

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**NEW MEXICO ENVIRONMENT DEPARTMENT,
RESOURCE PROTECTION DIVISION,
PETROLEUM STORAGE TANK BUREAU,**

Complainant,

v.

**PSTB Case No. 13-
20211022- 2460**

**INN OF THE MOUNTAIN GODS RESORT AND CASINO
Owner ID No. 276381/ Operator ID No. O14199
FID #276374**

SETTLEMENT AGREEMENT

Pursuant to 20.1.5.600(B) NMAC, the Petroleum Storage Tank Bureau ("Bureau") of the Resource Protection Division ("Division") of the New Mexico Environment Department ("NMED") and Inn of the Mountain Gods Resort and Casino, owners and operators (Owner ID No. 276381/ Operator ID No. O14199) of the storage tanks located at Ski Apache, 1286 Ski Run Road, Alto, New Mexico ("Facility") (Facility ID No. 276374) an enterprise of the Mescalero Apache Tribe (herein referred to collectively as "Ski Apache") have entered into a Settlement Agreement to resolve violations of the Petroleum Storage Tank Regulations ("Regulations") in 20.5 NMAC for the five aboveground storage tanks ("ASTs") (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232) located at the Facility. In addition, this Settlement Agreement resolves the outstanding tank fee balance for tanks not registered with NMED by Ski Apache (Tank ID Nos.

39228, 39229, 39230, 39231 and 39232). NMED and Ski Apache agree to this Settlement Agreement being incorporated into a Stipulated Final Order by NMED. For the purpose of this Settlement Agreement, NMED and Ski Apache admit to the jurisdictional allegations.

I. BACKGROUND

A. PARTIES

1. NMED is an agency of the executive branch of the State of New Mexico created pursuant to NMSA 1978, Section 9-7A-4 (2005).

2. NMED is charged with the administration and enforcement of the Hazardous Waste Act NMSA 1978, Section 74-4-1 and the implementing regulations 20.5 NMAC.

3. Pursuant to the Delegation Order dated March 24, 2023, the Secretary of the Department has delegated authority to enter into Settlement Agreements under the Hazardous Waste Act and the Petroleum Storage Tank Regulations to both the Division Director of the Resource Protection Division and the Bureau Chief of the Petroleum Storage Tank Bureau and has delegated authority to issue Stipulated Final Orders to the Division Director of the Resource Protection Division.

4. Ski Apache is the owner and operator registered with NMED, as defined by 20.5.10.7 NMAC ("Tank Owners/Operators") for the five ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232), located at the Facility.

B. NATURE OF DISPUTE

5. On October 22, 2021, NMED issued a List of Class A Violations ("LCAV") to Ski Apache for the ASTs in violation of the Regulations, pursuant to 20.5.116.1602(A) NMAC.

The LCAV informed Ski Apache that a Notice of Intent to Red Tag would follow if the violations were not corrected within thirty days from the date of the LCAV. The violations alleged within the October 21, 2021, LCAV were:

(a) Failure to stop the prohibited use of an underground storage tank being used as an AST by July 1, 2013, pursuant to 20.5.109.905 NMAC for ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232);

(b) Failure to provide approval from the State Fire Marshal's Office for existing single walled AST systems installed on or before July 1, 2001, that do not comply with the requirements of the International Fire Code, pursuant to 20.5.109.908(B) NMAC for ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232);

(c) Failure to install spill prevention equipment on an AST, pursuant to 20.5.109.910(A)(1) NMAC for ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232);

(d) Failure to install overfill prevention equipment on an AST, pursuant to 20.5.109.910(A)(2) NMAC for ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232);
and

(e) Failure to monitor AST system monthly for releases using a method, or combination of methods, of release detection, pursuant to 20.5.110.1100(A) NMAC for ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232).

