Defendants), potentially responsible parties (PRPs), for past costs associated with time-critical removal actions performed by the U.S. Environmental Protection Agency (EPA) to address the release of asbestos during a water main construction project in Orofino, Idaho during 2008 - 2010. In addition to this civil judicial settlement, the United States resolved criminal claims against Owyhee with a Criminal Plea Agreement on February 18, 2014, under which Owyhee paid a \$100,000 criminal fine. U.S. v. Owyhee Construction, Inc., Case No. 3:14-cr-00044-EJL (U.S. Dist. Idaho).

In the course of the construction project initiated by the District to improve its water system, Owyhee, contractor for the District, crushed cement asbestos pipe (CAP) and disposed it as fill material. The area over which asbestos containing material (ACM) was released (the Site) consists of several properties located within or just outside of the City of Orofino, Clearwater County, Idaho.

EPA incurred approximately \$2.7 million in removal responses conducted during 2010 - 2012. Both the District and Owyhee have an inability to pay the full costs incurred, so the United States is writing off approximately \$2.2 million in costs. Defendants have agreed to pay \$523,000 to settle this matter, well above our bottom-line figure of \$228,100. It appears that, though Owyhee's insurance policy did not cover its liability, AIG Specialty Insurance Company (AIG) may have contributed some money as "nuisance value" to the settlement offer we received.

The following describes the **BACKGROUND** of the case; presents the **TERMS OF THE SETTLEMENT** in the Consent Decree; and evaluates the settlement according to the ten **SETTLEMENT CRITERIA** set forth in the memorandum entitled "Interim CERCLA Settlement Policy" (December 5, 1984), as amended by the memorandum "Procedures for CERCLA Administrative Settlements and RCRA Prospective Purchaser Agreements that Require DOJ Approval or Signature" (September 30, 2015).

## II. BACKGROUND

### A. Removal Assessment

In May 2010, EPA's Emergency Management Program received a complaint forwarded from EPA's Criminal Investigation Division (CID) regarding the disposal of ACM at a vacant lot owned by Riverview Construction in Orofino.

In June 2010, EPA visited the Site and observed scattered pieces of suspected CAP on the ground. The CAP appeared weathered, the edges were crumbled, and potential asbestos fibers were visible at the edges. EPA collected three samples of suspected CAP during the June site visit. Laboratory test results for the three samples showed 8-9% chrysotile.

## **B. Removal Action Memos and Associated Work**

### **1. July 2010 Interim Time Critical Removal Action at Riverview Construction Site**

On July 22, 2010, EPA issued an Action Memorandum for an Interim Time Critical Removal Action with respect to CAP disposed at the vacant lot. The Action Memorandum identified the following interim removal activities: construction of a temporary fence to restrict access to those areas of the property where CAP was placed; installation of signage on the fencing to deter access; and application of a dust control agent (an interim crushed rock barrier to control fugitive dust). EPA estimated the cost of the removal action at \$6,000.

The work identified in the Action Memorandum was conducted by Owyhee and the property owners, John Anderson and Rick Burnham (doing business as Riverview Construction), under an Administrative Order on Consent (AOC) with EPA.

### **2. September 2010 Emergency Removal Action Memorandum**

On September 30, 2010, EPA issued an Action Memorandum for an Emergency Removal Action to address six additional properties where EPA investigated CAP disposal as a result of the water line project. EPA collected samples of suspected CAP, transite siding and surface soil. The laboratory test results indicated the CAP and transite siding samples contained greater than 1% asbestos and soil from 2 of the 4 properties contained detectable amounts of asbestos fibers (0.25% and 0.75% chrysotile).

The Action Memorandum identified the following removal action activities for these properties: excavation of ACM; off-site disposal of ACM; and backfilling excavation area with clean material and grading. EPA estimated the cost of the removal action at \$840,000. However, as indicated in subsequent amendments to this Action Memorandum, EPA would revise the response action for two of these properties to install an interim gravel barrier at one and construct an onsite repository (18<sup>th</sup> Street Repository) at the other.

During this removal action, EPA continued to learn about additional properties that received ACM from the construction project. As a result, during the 2010 field season, EPA

completed work at the properties identified above as well as the additional properties identified as work progressed.

### **3. May 2011 First Amendment to September 2010 Action Memorandum**

On May 11, 2011, EPA issued an amendment to the September 2010 Action Memorandum (First Amendment) regarding fifteen additional properties discovered in 2010. The First Amendment increased the total Site costs from \$840,000 estimated in the September 2010 Action Memo to \$1,176,000.

