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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)
)
Plaintiff,) No. CIV 07-1401-PHX-DKD
)
vs.)
) **CONSENT DECREE**
)
Texmo Oil Company Jobbers, Inc.)
)
Defendant.)
_____)

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Secretary of the United States Department of the Interior ("DOI"), filed a complaint in this action against Texmo Oil Company Jobbers, Inc. ("Texmo" or "Defendant") pursuant to the Oil Pollution Act ("OPA"), 33 U.S.C. §§ 2701-2761.

B. The Bill Williams River National Wildlife Refuge ("Refuge") is managed and administered by the United States Fish and Wildlife Service. Pursuant to Executive Order 12580 and the National Contingency Plan, 40 C.F.R. Part 300, DOI, through the Fish and Wildlife Service, has been delegated authority to act as the Federal Trustees for natural resources in the Refuge.

C. The United States' complaint alleges that on July 28, 2006 a tanker truck, owned and operated by Texmo, carrying 7,600 to 7,800 gallons of diesel fuel, lost control crossing a bridge over the Bill Williams River. The diesel spilled onto the bridge, caught fire, and flowed off the bridge into the Bill Williams River and onto land in the Refuge. The spilled, burning

1 diesel ignited the cattails in the marsh below the bridge and the fire eventually spread to include
2 woody riparian and upland vegetation along the shoreline and the riparian forest upstream of
3 the bridge. Approximately 348 acres of marsh and terrestrial habitats were burned or partially
4 burned by the fire. This event is hereinafter called the "Incident."

5 D. The United States' complaint alleges that the Defendant is liable under OPA for
6 damages for injury to, destruction of, or loss of natural resources resulting from the release of
7 oil during the Incident.

8 E. By entry into this Consent Decree, the Defendant does not admit any liability to
9 the Plaintiff arising out of the transactions or occurrences alleged in the complaint.

10 F. The Parties to this Consent Decree recognize, and the Court by entering this
11 Consent Decree finds, that this Consent Decree: (i) has been negotiated by the Parties in good
12 faith; (ii) will avoid prolonged and complicated litigation among the Parties; (iii) will expedite
13 natural resource restoration actions to be performed by the Trustees; and (iv) is fair, reasonable,
14 and in the public interest.

15 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

16 **II. JURISDICTION**

17 1. This Court has jurisdiction over the subject matter of this action pursuant to 28
18 U.S.C. §§ 1331 and 1345, and Section 1017(b) of the Oil Pollution Act of 1990 ("OPA"), 33
19 U.S.C. § 2717(b). The Court also has personal jurisdiction over Defendant. Solely for the
20 purposes of this Consent Decree and the underlying complaints, Defendant waives all objections
21 and defenses that it may have to jurisdiction of the Court or to venue in this District. Defendant
22 shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and
23 enforce this Consent Decree.

24 **III. PARTIES BOUND**

25 2. This Consent Decree applies to and is binding upon the Plaintiff and upon
26 Defendant and its successors and assigns. Any change in ownership or corporate status of
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1 Defendant including, but not limited to, any transfer of assets or real or personal property, shall
2 in no way alter Defendant's responsibilities under this Consent Decree.

3 **IV. DEFINITIONS**

4 3. Unless otherwise expressly provided herein, terms used in this Consent Decree
5 that are defined in OPA or in regulations promulgated under OPA shall have the meaning
6 assigned to them in OPA or in such regulations. Whenever terms listed below are used in this
7 Consent Decree the following definitions shall apply:

8 a. "Consent Decree" means this Consent Decree.

9 b. "Day" means a calendar day unless expressly stated to be a working day.

10 "Working Day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In
11 computing any period of time under this Consent Decree, where the last day would fall on a
12 Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next
13 working day.

14 c. "Defendant" means Texmo Oil Company Jobbers, Inc.

15 d. "DOI" means the United States Department of the Interior and any
16 successor departments or agencies of the United States.

17 e. "Effective Date" means the effective date of this Consent Decree as
18 provided by Section XIII of this Consent Decree (Effective Date and Retention of Jurisdiction).

19 f. "Incident" means the July 28, 2006 event when a tanker truck, owned and
20 operated by Texmo, carrying 7,600 to 7,800 gallons of diesel fuel, lost control crossing a bridge
21 over the Bill Williams River and spilled diesel into the Bill Williams River and into the Refuge.

22 g. "Natural Resource" or "Natural Resources" means land, fish, wildlife,
23 biota, air, water, ground water, drinking water supplies, and other such resources, belonging to,
24 managed by, held in trust by, appertaining to, or otherwise controlled by the United States.