6. On October 22, 2021, NMED also issued a Field Compliance Order ("FCO") to Ski Apache for violations of 20.5.102 NMAC and 20.5.117 NMAC for ASTs with (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232) that must be corrected within thirty days

of the date of the FCO.

7. The two violations alleged in the October 22, 2021, FCO were:
 - (a) Failure to register an existing AST by June 14, 2002, pursuant to 20.5.102.200(B) NMAC for the ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232); and
 - (b) Failure to demonstrate third party financial responsibility on petroleum storage tanks, pursuant to 20.5.117.1701(A) NMAC for the ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232).

8. On November 16, 2021, Mescalero Apache Tribe President Aguilar submitted a letter to NMED requesting a period of 12 months to correct the outstanding violations at Ski Apache.

9. On November 19, 2021, NMED issued a Corrective action timeline approval letter that authorized Ski Apache an extension deadline of November 21, 2022, to complete the installation of new AST systems and to permanently close the existing ASTs pursuant to 20.5 NMAC.

10. On November 29, 2021, Ski Apache corrected the violations listed in the October 22, 2021, FCO for the ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232) however, the violation in the October 22, 2021, LCAV for failure to monitor AST system monthly for releases using a method, or combination of methods, of release detection, pursuant to 20.5.110.1100(A) NMAC for the AST with Tank ID 39232 was not corrected and remains outstanding.

11. On January 12, 2023, NMED issued an invoice to Ski Apache for \$220,161.24, which is the amount of tank fees along with interest and penalties owed by Ski Apache, for the years the AST systems were not registered.

12. On January 27, 2023, NMED issued a Notice of Deficiency ("NOD") for the release detection violation listed in paragraph 5(e) of this Settlement Agreement (originally in the LCAV issued October 22, 2021). The violation listed in the NOD was to be corrected within 30 days of issuance of the NOD.

13. On February 16, 2023, NMED issued a Notice of Intent to Red Tag ("NOIRT") for the violations listed in paragraphs 5 (a) through (c) of this Settlement Agreement (originally in the LCAV issued October 22, 2021). The violations listed in the NOIRT were to be corrected within 30 days of issuance of the NOIRT.

14. On February 16, 2023, the violation in the October 22, 2021, LCAV for failure to monitor AST system monthly for releases using a method, or combination of methods, of release detection, pursuant to 20.5.110.1100(A) NMAC for ASTs (Tank ID Nos. 39228, 39229, 39230, and 39231) was corrected by Ski Apache.

15. On February 27, 2023, NMED had a meeting with Ski Apache to discuss the next steps in correcting the violations listed in the NOIRT without placing the AST systems into delivery prohibition. NMED and Ski Apache agreed to enter into a settlement agreement for the correction of the violations and payment of the tank fees.

16. On March 13, 2023, NMED received a letter from Mescalero Apache Tribe President Martinez that formally requested an additional 12 months to replace the existing AST

systems with new AST systems and delay placing the ASTs (Tank ID Nos. 39228, 39229, 39230, 39231 and 39232) into delivery prohibition pursuant to 20.5.116 NMAC for the violations list in the October 22, 2021, LCAV.

17. On March 31, 2023, NMED received a letter from Mescalero Apache Tribe President Martinez formally requesting a reduction of the \$220,161.24 owed for tank fees pursuant to 20.5.103 NMAC.

II. COMPROMISE AND SETTLEMENT

18. Following good faith settlement discussions, NMED and Ski Apache have entered into this Settlement Agreement and agree to the following terms and conditions:

(a) Ski Apache shall hire a contractor to remove the AST with Tank ID 39232 and submit a signed contract to NMED no later than 30 days after the execution of the Stipulated Final Order. The permanent closure of the AST with Tank ID 39232 shall be pursuant to the requirements in 20.5.115.1502 NMAC to include notification and a site assessment that will include the collection of at least two soil samples. The permanent closure shall be completed no later than June 30, 2023;