Because work had been completed at 10 of these properties during the 2010 field season, the First Amendment summarized the completed work. At eight properties, EPA excavated asbestos contaminated material and disposed of it off-Site. At two properties, EPA constructed an interim gravel barrier, which would later be excavated under another amendment. At the remaining properties, EPA postponed response actions either because landowners could not be contacted or weather conditions prevented work.

### **4. July 2011 Second Amendment to September 2010 Action Memorandum**

On July 13, 2011, EPA issued a Second Amendment to the September 2010 Action Memorandum (Second Amendment) in order to complete work at properties where interim gravel covers had been previously installed and at properties where work had been previously postponed. EPA estimated the cost for this work to be \$700,000 and thus increased the total identified in the First Amendment from \$1,176,000 to \$1,876,000.

The Second Amendment also revised the response action for the property located at 291 18<sup>th</sup> Street (site of the First Baptist Church) to include a constructed onsite repository where ACM excavated from other properties would be consolidated with ACM on this property and contained under asphalt (18<sup>th</sup> Street Repository). The 18<sup>th</sup> Street Repository design included an engineered gravel based retaining wall constructed with modular concrete blocks that served as two sides of the outer perimeter, a protective barrier consisting of a 4-inch asphalt surface, and appurtenant storm and surface water drainage features.

### **5. August 2012 Third Amendment to September 2010 Action Memorandum**

On August 2, 2012, EPA issued a Third Amendment to the September 2010 Action Memo to address a failure of the 18<sup>th</sup> Street Repository constructed at 291 18<sup>th</sup> Street.

In March 2012, a First Baptist Church representative contacted EPA and provided photographs indicating a structural failure of the retaining wall. After conducting two investigations of the retaining wall, EPA issued a Third Amendment, which included the

following components: deconstruct retaining wall and temporarily stage asbestos containing material elsewhere on property; and reconstruct the retaining wall to include additional measures to address significant storm events and snow removal activities.

EPA estimated the cost for this work to be \$879,000 and thus increased the total identified in the Second Amendment from \$1,876,000 to \$2,755,000. The Third Amendment documented an exemption to the statutory limitations of 12 months and \$2 million.

EPA has not included the costs associated with the Third Amendment in its cost recovery case. The conceptual site plan for the repository included a catch basin and dry well to handle surface water drainage issues. However, EPA determined during field construction that these features were not necessary given the design of the retaining wall and the appurtenant drainage features. The retaining wall eventually became stressed (possibly due to settling of backfilled, inadequately compacted soil in the dry retention basin and/or insufficient drainage) and the modular blocks shifted.

### **C. Legal Notices and Litigation**

On July 18, 2011, EPA issued a notice letter to the District and Owyhee, notifying them of potential liability with respect to the Orofino Site. The notice letter included a draft AOC addressing certain removal activities and a request that the parties agree to undertake the work and finalize negotiations within 10 days.

On July 29, 2011, The District responded that it was unable to enter into an agreement to do the requested work due to time, financial and legal constraints.

In May 2012, EPA issued an information request to Owyhee under CERCLA § 104(e). Owyhee responded in July 2012, and included information related to insurance coverage. EPA's insurance specialists at Eisenstein & Malanchuk concluded that Owyhee was not covered by insurance for costs associated with the disposal of ACM, but that AIG might pay a nuisance value to avoid litigation.

On June 21, 2012, EPA issued a demand letter to both Owyhee and the District. The demand letter notified the parties of the option of pursuing an inability to pay settlement. In response, Owyhee and the District submitted documents to support an inability to pay claim on December 4, 2012, and December 17, 2012, respectively.

On March 13, 2013, the United States filed a complaint against the District and Owyhee pursuant to CERCLA § 107. U.S. v. Owyhee Construction, Inc. & Riverside Water and Sewer District, Civ. No. 15-88 (U.S. Dist. Idaho). EPA continued through January 2016 to collect and review audited financial information from Defendants to determine ability to pay.

On October 30, 2015, AIG filed a Complaint for Declaratory Judgment against Owyhee and the District, arguing that its policy does not cover Defendants for costs related to the ACM disposal. AIG v. Owyhee Construction, Inc. and the Riverside Water & Sewer District, Case No. 1:15-cv-00514 (U.S. Dist Idaho).

