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Honorable Judge Rothstein

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 AT SEATTLE
 CLERK U.S. DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 BY DEPUTY

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 AT SEATTLE
 CLERK U.S. DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 BY DEPUTY

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, THE STATE
OF WASHINGTON, AND THE TULALIP
TRIBES OF WASHINGTON,

Plaintiffs,

v.

ASSOCIATED GROCERS, INC. and
FOG-TITE, INC.,

Defendants.

CIVIL ACTION NO.
C00-167-R

ORDER ENTERING
NATURAL RESOURCE DAMAGES
CONSENT DECREE

AND RELATED CASES

RELATED CASES:
C97-152-D
C97-1648-WD
C98-300-R
C99-665-R

For good cause shown, the Natural Resource Damages Consent Decrees between plaintiffs the United States of America, the State of Washington Department of Ecology and the Tulalip Tribes of Washington, as trustees for natural resources at the Tulalip Landfill Superfund Site, and defendants Associated Grocers, inc. and Fog-Tite, Inc., are hereby entered as orders of this Court in this action.

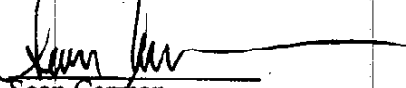
So ORDERED this 3rd day of April, 2000

Barbara Rothstein
UNITED STATES DISTRICT JUDGE

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Prepared by:



Sean Carman
U.S. Department of Justice
Environmental Enforcement Section
c/o NOAA DARC
7600 Sand Point Way, NE
Seattle, WA 98115
(206) 526-6617

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,
THE STATE OF WASHINGTON, and THE
TULALIP TRIBES OF WASHINGTON,

Plaintiffs,

v.

ASSOCIATED GROCERS, INC.
and FOG-TITE, INC.,

Defendants.

CIVIL ACTION NO.

C000000000

RELATED CASES:
C97-152D
C97-1648WD
C98-300R
C99-665R

DE MINIMIS CONSENT DECREE WITH FOG-TITE FOR
NATURAL RESOURCE DAMAGES

This Consent Decree is made and entered into by the United States of America, on behalf of the Fish and Wildlife Service of the United States Department of the Interior ("FWS") and the National Oceanic and Atmospheric Administration of the United States Department of Commerce ("NOAA"), the Washington Department of Ecology on behalf of the State of Washington, and the Tulalip Tribes of Washington, as their respective interests appear in the complaint, including as trustees for natural resources (collectively referred to as "Plaintiffs") and defendant Fog-

De Minimis Consent Decree
for Natural Resource Damages

U.S. Dept. Justice
c/o NOAA DARC
7600 Sand Point Way, NE
Seattle, WA 98115
(206) 526-6617

1 Tite, Inc. (hereinafter "Fog-Tite").

2 I. INTRODUCTION

3 1. The Plaintiffs allege that the Tulalip Landfill is
4 located on Ebey Island between Steamboat Slough and Ebey Slough
5 in the Snohomish River delta system between Everett and
6 Marysville, Washington. Ebey Island is located in Snohomish
7 County, Township 30N, Range 5E, Section 32. The Tulalip Landfill
8 Superfund Site ("the Site"), located within the Tulalip Indian
9 Reservation, occupies approximately 147 acres of the western
10 portion of Ebey Island, just to the west of Interstate 5 and the
11 Burlington Northern Railroad. The landfill area ("the Tulalip
12 Landfill") is bordered by a berm and is surrounded primarily by
13 wetlands in the form of freshwater and brackish water marshes.
14 To the west of the landfill area are approximately 160 acres of
15 salt marsh.