(b) Ski Apache shall pay, pursuant to 20.5.103 NMAC, to NMED the principal outstanding tank fee balance of eleven hundred dollars for the AST with Tank ID 39332 that was not registered in accordance with 20.5.102 NMAC. NMED has agreed to waive all penalties and interest associated with the outstanding tank fee balance for this AST if the Tank Owner makes the payment that is postmarked no later than June 15, 2023. If the payment is not received by NMED by June 30, 2023, the Tank Owner will have to pay the outstanding tank fee balance

including all accumulated interest and penalties;

(c) Ski Apache shall pay, pursuant to 20.5.103 NMAC, to NMED the principal of the outstanding tank fee balance of \$8,400.00 dollars for the length of time the ASTs with Tank ID 39228, 39229, 39230, and 39231 were not registered pursuant to 20.5.102 NMAC. NMED has agreed to waive all penalties and interest associated with the outstanding tank fee balance for these four ASTs. Ski Apache shall include an additional \$400.00 for the tank fees for fiscal year 2024 that will be due after July 1, 2023. The payment for the tank fees for the four ASTs with Tank ID 39228, 39229, 39230, and 39231 shall be postmarked no later than June 15, 2024, and if payment is not received by June 30, 2024, then the outstanding balance including interest and penalties will be due within the next 30 days;

(d) Ski Apache shall hire a New Mexico AST Certified Installer that meets the requirements in 20.5.105 NMAC no later than June 30, 2023, and shall submit documentation to NMED demonstrating that they have entered into a contract with an AST certified installer, that meets the requirements of 20.5.105.501 NMAC and 20.5.105.506 NMAC, for the installation of new AST systems;

(e) Ski Apache is responsible for either promptly ordering or ensuring that the AST certified installer orders the new AST systems and any equipment for the AST installation to replace the noncompliant ASTs with Tank ID 39228, 39229, 39230, and 39231 in order to meet the deadlines in this Settlement Agreement. Within seven calendar days after Ski Apache orders the new AST systems, they shall provide the Bureau with documentation confirming the order of the new AST systems along with projected delivery dates;

(f) Ski Apache is responsible for ensuring that project drawings for the installation of all new AST systems along with a scope of work and equipment list are submitted to NMED no later than September 1, 2023. Ski Apache shall ensure that the AST certified installer assists in developing the previously mentioned documents in this sub-paragraph;

(g) Ski Apache shall submit documentation to the Bureau demonstrating that they have received estimates for the permanent closure of the ASTs with Tank ID Nos. 39228, 39229, 39230, and 39231 along with a proposed schedule for permanent closure, and a copy of a contract for the permanent closure, at least 90 calendar days before the scheduled permanent closure of any or all tanks. Permanent closure means the ASTs will be removed from the facility.

(h) Ski Apache shall notify NMED in writing 90 days prior to the deadlines in this Settlement Agreement, if they determine that the deadlines cannot be met;

(i) Ski Apache shall permanently close the ASTs with Tank ID Nos. 39228, 39229, 39230, and 39231 pursuant to 20.5.115.1502 NMAC to include a site assessment where contamination is most likely to be present at the facility. The site assessment shall include the collection of soil samples pursuant to 20.5.115.1502 NMAC with a minimum of one soil sample per AST. Notification requirements in 20.5.115.1500 NMAC shall be met no later than June 15, 2024;

(j) If Ski Apache changes the ownership of the ASTs with Tank ID Nos. 39228, 39229, 39230, 39231 and 39232 changes (e.g., if the tanks are sold, leased, or transferred) prior to June 15, 2024, the Bureau will affix red tags to the ASTs immediately and without notice; and

(k) Ski Apache will make sure that the new AST systems discussed in sub-

paragraph 14(e) of this Settlement Agreement, shall be fully operational as soon as possible but no later than May 15, 2024.