On February 3, 2016, the parties to the litigation met at Federal District Court in Boise, Idaho for a court-ordered mediation to try to resolve the litigation. At that mediation, the United States and Defendants were able to reach an ability-to-pay settlement in principle for payment of \$523,000 in past costs.

### III. TERMS OF THIS SETTLEMENT

This settlement is authorized by Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613. This section describes the terms of this settlement.

The Consent Decree (attached) follows the terms of the Model CERCLA Peripheral Party Ability to Pay Cashout Consent Decree (September 2014) and the Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs (September 2014).

The Consent Decree provides that Defendants shall pay \$523,000 in past costs. An initial payment of \$475,000 shall be made by Defendants within 60 days after approval of this Consent Decree by the Court, with an additional sum for interest accrued on the principal amount calculated from February 3, 2015.

In addition, Owyhee shall pay \$48,000 in quarterly installments over a period not to exceed three years from approval of the Consent Decree by the Court. The first installment payment of \$6,000 is due within 90 days after such approval and, if timely paid, shall include no interest. The next installment payment of \$6,000 will be due no later than 90 days from the date of the first quarterly installment payment. Each quarterly installment payment thereafter shall be due no later than 90 days from the date of the preceding payment. Each installment payment shall also include an additional sum for interest accrued on the then unpaid portions of the principal amount calculated from February 3, 2015, until the date of each such payment.

The United States covenants in the Consent Decree not to sue or to take administrative action against the Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), regarding the Site. With respect to present and future liability, these covenants take effect upon the date approval of the Consent Decree is recorded on the Court's docket, and they are conditioned upon satisfactory performance of the Defendant's obligations under the Consent Decree.

#### **IV. SETTLEMENT CRITERIA**

##### **1. Volume of Waste Contributed by Each PRP**

The total volume of ACM-contaminated material placed in the 18<sup>th</sup> Street Repository is approximately 12,000 cubic yards. The total volume of ACM-contaminated material placed under the gravel cover at the Riverview Construction property is approximately 6,000 cubic yards.

##### **2. Nature of the Waste Contributed**

The contaminant at the Orofino Site is ACM-contaminated fill material.

##### **3. Strength of the Evidence tracing the Waste at the Site to Defendants**

As stated above, the District owned and operated the water lines that were crushed and disposed at various properties in Orofino. The District contracted with Owyhee to do this work, and Owyhee failed to follow proper procedures to prevent release of the asbestos.

##### **4. Ability to pay**

Audited financial documents submitted to EPA through December 2014 indicate that Owyhee had an ability to pay approximately \$256,000. However, Owyhee submitted further financial information for 2015 showing the loss of a major contract with United Water Idaho that resulted in a revenue loss of about \$2 million, such that Owyhee no longer has an ability to pay. Audited financial documents submitted by the District show it has an ability to pay \$228,100. Together, the bottom-line settlement figure with Defendants is \$228,100.

##### **5. Litigative Risks**

There are no litigation risks associated with the strength of the evidence in this case, nor with any potential defenses to liability. However, there is litigative risk associated with Owyhee's insurer, AIG, having filed a Complaint for Declaratory Judgment against Owyhee and the District. As noted above, our insurance experts do not believe the AIG policy provides coverage, and have advised us that AIG is likely to prevail in its litigation. Once that occurs, we would not be able to obtain nuisance value funds from AIG in our litigation.

##### **6. Public Interest Considerations**

This settlement is in the public interest because it allows EPA to recover some of our past costs in this matter and put that money back into a Special Account for the Orofino Asbestos

Superfund Site for use in additional response actions that may be needed at these sites. In addition, it resolves this matter without the need for litigation, thereby saving the federal government the time and money it takes to bring a cost recovery action. Finally, if we pursue litigation in this matter, the litigation itself will likely diminish the amount of money that is now available to us through settlement, and we would risk an adverse decision in the AIG litigation.

**7. Precedential Value**

The terms of the Consent Decree follow the provisions in the Model CERLCA Consent Decree, with the exception of the terms of payment by Owyhee. As noted above, Owyhee recently lost a major contract that resulted in a revenue loss of approximately \$2 million, placing the company in a position of inability to pay its portion of the penalty in one payment. As detailed above in Section III of this memorandum, the United States agreed in mediation to allow Owyhee to pay \$48,000 in quarterly installments over a period not to exceed three years. Each quarterly installment payment will include an additional sum for interest on the unpaid portion of the \$48,000.