16 2. The Plaintiffs allege that in 1964, The Tulalip Tribes,
17 a Section 17 Corporation federal corporation chartered pursuant
18 to Section 17 of the Indian Reorganization Act, as amended, 25
19 U.S.C. § 477, leased the Site to Seattle Disposal Company for a
20 period of 10 years. The lease was renewed in 1972. From 1964 to
21 1979, Seattle Disposal Company, its general partners J. Razore,
22 J. Banchemo, and other partners, and Marine Disposal Company,
23 operated the Site, then known as the "Big Flats Landfill," as a
24 disposal site for commercial and industrial waste. The
25 Plaintiffs allege that waste material collected in King County,
26 Snohomish County, and communities in and around the Puget Sound

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1 region, including waste materials containing hazardous substances
2 generated or transported by the Settling Defendants, was
3 delivered to the Site by a variety of methods. In 1979, the
4 landfill was closed and capped pursuant to the Rivers and Harbors
5 Act of 1899, 33 U.S.C. §§ 403 and 407, and the Federal Water
6 Pollution Control Act, 33 U.S.C. §§ 1311, 1319, 1342, and 1344,
7 pursuant to a consent decree entered in the United States
8 District Court for the Western District of Washington on October
9 19, 1977, No. C77-721M. Additional capping materials, including
10 construction debris and earthen materials, were placed on the
11 source area by other parties after the 1979 consent decree
12 closure, pursuant to the NPDES permit.

13 3. The Plaintiffs allege that hazardous substances within
14 the definition of Section 101(14) of the Comprehensive
15 Environmental Response, Compensation and Liability Act
16 ("CERCLA"), 42 U.S.C. § 9601(14), MTCA, RCW 70.105D.020(7), have
17 been released into the environment from the Site. Hazardous
18 substances have been found in soils in and around the Site, in
19 sediments around the Site, in leachate emanating from the Site,
20 and in ground water at the Site. Hazardous substances of concern
21 found in soils and sediments include benzo(a)anthracene,
22 benzo(a)pyrene, benzo(b)fluoranthene, benzo(k)fluoranthene,
23 bis(2-ethylhexyl)phthalate, chrysene, 1,4-dichlorobenzene,
24 fluoranthene, fluorine, naphthalene, N-nitroso-di-n-propylamine,
25 polychlorinated biphenyls (PCBs), and pyrene. Metals were also
26 found at the Site, including arsenic, lead, and chromium.

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1 Samples of leachate flowing from the Site have shown levels of
2 arsenic, barium, cadmium, iron, zinc, manganese, toluene,
3 ethylbenzene, PCBs, and acenaphthene.

4 4. The Plaintiffs allege that, as a result of these
5 releases of hazardous substances, injuries to, destruction or
6 losses of natural resources have occurred at the Site, and that
7 such injuries, destruction or losses are compensable under
8 Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), and
9 the Model Toxics Control Act ("MTCA"), Ch. 70.105D RCW.

10 5. Plaintiffs have filed, contemporaneously with the
11 lodging of this Consent Decree, a civil complaint alleging that
12 Settling Defendant is liable under Section 107 of CERCLA, 42
13 U.S.C. § 9607, and MTCA Ch. 70.105D RCW, to the Plaintiffs for
14 damages for the injury to, destruction of or loss of natural
15 resources caused by the release of hazardous substances at or
16 from the Site.

17 6. The Settling Defendant denies the allegations in the
18 complaint in this action, including any and all allegations of
19 liability and dispute the waste volumes attributed to it in EPA's
20 volumetric report.

21 7. The purposes of this Consent Decree are to resolve the
22 liability of the Settling Defendant for claims for Natural
23 Resource Damages resulting from releases of hazardous substances
24 at or from the Tulalip Landfill and to protect the Settling
25 Defendant against claims for contribution regarding Covered
26 Matters.

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1 **III. JURISDICTION**

2 14. This Court has jurisdiction over this Consent Decree
3 under Sections 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9607(a)
4 & 9613(b), 28 U.S.C. §§ 1331 & 1345, and supplemental
5 jurisdiction over state law claims as set forth in 28 U.S.C. Sec.
6 1367. The trustees have determined, pursuant to Section
7 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1), that both the amount
8 of hazardous substances contributed by Fog-Tite to the Site and
9 the toxic or other hazardous effects of such substances were
10 minimal in comparison to other hazardous substances at the
11 facility.