19. Failure by Ski Apache to meet any of the deadlines or requirements outlined in sub-paragraphs 18(a) through 18(k) of this Settlement Agreement constitutes a violation of this Settlement Agreement and the Stipulated Final Order. Ski Apache will be required to remit stipulated penalties of \$100 per day for each violation until the requirements or deadlines have been met. The stipulated penalties shall be collected pursuant to NMSA 1978, Section 74-4-10(J) of the HWA. The Bureau shall issue a written notification to Ski Apache of the requirement(s) or deadline(s) that have not been met.

20. If Ski Apache fails to come into compliance with the requirements in sub-paragraphs 18(a) through 18(k) of this Settlement Agreement within 30 calendar days from the date of the Bureau's notification letter issued pursuant to paragraph 19 of the Stipulated Final Order, constitutes a violation of the Settlement Agreement and the Stipulated Final Order and Ski Apache agrees to remit stipulated penalties of \$200 per day per violation until the requirements or deadlines have been met.

21. If the new AST systems are not operational by the date set in sub-paragraph 14(k), NMED will place the ASTs with Tank ID Nos. 39228, 39229, 39230, and 39231 into delivery prohibition pursuant to 20.5.116 NMAC by placing red tags on the fill ports no less than 10 working days after the missed deadline.

22. The Bureau shall issue monthly invoices for the stipulated penalties. If Ski Apache fails to remit payment for the stipulated penalties, NMED may seek enforcement of this

Settlement Agreement and the Stipulated Final Order by administrative or judicial action, as discussed in paragraph 19 of this Settlement Agreement.

23. If permanent closure of the ASTs with Tank ID Nos. 39228, 39229, 39230, and 39231 does not occur by June 15, 2024, as required by sub-paragraph 14(i) of this Settlement Agreement, immediately and without notice the Bureau will affix red tags to the tank or tanks that have not been permanently closed.

24. Payment for the future stipulated penalties shall be made to the *State of New Mexico Hazardous Waste Emergency Fund* by certified or corporate check, or by ACH deposit. On the date that delivery of funds by check or ACH is confirmed, Ski Apache shall notify the Bureau contacts discussed in paragraph 25 of this Settlement Agreement. Certified or corporate checks shall be sent to the following:

New Mexico Environment Department
Petroleum Storage Tank Bureau
c/o Tank Operations and Support Program Manager
2905 Rodeo Park Dr. East, Bldg 1
Santa Fe, New Mexico, 87505

25. All communications regarding the components of this Settlement Agreement shall be sent to:

PSTB.Inbox@state.nm.us

With copies to:
Lorena Goerger, Bureau Chief, Petroleum Storage Tank Bureau
E-mail: lorena.goerger@env.nm.gov;

Joe Godwin, Manager, Prevention Inspection Program
E-mail: joe.godwin@env.nm.gov;

Denice Torres, Manager, Tank Operations and Support Program
E-mail: denice.torres@env.nm.gov; and

Van Lewis, Inspector of Record
E-mail: van.lewis@env.nm.gov

III. OTHER TERMS AND CONDITIONS

A. ENFORCEMENT

26. NMED retains the right to pursue any relief authorized by the HWA, the Regulations, or other law for any violation not addressed herein.

27. NMED retains the right to enforce this Settlement Agreement and the Stipulated Final Order by administrative or judicial action.

28. In the event that NMED elects to file a judicial action to enforce this Settlement Agreement and the Stipulated Final Order, the Parties agree that the First Judicial District Court of Santa Fe County, New Mexico shall have exclusive jurisdiction over Ski Apache. Further, Ski Apache agree to waive any right to challenge that jurisdiction or venue lies with the First Judicial District Court of Santa Fe County, New Mexico.

29. The laws of the State of New Mexico shall govern the construction and interpretation of the Settlement Agreement and the Stipulated Final Order.

B. BINDING EFFECT

30. This Settlement Agreement shall be binding upon NMED and its successor agencies and shall be binding upon Ski Apache and any successors-in-interest if there is transfer of ownership for any storage tank systems under 20.5.102.201 NMAC.