25 h. "Natural Resource Damages" means the damages recoverable by the
26 United States described at Section 1002(b)(2)(A) of OPA, 33 U.S.C. § 2702(b)(2)(A), which
27 include the reasonable costs of damage assessment.

1 i. "NRDAR Fund" means DOI's Natural Resource Damage Assessment and
2 Restoration Fund.

3 j. "Paragraph" means a portion of this Consent Decree identified by an arabic
4 numeral or an upper case letter.

5 k. "Parties" means the United States and the Settling Defendant.

6 l. "Plaintiff" means the United States.

7 m. "Section" means a portion of this Consent Decree identified by a roman
8 numeral.

9 n. "Subparagraph" means a portion of this Consent Decree identified by a
10 lower case letter or an arabic numeral in parentheses.

11 o. "United States" means the United States of America, including all of its
12 departments, agencies, and instrumentalities.

13 **V. STATEMENT OF PURPOSE**

14 4. The mutual objectives of the Parties in entering into this Consent Decree are: (i)
15 to contribute to the restoration, replacement, or acquisition of the equivalent of the natural
16 resources allegedly injured, destroyed, or lost as a result of the Incident; (ii) to reimburse natural
17 resource damage assessment costs incurred by DOI; (iii) to resolve the Defendant's liability for
18 Natural Resource Damages as provided herein; and (iv) to avoid potentially costly and
19 time-consuming litigation.

20 **VI. PAYMENTS BY THE SETTLING DEFENDANTS**

21 5. Within 30 days after the Effective Date, the Settling Defendant shall pay a total
22 of \$1,217,382.91 to the United States for Natural Resource Damages. Payment shall be made
23 by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in
24 accordance with current EFT procedures, referencing USAO File Number ____, and DOJ Case
25 Number 90-5-1-1-09082. Payment shall be made in accordance with instructions provided to
26 the Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office
27 for the District of Arizona following lodging of the Consent Decree. Any payments received
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1 by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next
2 business day.

3 6. The total amount to be paid by Settling Defendant pursuant to Paragraph 5 shall
4 be deposited in the DOI NRDAR Fund, to be applied toward natural resource damage
5 assessment costs incurred by DOI, or to be deposited in a segregated sub-account within the
6 NRDAR Fund, to be managed by DOI for natural resource restoration projects in accordance
7 with Section VII.

8 7. Upon making any payment under Paragraph 5, Settling Defendant shall send
9 written notice that payment has been made, to all the names listed in Section XII (Notices) and
10 also to:

11 Bruce Nessler
12 DOI Restoration Fund Manager
13 1849 "C" Street, N.W.
14 Mail Stop 4449
15 Washington, D.C. 20240.

16 8. Non-Compliance with Payment Obligations.

17 a. Interest. In the event any payment required by Paragraph 5 is not made
18 when due, the Settling Defendant shall pay Interest on the unpaid balance commencing on the
19 payment due date and accruing through the date of full payment. Interest shall be compounded
20 daily at the rate set forth in 28 U.S.C. §1961.

21 b. Stipulated Damages. In addition to the Interest required to be paid under
22 the preceding Subparagraph, if any payment required by Paragraph 5 is not made when due, the
23 Settling Defendant shall also pay stipulated damages of \$1,000 per day through the date of full
24 payment.

25 c. Payment of Interest and Stipulated Damages. Any Interest payments under
26 Subparagraph 8.a shall be paid in the same manner as the overdue principle amount, and shall
27 be directed to the same fund or account as the overdue principle amount. Any stipulated
28 damages payments under this Paragraph shall be paid to the United States in accordance with

1 payment instructions provided by the Financial Litigation Unit of the United States Attorney's
2 Office for the District of Arizona, and shall be deposited in the United States Treasury.

3 **VII. USE OF FUNDS**

4 9. All funds deposited in the NRDAR Fund under Subparagraph 5 shall be managed
5 by DOI to pay for the costs of restoration, rehabilitation, or replacement of injured natural
6 resources, and/or acquisition of equivalent resources, including but not limited to any
7 administrative costs and expenses necessary or incidental thereto, or to reimburse DOI's damage
8 assessment costs. DOI intends to prepare a separate Restoration Plan describing how the funds
9 will be used. The Plan will identify how funds will be used for restoration, rehabilitation,
10 replacement, or acquisition of equivalent resources. The Plan may also identify how funds will
11 be used to address services lost to the public until restoration, rehabilitation, replacement, and/or
12 acquisition of equivalent resources is completed.