12 **IV. DEFINITIONS**

13 15. Whenever the following capitalized terms are used in
14 this Consent Decree, they shall have the following meaning:

15 a. "Natural Resources" include land, fish, wildlife,
16 biota, air, water, groundwater, drinking water supplies, and
17 other such resources belonging to, managed by, held in trust by,
18 appertaining to, or otherwise controlled by the United States
19 (including the resources of the exclusive economic zone), the
20 State of Washington or the Tulalip Tribes of Washington.

21 b. "Natural Resource Damages" means compensatory and
22 remedial relief recoverable by the Federal, State and Tribal
23 Trustees of Natural Resources on behalf of the public or tribal
24 members for injury to, destruction of, or loss of use of any and
25 all Natural Resources resulting from the release of hazardous
26 substances, including (1) costs of damage assessment; (2)

1 compensation for loss, injury, impairment, damage or destruction
2 of Natural Resources, whether temporary or permanent, or for loss
3 of use value, non-use value, passive value, option value, amenity
4 value, bequest value, existence value, consumer surplus, economic
5 rent, or any similar value of Natural Resources; (3) any
6 diminution in value of Natural Resources pending restoration; and
7 (4) costs of restoring, rehabilitating, replacing, or acquiring
8 the equivalent of the Natural Resources.

9 c. "Covered Matters" means any civil or
10 administrative liability Settling Defendant may have to the
11 United States, the State of Washington (including the Washington
12 Department of Ecology), the Tulalip Tribes of Washington, or any
13 other individual or entity for any claim under 42 U.S.C. §§
14 9607(a)(4)(c) & 9607(f), 33 U.S.C. § 1321, 33 U.S.C. §§ 2702,
15 2706, chapter 70.105D RCW, chapter 90.48 RCW, or any other
16 federal, state, tribal or common law, for Natural Resource
17 Damages resulting from releases of hazardous substances at or
18 from the Tulalip Landfill.

19 **V. PAYMENT AND RELATED MATTERS**

20 16. Within 30 days of receiving notice of the entry of
21 this Consent Decree, Settling Defendant shall deliver to:

22 Registry of the U.S. District Court
23 c/o Clerk, United States District Court
24 Western District of Washington
1010 Fifth Avenue, Room 215
Seattle, WA 98104

25 a certified check payable to the Clerk of the United States
26 District Court for the Western District of Washington in the

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1 amount of NINE HUNDRED AND NINETY DOLLARS (\$990.00). The
2 certified check submitted by Settling Defendant shall reference
3 the "Tulalip Landfill NRD Settlement."

4 17. Within 5 business days of making the payment specified
5 in Paragraph 16, Settling Defendant shall provide written
6 notification of the aforesaid delivery to the persons designated
7 in Paragraph 27.

8 18. The amount deposited into the Registry of the Court
9 shall be managed pursuant to the Order Directing the Deposit of
10 Funds into the Registry of the Court issued by Judge Dimmick in
11 United States v. Ace Galvanizing, Inc., No. C97-152D (Attachment
12 A hereto), which is hereby incorporated into this Decree. Those
13 funds shall be used by Plaintiffs only for assessing, restoring,
14 rehabilitating, replacing or acquiring the equivalent of the
15 natural resources injured, destroyed, or lost as a result of
16 releases at or from the Site, as provided in 42 U.S.C. §
17 9607(f)(1).

18 19. If Settling Defendant fails to timely make any payment
19 required under this Consent Decree, it shall be liable,
20 commencing the day after payment is due, for interest on the
21 unpaid balance at the federal judgment interest rate computed in
22 accordance with 28 U.S.C. § 1961 as of the date payment is due,
23 and, if incurred, the costs of enforcement and collection
24 pursuant to the Federal Debt Collection Procedure Act, 28 U.S.C.
25 § 3001 et seq.

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1 **VI. COVENANTS NOT TO SUE**

2 20. In consideration of the Settling Defendant's timely
3 compliance with the terms of this Consent Decree, the United
4 States, the State of Washington (including the Washington
5 Department of Ecology) and the Tulalip Tribes of Washington
6 covenant not to sue or take any other civil or administrative
7 action, after entry of this Consent Decree, against Settling
8 Defendant for Covered Matters. This covenant not to sue shall
9 extend to, and inure to the benefit of, the Settling Defendant
10 and its past, present and future directors, officers and
11 employees, acting in those capacities, and its successors and
12 assigns. This covenant not to sue is subject to the reservations
13 in Section VIII of this Decree.