**8. Value of Obtaining Present Sum Certain**

The Agreement will collect \$523,000 to put toward EPA's outstanding past costs. Though we are writing off significant costs because of the Defendants' inability to pay and the pending AIG litigation, the Region believes that this settlement would bring in a sum certain which would exceed what the government would likely obtain through litigation.

**9. Inequities and Aggravating Factors**

There are no anticipated inequities or aggravating factors.

**10. Nature of the Case that Remains After Settlement**

There are no remaining PRPs to pursue at this Site.

**V. CONTACTS**

Office of Regional Counsel: Stephanie Mairs, (206) 553-7359

Office of Environmental Cleanup: Angie Zavala, (206) 553-2101

Zachary N. Moor, PA #315406  
Environmental Enforcement Section  
U.S. Department of Justice  
601 D Street, N.W., Room 2121  
Washington, D.C. 20004  
Telephone No.: (202) 514-4185  
Facsimile No.: (202) 514-0097  
Email: zachary.moor@usdoj.gov  
*Attorney for the United States of America*

Robert A. Anderson, ISB #2124  
Yvonne A. Dunbar, ISB #7200  
Anderson, Julian & Hull LLP  
C.W. Moore Plaza  
250 South Fifth Street, Suite 700  
Boise, Idaho 83707-7426  
Telephone No.: (208) 344-5800  
Facsimile: (208) 344-5510  
Email: raanderson@ajhlaw.com  
ydunbar@ajhlaw.com  
*Attorneys for Taylor Engineering, Inc.*

Susan E. Buxton, ISB #4041  
Jill S. Holinka, ISB #6563  
Moore, Smith, Buxton & Turcke, Chtd.  
950 W. Bannock Street, Suite 520  
Boise, ID 83702  
Telephone No.: (208) 331-1800  
Facsimile No.: (208) 331-1202  
Email: seb@msbtlaw.com  
jsh@msbtlaw.com  
*Attorneys for Riverside Water and Sewer District*

Richard W. Stover, ISB #6801  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chtd.  
1111 W. Jefferson, Suite 530  
Post Office Box 1368  
Boise, Idaho 83701-1368  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542  
Email: rstover@eberle.com  
*Attorney for Owyhee Construction, Inc.*

UNITED STATES COURT FOR THE  
DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

OWYHEE CONSTRUCTION INC. &  
RIVERSIDE WATER AND SEWER  
DISTRICT

*Defendants.*

OWYHEE CONSTRUCTION INC.  
&RIVERSIDE WATER AND SEWER  
DISTRICT,

Third-Party Plaintiffs,

Civ. No. 3:15-cv-00088-REB

**CONSENT DECREE**

v.

TAYLOR ENGINEERING, INC.,

Third-Party Defendant.

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## I. BACKGROUND

1. The United States of America ("United States"), on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607 ("CERCLA"), seeking declaratory judgment and reimbursement of response costs incurred or to be incurred for response actions taken or to be taken in connection with the release or threatened release of hazardous substances at the Orofino Asbestos Superfund Site (the "Site").

2. In response to the release or threatened release of hazardous substances at the Site, EPA undertook removal actions pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. In performing the removal actions at the Site, EPA has incurred response costs.

3. The United States alleges that Owyhee Construction, Inc., ("Owyhee"), and the Riverside Water and Sewer District ("RWSD") (collectively the "Settling Defendants") are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred at the Site.

4. The Settling Defendants that have entered into this Consent Decree do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

5. The United States has reviewed the Financial Information and Insurance Information submitted by the Settling Defendants to determine whether the Settling Defendants are financially able to pay response costs incurred at the Site. Based upon this Financial Information and Insurance Information, the United States has determined that the Settling Defendants have limited financial ability to pay for response costs incurred at the Site.

6. The United States and the Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter without further litigation and without any further admission or adjudication of any issue of fact or law is appropriate and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

## II. JURISDICTION

7. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, the Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Settling Defendants shall not challenge entry or the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

### III. PARTIES BOUND

8. This Consent Decree is binding upon the United States and upon the Settling Defendants and their successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of the Settling Defendants under this Consent Decree.

### IV. DEFINITIONS

9. Unless otherwise expressly provided in this Consent Decree, terms used in this Consent Decree 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 Consent Decree or in any appendix attached hereto, the following definitions shall apply:

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

“Consent Decree” shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

“Day” or “day” shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal or State holiday, the period shall run until the close of business of the next working day.