13 **VIII. COVENANTS NOT TO SUE BY PLAINTIFF**

14 10. Except as specifically provided by Paragraph 11 (General Reservations) and
15 Paragraph 12 (Special Reservations Regarding Natural Resource Damages), the United States
16 covenants not to sue Defendant pursuant to Section 1002(b)(2) of OPA, 33 U.S.C. § 2702(b)(2),
17 for Natural Resource Damages resulting from the Incident. This covenant not to sue shall take
18 effect upon receipt of the Defendant's payments pursuant to Paragraph 5 of this Consent Decree.
19 This covenant not to sue is conditioned upon the satisfactory performance by Defendant of its
20 obligations under this Consent Decree.

21 **IX. RESERVATION OF RIGHTS BY PLAINTIFF**

22 11. General Reservations. The United States reserves, and this Consent Decree is
23 without prejudice to, all rights against Defendant and with respect to all matters not expressly
24 included within Paragraph 10 (Covenants by the United States). Notwithstanding any other
25 provisions of this Consent Decree, the United States reserves all rights against Defendant with
26 respect to:
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1 a. claims based on a failure by the Defendant to meet a requirement of this
2 Consent Decree;

3 b. liability under OPA for costs of response incurred by the United States in
4 connection with the Incident, including removal costs under Section 1002(b)(1) of OPA, 33
5 U.S.C. § 2702(b)(1);

6 c. actions pursuant to Section 311(c)(1)(A) of the CWA, 33 U.S.C. §
7 1321(c)(1)(A) or Section 1002(b)(1) of OPA, 33 U.S.C. § 2702(b)(1), to mitigate or prevent a
8 discharge or a substantial threat of discharge of oil or a hazardous substance;

9 d. liability for any other costs or damages incurred or to be incurred by the
10 Plaintiffs that are not within the definition of Natural Resource Damages;

11 e. liability for damages for injury to, destruction of, or loss of natural
12 resources resulting from any releases or threatened releases of hazardous substances or oil, other
13 than during the Incident;

14 f. subrogated claims under Section 1015 of OPA, 33 U.S.C. § 2715, for any
15 amounts paid or to be paid by the Oil Spill Liability Trust Fund to any person in connection
16 with the Incident; and

17 g. criminal liability.

18 12. Special Reservations Regarding Natural Resource Damages. Notwithstanding any
19 other provision of this Consent Decree, the United States reserves the right to institute
20 proceedings against Defendant in this action or in a new action seeking recovery of Natural
21 Resource Damages, including costs of damages assessment, based on: (i) conditions caused by
22 the Incident, unknown to DOI as of the date of lodging of this Consent Decree, that result in
23 releases of oil that contribute to injury to, destruction of, or loss of Natural Resources; or (ii)
24 information received by DOI after the date of lodging of this Consent Decree which indicates
25 that the Incident has resulted in injury to, destruction of, or loss of Natural Resources of a type
26 or future persistence that was unknown to DOI as of the date of lodging of this Consent Decree.

1 **X. COVENANTS BY DEFENDANT**

2 13. Covenants by Defendant. Defendant covenants not to sue and agrees not to assert
3 any claims or causes of action against the United States, or its contractors or employees, with
4 respect to the Incident or this Consent Decree, including but not limited to any direct or indirect
5 claim for reimbursement of any payment from the Oil Spill Liability Trust Fund established
6 pursuant to 26 U.S.C. §§ 4611 and 9509 or any direct or indirect claim for contribution under
7 OPA, including under Section 1009 of OPA, 33 U.S.C. § 2709.

8 14. In any subsequent administrative or judicial proceeding initiated by the United
9 States for injunctive relief, recovery of response costs or Natural Resource Damages, or other
10 relief relating to the Incident, the Settling Defendant shall not assert, and may not maintain, any
11 defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue
12 preclusion, claim-splitting, or other defenses based upon any contention that the claims raised
13 by the United States in the subsequent proceeding were or should have been brought in the
14 instant case; provided, however, that nothing in this Paragraph affects the enforceability of the
15 Covenants Not To Sue by the United States set forth in Section VIII.

16 **XI. EFFECT OF SETTLEMENT**

17 15. Nothing in this Consent Decree shall be construed to create any rights in, or grant
18 any cause of action to, any person not a Party to this Consent Decree. The Parties expressly
19 reserve any and all rights (including, but not limited to, any right to contribution), defenses,
20 claims, demands, and causes of action which each Party may have with respect to any matter,
21 transaction, or occurrence relating in any way to the Incident against any person not a Party
22 hereto.