14 21. In consideration of the Plaintiffs' covenants not to
15 sue in this Section VI of this Consent Decree, Settling Defendant
16 agrees not to assert any claim or cause of action against any of
17 the Plaintiffs arising out of injuries to Natural Resources
18 resulting from releases of hazardous substances at or from the
19 Site, or to seek any costs, damages or attorneys' fees from any
20 Plaintiff in connection with injuries to natural resources
21 resulting from releases of hazardous substances at or from the
22 Site.

23 **VII. CONTRIBUTION PROTECTION**

24 22. Subject to the Reservation of Rights in Section VIII of
25 this Consent Decree, Plaintiffs agree that by entering into this
26 Consent Decree, Settling Defendant will have resolved its
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1 liability for Covered Matters, as described in Paragraphs 15(c)
2 and 20 of this Consent Decree, pursuant to Sections 122(g)(5) and
3 113(f)(2) of CERCLA, 42 U.S.C. § 9622(g)(5) and 9613(f)(2), MTCA,
4 RCW Chapter 70.105D.040(1), (2) and RCW 90.48.142, and shall be
5 protected against claims for contribution regarding Covered
6 Matters as provided in Sections 122(g)(5) and 113(f)(2) of
7 CERCLA, 42 U.S.C. §§ 9622(g)(5) and 9613(f)(2), RCW
8 70.105D.040(d). Contribution protection shall extend to, and
9 inure to the benefit of, the Settling Defendant and its past,
10 present and future directors, officers and employees, to the
11 extent they were acting in those capacities, and its their
12 successors and assigns.

13 **VIII. RESERVATION OF RIGHTS**

14 23. Nothing in this Consent Decree is intended to be nor
15 shall it be construed as a release or covenant not to sue for any
16 claim or cause of action, administrative or judicial, civil or
17 criminal, past or future, at law or in equity, which the
18 Plaintiffs may have against Settling Defendant for:

19 a. Any claims and liability as a result of failure to
20 make the payments required by this Consent Decree;

21 b. Any liability arising from the past, present, or
22 future disposal, release, or threat of release of any hazardous
23 substance, hazardous waste, or solid waste other than releases or
24 threats of releases at or from the site; or

25 c. Any criminal liability.

26 24. As required by MTCA, RCW 70.105D.040(4)(c), nothing in
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1 this Consent Decree is intended to be nor shall it be construed
2 as a release or covenant not to sue by the State of Washington
3 for any claim or cause of action, administrative or judicial,
4 civil or criminal, past or future, at law or in equity, which the
5 State of Washington may have against Settling Defendant for
6 factors not known to EPA at the time of entry of the decree that
7 are discovered and present a previously unknown threat to human
8 health or the environment. Factors known and threats known at
9 the time of the entry of the Consent Decree include all facts,
10 documents, evidence and data in the possession of EPA at the time
11 of entry of the Consent Decree, including but not limited to all
12 of the facts set forth in documents in EPA's administrative
13 record for the Site, EPA's Risk Assessment for the Site and EPA's
14 Proposed Plan for Interim Remedial Action for the Site.

15 **IX. DISCLAIMER OF LIABILITY**

16 25. Neither entry of this Consent Decree nor any action in
17 accordance with this Consent Decree shall constitute an admission
18 of liability under any federal, state, tribal or local statute,
19 regulation, ordinance, general maritime law or common law by
20 Settling Defendant, its present or former officers, members,
21 directors, trustees, shareholders, insurers, agents,
22 representatives, employees, subsidiaries, successors, assigns or
23 affiliates, for any fine, penalty, response costs, damages, or
24 claims or any issues of fact or law for releases of hazardous
25 substances at the Site.