“DOJ” shall mean the U.S. Department of Justice and its successor departments, agencies, or instrumentalities.

“Effective Date” shall mean the date upon which the approval of this Consent Decree is recorded on the Court’s docket.

“EPA” shall mean the U.S. Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“Financial Information” shall mean those financial documents identified in Appendix A.

“Insurance Information” shall mean those insurance documents identified in Appendix B.

“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 on October 1 of each year, 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. Rates are available online at: <http://www.epa.gov/superfund/superfund-interest-rates>.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Orofino Asbestos Superfund Site Special Account” shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Orofino Asbestos Superfund Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean the United States and the Settling Defendants.

“Plaintiff” shall mean the United States.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendants” shall mean Owyhee Construction, Inc., and the Riverside Water and Sewer District.

“Site” shall mean the Orofino Asbestos Superfund Site comprised of the following 22 properties: 12976 Highway 12, 131 122<sup>nd</sup> Street, 12586 Hartford Avenue, 291 118<sup>th</sup> Street, 14228 Highway 12, 4753 Transfer Station Road, 256 2<sup>nd</sup> Street, 12140 Hartford Avenue, 12170 Hartford Avenue, 12453 Hartford Avenue, 12517 Hartford Avenue, 12611 Hartford Avenue, 12719 Hartford Avenue, 12742 Hartford Avenue, 12154 Indio Avenue, 12252 Indio Avenue, 12253 Indio Avenue, 12474 Indio Avenue, 12742 Jerome Avenue, 129-119<sup>th</sup> Street, 130 122<sup>nd</sup> Street, 10820 Highway 12, and public right of way areas located within or outside Orofino in Clearwater County, Idaho.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.

## V. STATEMENT OF PURPOSE

10. By entering into this Consent Decree, the mutual objective of the Parties is for the Settling Defendants to make a series of cash payments to resolve their alleged civil liability for the Site under Section 107 of CERCLA, 42 U.S.C. § 9607 as provided in the Covenants by Plaintiffs in Section VIII, and subject to the Reservations of Rights by the United States in Section IX.

## VI. PAYMENT OF RESPONSE COSTS

11. Initial Payment. The Settling Defendants shall pay to EPA the principal amount of \$523,000. An initial payment of \$475,000 shall be made by the Settling Defendants within 60 days after the Effective Date.

12. Quarterly Payments. Owyhee shall pay to EPA \$48,000 in quarterly installments over a period not to exceed three years from the Effective Date of this Consent Decree. The first installment payment of \$6,000 is due within 90 days after the Effective Date of this Consent Decree, with an additional sum for Interest accrued on the quarterly payment amount (\$48,000)

calculated from February 3, 2016. The next installment payment of \$6,000 will be due no later than 90 days from the date of the first quarterly installment payment. Each quarterly installment payment thereafter shall be due no later than 90 days from the date of the preceding payment. Each installment payment shall also include an additional sum for Interest accrued on the then unpaid portion of the quarterly payment amount (\$48,000) calculated from the date of the prior payment until the date of payment. The Financial Litigation Unit ("FLU") of the U.S. Attorney's Office for the District of Idaho shall send a calculation of the Interest due for each payment to the Settling Defendants. Owyhee may pay any installment payment prior to the due date, but must contact the FLU in advance for a determination regarding the amount of Interest to be included with the payment. In the event any installment payment includes an overpayment, the amount of the overpayment shall be applied to the remaining principal.

13. The Settling Defendants shall make the payments required by Paragraph 11 (Initial Payment) and Paragraph 12 (Quarterly Payments) by either: a) certified or cashier's check; or b) electronic transfer. Payments made by certified or cashier's check must be made payable to the United States Department of Justice and mailed to the United States Attorney's Office, Financial Litigation Unit, 800 E. Park Blvd., Ste. 600, Boise, ID 83712. Payments made by electronic transfer shall be made through Fedwire Electronic Funds Transfer EFT to the U.S. Department of Justice account, in accordance with instructions provided to the Settling Defendants by the FLU of the U.S. Attorney's Office for the District of Idaho after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System ("CDCS") number, which shall be used to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

**As to Owyhee:**

Joseph M. McClure  
President  
Owyhee Construction, Inc.  
6336 W. Contractors St., Suite A  
Boise, Idaho 83709  
(208) 376-2240  
[Joe@owyheeconstruction.com](mailto:Joe@owyheeconstruction.com)

**As to RWSD:**

EJ Bonner  
Administrator  
Riverside Water and Sewer District  
10460 Highway 12  
Orofino, ID 83544  
(208) 476-3613  
[rwsd.ebonner@frontier.com](mailto:rwsd.ebonner@frontier.com)

on behalf of the Settling Defendants. The Settling Defendants may change the individual to receive payment instructions on their behalf by providing written notice to DOJ and EPA of such change in accordance with Section XIII (Notices and Submissions).