23 **XII. NOTICES**

24 16. Whenever, under the terms of this Consent Decree, notice is required to be given
25 or a document is required to be sent by one Party to another, it shall be directed to the
26 individuals at the addresses specified below, unless those individuals or their successors give
27 notice of a change to the other Parties in writing. Written notice as specified herein shall
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1 constitute complete satisfaction of any written notice requirement of the Consent Decree with
2 respect to the United States and the Settling Defendant, respectively.

3 As to the United States:

4 Chief, Environmental Enforcement Section
5 U.S. Department of Justice
6 DJ #90-5-1-1-09082
7 P.O. Box 7611
8 Washington, DC 20044-7611

9 and

10 Janet Wong
11 Office of the Field Solicitor
12 United States Department of Interior
13 Sandra Day O'Connor U.S. Courthouse, Suite 404
14 401 West Washington Street, SPC 44
15 Phoenix, Arizona 85003-2151.

16 As to the Settling Defendant:

17 Lisa Futo
18 Commercial Claims Consultant
19 Nationwide Agribusiness
20 1100 Locust St., Department 3010
21 Des Moines, IA 20391-3010.

22 **XIII. EFFECTIVE DATE AND RETENTION OF JURISDICTION**

23 17. This Consent Decree shall take effect upon entry by the Court.

24 18. The Court shall retain jurisdiction to modify and enforce the terms and conditions
25 of this Consent Decree and to resolve disputes arising hereunder as may be necessary or
26 appropriate for the construction or execution of this Consent Decree.

27 **XIV. CONSENT DECREE MODIFICATIONS**

28 19. Any material modification of this Consent Decree shall be made by agreement of
the Parties to this Consent Decree and in writing, and shall not take effect unless approved by
the Court. Any non-material modification of this Consent Decree shall be made by agreement
of the Parties to this Consent Decree and in writing, and shall not take effect until filed with the
Court. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce,
supervise, or approve modifications to this Consent Decree.

1 **XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

2 20. This Consent Decree shall be lodged with the Court for a period of not less than
3 30 days for public notice and comment. The United States reserves the right to withdraw or
4 withhold its consent if comments regarding the Consent Decree disclose facts or considerations
5 which indicate that this Consent Decree is inappropriate, improper, or inadequate. The Settling
6 Defendant consents to the entry of this Consent Decree without further notice. If for any reason
7 the Court should decline to approve this Consent Decree in the form presented, or if approval
8 and entry is subsequently vacated on appeal of such approval and entry, this agreement is
9 voidable at the sole discretion of any party and the terms of the agreement may not be used as
10 evidence in any litigation between the Parties.

11 21. Defendant hereby agrees not to oppose entry of this Consent Decree by this Court
12 or to challenge any provision of this Consent Decree unless the United States has notified
13 Defendant in writing that it no longer supports entry of the Consent Decree.

14 22. The provisions of this Consent Decree are not severable. The Parties' consent
15 hereto is conditioned upon the entry of the Consent Decree in its entirety without modification,
16 addition, or deletion except as agreed to by the Parties.

17 **XVI. SIGNATORIES/SERVICE**

18 23. The undersigned representatives of the Settling Defendant and the United States
19 each certify that he or she is fully authorized to enter into the terms and conditions of this
20 Consent Decree and to execute and legally bind such Party to this document. This Consent
21 Decree may be executed in multiple counterparts, each of which shall be deemed an original,
22 but all of which, taken together, shall constitute one and the same instrument.

23 24. Defendant shall identify, on the attached signature pages, the name, address and
24 telephone number of an agent who is authorized to accept service of process by mail on behalf
25 of Defendant with respect to all matters arising under or relating to this Consent Decree.
26 Defendant hereby agrees to accept service in that manner and to waive the formal service
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1 requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local
2 rules of this Court, including but not limited to service of a summons.

3 **XVII. FINAL JUDGMENT**

4 25. This Consent Decree and its appendices constitute the final, complete, and
5 exclusive understanding among the Parties with respect to the settlement embodied in the
6 Consent Decree. The Parties acknowledge that there are no representations, agreements, or
7 understandings relating to the settlement other than those expressly contained in this Consent
8 Decree.

9 26. Upon approval and entry of this Consent Decree by the Court, this Consent
10 Decree shall constitute a final judgment between and among the United States and the
11 Defendant. The Court finds that there is no reason for delay and therefore enters this judgment
12 as a final judgment under Fed. R. Civ. P. 54 and 58.

13 **SO ORDERED.**

14 DATED this 12th day of September, 2007.

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19 David K. Duncan
20 United States Magistrate Judge
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