26 26. The parties further agree that none of the provisions
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1 of this Consent Decree or evidence of negotiations shall be
2 offered or received in evidence in this action or any other
3 action or proceedings by any other party for any purpose, except
4 for enforcement of this Consent Decree or except as specifically
5 provided herein.

6 **X. NOTICES AND SUBMISSIONS**

7 27. Whenever, under the terms of this Consent Decree,
8 written notice is required to be given or a report or other
9 document is required to be sent by one party to the other, it
10 shall be directed to individuals at the addresses specified
11 below, unless those individuals or their successors give written
12 notice of a change. All notices and submissions shall be
13 considered effective upon receipt, unless otherwise provided.

14 As to the United States:

15 Chief
16 Environmental Enforcement Section
17 Environment and Natural Resources Division
18 U.S. Department of Justice
19 P.O. Box 7611
20 Ben Franklin Station
21 Washington, D.C. 20044

19 As to the State of Washington:

20 Michelle Wilcox
21 Toxics Cleanup Program
22 State of Washington
23 P.O. Box 47600
24 Olympia, Washington 98504-7600

23 As to the Tulalip Tribes of Washington:

24 Tom McKinsey
25 Tulalip Tribes of Washington
26 6326 33rd Ave., N.E.
27 Marysville, Washington 98271

1 **XI. ENTRY OF DECREE**

2 28. This Consent Decree shall be lodged with the Court for
3 a period of not less than thirty (30) days and shall be made
4 available for public notice and comment in accordance with
5 Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), 28 C.F.R. §
6 50.7, and RCW 70.105D.040(4)(a). The United States, the State of
7 Washington and the Tulalip Tribes of Washington intend to defend
8 the settlement embodied in this Consent Decree, unless comments
9 regarding the Consent Decree disclose facts or considerations
10 that indicate that the Consent Decree is not fair, reasonable or
11 in the public interest, in which case the United States and the
12 Tulalip Tribes of Washington reserve the right to withdraw or
13 withhold their consent to the Consent Decree. The State of
14 Washington reserves the right to withdraw or withhold its consent
15 if the comments regarding the Consent Decree disclose facts or
16 considerations that demonstrate that the proposed settlement
17 would not lead to a more expeditious restoration of natural
18 resources. Settling Defendant consents to the entry of this
19 Consent Decree without further notice.

20 29. After its entry by the Court, this Consent Decree shall
21 be considered an enforceable judgement for purposes of post-
22 judgement collection in accordance with Rule 69 of the Federal
23 Rules of Civil Procedure and other applicable federal statutory
24 authority.

25 30. Settling Defendant hereby waives the 60-day notice
26 requirement applicable to the the trustees by virtue of Section
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1 113(g)(1) of CERCLA, 42 U.S.C. § 9613(g)(1), and agrees that any
2 failure by Plaintiffs to give the notice required by that section
3 shall not constitute a deficiency in the Complaint or in this
4 Consent Decree.

5 31. This Court retains jurisdiction over both the subject
6 matter of this Consent Decree and the Parties hereto for the
7 duration of the performance of the terms and conditions of this
8 Consent Decree solely for the purpose of enforcing those terms
9 and conditions.

10 **XII. MISCELLANEOUS**

11 32. In any subsequent administrative or judicial proceeding
12 initiated by the United States for injunctive relief, recovery of
13 response costs, or other appropriate relief relating to the Site,
14 Settling Defendant shall not assert, and may not maintain, any
15 defense or claim based upon the principles of waiver, res
16 judicata, collateral estoppel, issue preclusion, claim-splitting,
17 or other defenses based upon any contention that the claims
18 raised by the United State in the subsequent proceeding were or
19 should have been brought in the instant case; provided, however,
20 that nothing in this paragraph affects the enforceability of the
21 covenants not to sue set forth in Section VI.

22 33. Settling Defendant shall not reference or rely upon its
23 payment under this Consent Decree in any application for dredged
24 or fill material under Section 404 of the Federal Water Pollution
25 Control Act, or in any proceeding arising out of the Settling
26 Defendant's application, or failure to apply, for such a permit.