14. Deposit of Payment. The total amount of each payment to be paid pursuant to Section VI (Payment of Response Costs) shall be deposited in the Orofino Asbestos Superfund

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.

15. Notice of Payment. At the time of each payment, the Settling Defendants shall send notice that payment has been made to: (a) EPA in accordance with Section XIII (Notices and Submissions); (b) DOJ in accordance with Section XIII (Notices and Submissions); and (c) the EPA Cincinnati Finance Center (“CFC”) at:

**EPA CFC by email:** cinwd\_acctsreceivable@epa.gov

**EPA CFC by regular mail:** EPA Cincinnati Finance Center  
26 W. Martin Luther King Drive  
Cincinnati, Ohio 45268

Such notice shall reference the CDCS Number provided by the FLU, Site/Spill ID Numbers 10JN and 10JG, and DJ Number 90-11-3-10860.

## **VII. FAILURE TO COMPLY WITH CONSENT DECREE**

16. Interest on Payments and Accelerated Payment. If the Settling Defendants fail to make the payment required by Paragraph 11 (Initial Payment) by the required due date, Interest shall accrue on the unpaid balance from February 3, 2016 through the date of payment. If Owyhee fails to make any payment required by Paragraph 12 (Quarterly Payments) by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure. Interest shall continue to accrue on any unpaid amount until the total amount due has been received.

17. Stipulated Penalty.

a. If any amount due to EPA under Paragraph 11 (Initial Payment) is not paid by the required date, the Settling Defendants shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 16 (Interest on Payments and Accelerated Payment), \$5,000 per violation per day that such payment is late.

b. If any amount due to EPA under Paragraph 12 (Quarterly Payments) is not paid by the required date, Owyhee shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 16 (Interest on Payments and Accelerated Payment), \$500 per violation per day that such payment is late.

c. Stipulated penalties are due and payable within 30 days after the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by Fedwire EFT to:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read "D 68010727  
Environmental Protection Agency"

Each payment shall reference the CDCS Number provided by the FLU, Site ID Numbers 10JN and 10JG, and DJ Number 90-11-3-10860.

d. Penalties shall accrue as provided in this Section regardless of whether EPA has notified the Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing in this Consent Decree shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

18. The United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action to collect any portion of the response costs or any stipulated penalties due but not paid by the Settling Defendants.

19. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of the Settling Defendants' failure to comply with the requirements of this Consent Decree.

20. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse the Settling Defendants from payment as required by Section VI (Payment of Response Costs) or from performance of any other requirements of this Consent Decree.

#### **VIII. COVENANTS BY PLAINTIFF**

21. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against the Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), regarding the Site. With respect to present and future liability, these covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by the Settling Defendants of their obligations under this Consent Decree, including but not limited to, payment of all amounts due under Section VI (Payment of Response Costs), and any Interest or stipulated penalties due thereon under Section VII (Failure to Comply with Consent Decree). These covenants are also conditioned upon the veracity and completeness of the Financial Information and the Insurance Information provided to EPA by the Settling Defendants and the financial, insurance, and indemnity certification made by the Settling Defendants in Paragraph 33. These covenants extend only to the Settling Defendants and do not extend to any other person.

## **IX. RESERVATION OF RIGHTS BY UNITED STATES**

22. The United States reserves, and this Consent Decree is without prejudice to, all rights against the Settling Defendants with respect to all matters not expressly included within Paragraph 21. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against the Settling Defendants with respect to:

- a. liability for failure of the Settling Defendants to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability based on the ownership or operation of the Site by the Settling Defendants when such ownership or operation commences after signature of this Consent Decree by the Settling Defendants;
- e. liability based on the Settling Defendant's transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by the Settling Defendants; and
- f. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

23. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information or the Insurance Information provided by the Settling Defendants or the financial, insurance, or indemnity certification made by the Settling Defendants in Paragraph 33, is false, or in any material respect, inaccurate.

## **X. COVENANTS BY THE SETTLING DEFENDANTS**

24. The Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees, with respect to the Site and this Consent Decree, including but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund 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 response actions at or in connection with the Site, including any claim under the United States 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 pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law, relating to the Site.

25. Except as provided in Paragraph 27 (claims against other PRPs) and Paragraph 32 (Res Judicata and other Defenses), these covenants shall not apply in the event the United States brings a cause of action or issues an order pursuant to any of the reservations set forth in Section IX (Reservations of Rights by United States), other than in Paragraph 22.a (liability for failure to meet a requirement of the Consent Decree) or 22.b (criminal liability), but only to the extent that a Settling Defendant's claims arises from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

26. Nothing in this Consent Decree 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).

27. The Settling Defendants agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for response costs relating to the Site against each other or any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

#### **XI. EFFECT OF SETTLEMENT/CONTRIBUTION**

28. Except as provided in Paragraph 27 (claims against other PRPs), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Section X (Covenants by the Settling Defendants), each of the Parties expressly reserves any and all rights (including, but not limited to, under Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(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).

29. The Parties agree, and by entering this Consent Decree this Court finds, that this settlement constitutes a judicially-approved settlement pursuant to which the Settling Defendants have, as of the Effective Date, resolved their liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person, except for the State; provided, however, that if the United States exercises rights under the reservations in Section IX (Reservations of Rights by United States), other than in Paragraphs 22.a (liability for failure to meet a requirement of Consent Decree) or 22.b (criminal liability), the "matters addressed" in this Consent Decree will no longer include those response costs or response actions that are within the scope of the exercised reservation.

30. The Parties further agree, and by entering this Consent Decree this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which the Settling Defendants have, as of the Effective Date, resolved their liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

31. The Settling Defendants shall, with respect to any suit or claim brought by them for matters related to this Consent Decree, notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. The Settling Defendants also shall, with respect to any suit or claim brought against them for matters related to this Consent Decree, notify EPA and DOJ in writing within 10 days after service of the complaint or claim upon them. In addition, the Settling Defendants shall notify EPA and DOJ within 10 days after service or receipt of any Motion for Summary Judgment, and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

32. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, the Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiff set forth in Section VIII.

## XII. CERTIFICATION

33. The Settling Defendants certify that, to the best of their knowledge and belief, after thorough inquiry, they have:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, documents, or other information (including records, reports, documents and other information in electronic form), other than identical copies, relating to its potential liability regarding the Site since notification of potential liability by the United States, and that they have fully complied with any and all EPA requests for information regarding the Site and the Settling Defendants' financial circumstances, including but not limited to insurance and indemnity information, pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B);

b. submitted to EPA Financial Information that fairly, accurately, and materially sets forth their financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time the Settling Defendants execute this Consent Decree; and

c. fully disclosed any information regarding the existence of any insurance policies or indemnity agreements that may cover claims relating to cleanup of the Site, and submitted to EPA upon request such insurance policies, indemnity agreements, and information.

34. The Settling Defendants shall supplement the Financial Information listed in Appendix A by providing updated materials, including tax returns for fiscal year 2015, in order to confirm the United States' ability to pay analysis.

### XIII. NOTICES AND SUBMISSIONS

35. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the Consent Decree regarding such Party.

**As to DOJ by email:** [eescasemanagement.enrd@usdoj.gov](mailto:eescasemanagement.enrd@usdoj.gov)

**As to DOJ by regular mail:** EES Case Management Unit  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ# 90-11-3-10860

**As to EPA:** Angie Zavala  
On-Scene Coordinator  
U.S. EPA, Region 10  
1200 Sixth Avenue  
Mail Stop: ECL-133  
Seattle, WA 98101  
(206) 553-2101  
[zavala.angie@epa.gov](mailto:zavala.angie@epa.gov)

**As to RWSD :** EJ Bonner  
Administrator  
Riverside Water and Sewer District  
10460 Highway 12  
Orofino, ID 83544  
(208) 476-3613  
[rwsd.ebonner@frontier.com](mailto:rwsd.ebonner@frontier.com)

<b>As to Owyhee:</b>	Joseph M. McClure President Owyhee Construction, Inc. 6336 W. Contractors St., Suite A Boise, Idaho 83709 (208) 376-2240 <a href="mailto:Joe@owyheeconstruction.com">Joe@owyheeconstruction.com</a>	Richard W. Stover Eberle, Berlin, Kading, Turbow & McKlveen, Chtd. P.O. Box 1368 Boise, Idaho 83701 (208) 344-8535 <a href="mailto:rstover@eberle.com">rstover@eberle.com</a>

#### **XIV. RETENTION OF JURISDICTION**

36. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

#### **XV. INTEGRATION/APPENDICES**

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

“Appendix A” is a list of the financial documents submitted to EPA by the Settling Defendants.