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1 34. This Consent Decree shall not affect any party's rights
2 against any person or entity not a party to this Consent Decree,
3 except for the contribution protection provisions of Section VII.
4 No person or entity other than the parties hereto shall have the
5 authority to seek to enforce the terms of this Consent Decree.

6 35. This Consent Decree constitutes the entire agreement
7 among the parties with regard to the subject matter hereof and
8 can be modified or amended only with the express written consent
9 of all the parties to this Consent Decree.

10 36. Each of the undersigned representatives of Plaintiffs
11 and Settling Defendant certifies that he or she is fully
12 authorized to enter into the terms and conditions of this Consent
13 Decree and to execute and legally bind the party whom he or she
14 represents to this Consent Decree.

15 37. The Tulalip Tribes of Washington's joinder to this
16 Decree is solely in its capacity as a trustee for natural
17 resources and constitutes a limited waiver of the Tulalip Tribes
18 of Washington's sovereign immunity for the sole and limited
19 purpose of enforcing the terms of this Consent Decree; provided
20 that, this Consent Decree shall not act as a general waiver of
21 sovereign immunity nor shall it in any way impair treaty-reserved
22 hunting and fishing rights.

23 38. This Consent Decree may be executed in several
24 counterparts and by facsimile and, as executed, shall constitute
25 one agreement, binding on all parties hereto, even though all
26 parties do not sign the original or the same counterpart.

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1 39. Except as otherwise provided herein each party to this
2 Consent Decree shall bear his, her or its own costs, attorneys
3 fees and disbursements.

4 40. Settling Defendant shall identify, on the attached
5 signature page, the name, address and telephone number of an
6 agent who is authorized to accept service of process by mail on
7 its behalf with respect to all matters arising under or relating
8 to this Consent Decree. Settling Defendant hereby agrees to
9 accept service in that manner and to waive the formal service
10 requirements set forth in Rule 4 of the Federal Rules of Civil
11 Procedure and any applicable local rules of this Court,
12 including, but not limited to, service of a summons.

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SO ORDERED THIS ____ DAY OF _____, ____.

UNITED STATES DISTRICT JUDGE

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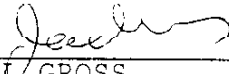
We hereby consent to the entry of the foregoing Consent

Decree:

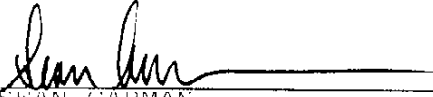
FOR THE UNITED STATES OF AMERICA:

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice
Washington, D.C.

1-10-1000
Date


JOEL GROSS
Section Chief
Environmental Enforcement Section
United States Department of Justice
Washington, D.C.

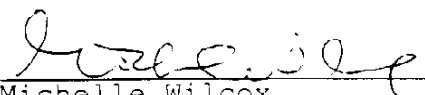
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SEAN CARMAN
Trial Attorney
Environmental Enforcement Section
United States Department of Justice
NOAA DARC - DOJ
7600 Sand Point Way, N.E.
Seattle, Washington 98115-0070
(206) 526-6617

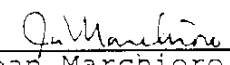
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FOR THE STATE OF WASHINGTON:

January 26, 2000
Date


Michelle Wilcox
Program Director
Toxics Cleanup Program
Washington Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

1/27/00
Date


Joan Marchioro
Assistant Attorney General
Ecology Division
629 Woodland Square Loop, S.E.
P.O. Box 40117
Olympia, Washington 98504-0117

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FOR THE TULALIP TRIBES OF WASHINGTON:

Jan 27, 2000
Date

By: Herman A. Williams, Jr.
Herman Williams, Jr.
Chairman
Board of Directors

De Minis Consent Decree
for Natural Resource Damages

U.S. Dept. Justice
c/o NOAA DARC
7600 Sand Point Way, NE
Seattle, WA 98115
(206) 526 6617

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By the signature on this page, Fog-Tite, Inc. agrees to be bound by the terms of this Consent Decree:

12-9-99
Date

Donald L. Blidner

Agent for Service of Process: _____