“Appendix B” is a list of the insurance documents submitted to EPA by the Settling Defendants.

#### **XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

38. This Consent Decree shall be lodged with the Court for a period of at least 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate. The Settling Defendants consent to the entry of this Consent Decree without further notice.

39. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any Party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

#### **XVII. SIGNATORIES/SERVICE**

40. Each undersigned representative of the Settling Defendants and the Assistant Attorney General, U.S. Department of Justice, Environment and Natural Resources Division certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

41. The Settling Defendants agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

42. The Settling Defendants shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. The Settling Defendants agree to accept service in that manner and to waive the formal service requirements set forth in

Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

**XVIII. FINAL JUDGMENT**

43. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and the Settling Defendants. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 20\_\_.

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Honorable Edward J. Lodge  
United States District Court Judge

FOR THE UNITED STATES OF AMERICA

\_\_\_\_\_  
DATE

\_\_\_\_\_  
JOHN C. CRUDEN  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

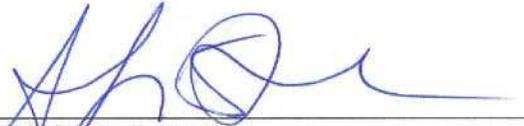
\_\_\_\_\_  
ZACHARY N. MOOR  
KATHERINE MATTHEWS  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

WENDY J. OLSON  
United States Attorney  
District of Idaho

NICOLAS J. WOYCHICK  
Assistant United States Attorney  
Washington Group Plaza IV  
800 E. Park Blvd., Suite 600  
Boise, ID 83712

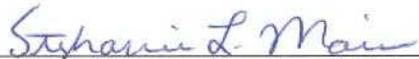
May 17, 2016

DATE



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ALLYN L. STERN  
Regional Counsel  
U.S. Environmental Protection Agency  
Region 10  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101



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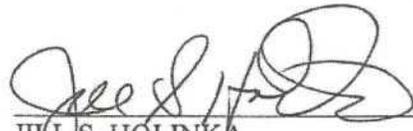
STEPHANIE L. MAIRS  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 10  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101

FOR THE RIVERSIDE WATER AND SEWER DISTRICT

April 28-2016  
DATE

  
MICHAEL J. DUGGER  
CHAIRMAN  
Riverside Water and Sewer District  
10460 Highway 12  
Orofino, ID 83544

Agent Authorized to Accept Service on Behalf  
of Above-signed Party:

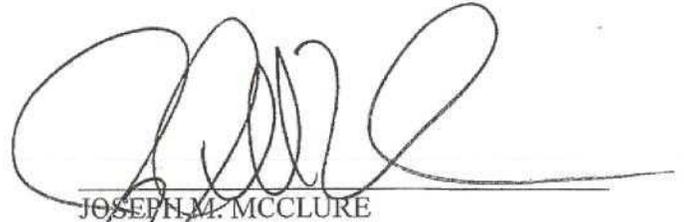
  
JILL S. HOLINKA  
Moore, Smith, Buxton & Turcke, Chtd.  
950 W. Bannock Street, Suite 520  
Boise, ID 83702  
Telephone: (208) 331-1800  
Facsimile: (208) 331-1202  
Email: seb@msbtlaw.com



FOR OWYHEE CONSTRUCTION, INC.

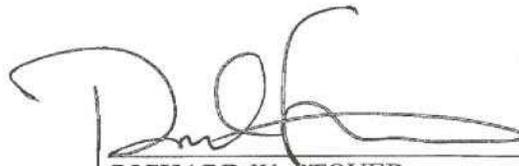
5-7-16

DATE



JOSEPH M. MCCLURE  
President  
Owyhee Construction, Inc.  
6396 W. Contractors St., Suite A  
Boise, Idaho 83709

Agent Authorized to Accept Service on Behalf  
of Above-signed Party:



RICHARD W. STOVER  
Eberle, Berlin, Kading, Turbow & McKlveen,  
Chtd.  
1111 W. Jefferson, Suite 530  
P.O. Box 1368  
Boise, Idaho 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542  
Email: rstover@eberle.com