C. EFFECTIVE DATE

Settlement Agreement and Stipulated Final Order
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31. This Settlement Agreement and any modifications thereto shall be effective when the Stipulated Final Order or modification has been executed by both NMED and Ski Apache.

D. INTEGRATION

32. This Settlement Agreement merges all prior written and oral communications between the Parties concerning the subject matter of the Settlement Agreement and Stipulated Final Order and contains the entire agreement between the Parties.

E. MODIFICATION

33. This Settlement Agreement shall not be modified except by express written agreement of both NMED and Ski Apache.

F. RESERVATION OF RIGHTS AND DEFENSE

34. This Settlement Agreement shall not be construed to prohibit or limit NMED in any way from requiring Ski Apache, and any successors-in-interest if there is transfer of ownership for any storage tank systems under 20.5.102.201 NMAC, from complying with any state or federal requirements that are not resolved herein. This Settlement Agreement shall not be construed to prohibit or limit NMED in any way from seeking any relief authorized by the HWA or Regulations for violation of any state or federal requirement applicable to Ski Apache of penalties under NMSA 1978, Section 74-4-10 of the HWA. This Settlement Agreement shall not be construed to prohibit or limit Ski Apache in any way from raising any defense to Ski Apache.

35. This Settlement Agreement shall not be construed to be a Compliance Determination under 20.5.123 NMAC nor shall eliminate any existing compliance issues at the

Facility for the purpose of accessing the Corrective Action Fund in NMSA 1978, Section 74-6B-7 (2004). Ski Apache, and any successors-in-interest if there is transfer of ownership for any storage tank systems under 20.5.102.201 NMAC, shall be liable for any contamination discovered at the Facility during the terms of this Settlement Agreement. If there is discovery of a suspected or a confirmed release at the Facility, Ski Apache shall comply with the Regulations and HWA for investigating the suspected release and for any remediation that may follow, including but not limited to, conducting an investigation within seven calendar days of discovery of the suspected release and submitting an investigation report to NMED, as required by 20.5.118.1801(B) NMAC.

G. WAIVER OF STATE LIABILITY

36. Ski Apache, and any successors-in-interest if there is transfer of ownership for any storage tank systems under 20.5.102.201 NMAC, shall assume all costs and liabilities incurred in performing any obligation under this Settlement Agreement.

37. NMED, on its own behalf, and on behalf of the State of New Mexico, shall not assume any liability for the performance of any obligation under this Settlement Agreement.

H. DISCLOSURE TO SUCCESSORS-IN-INTEREST

38. Ski Apache shall disclose this Settlement Agreement to any successor-in-interest and shall advise such successor-in-interest that the Settlement Agreement is binding on the successor-in-interest. Ski Apache will communicate any changes using the contact information discussed in paragraph 25 of this Settlement Agreement.

J. AUTHORITY OF SIGNATORIES

39. The persons executing this Settlement Agreement and the Stipulated Final

Settlement Agreement and Stipulated Final Order

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Order represent that they have the requisite authority to bind either NMED or Ski Apache, as appropriate, to this Settlement Agreement, and that their representation shall be legally sufficient evidence of actual or apparent authority to bind NMED or Inn of the Mountain Gods Resort and Casino.

K. SIGNATURE AND COUNTERPARTS

40. This Settlement Agreement is intended to be executed on separate signature pages. Faxed, emailed, electronic, or digital signatures shall constitute original signatures binding on the signing party.

41. This Settlement Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

SKI APACHE

BY: Bernardo R. Vici (acting)
Eddie Martinez, President
Mescalero Apache Tribe
(Owner ID #276381/Operator ID# 014199)

DATE: 5/23/23

PETROLEUM STORAGE TANK BUREAU

BY: [Signature]
Lorena Goerger, Chief

DATE: 6/12/23

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Owner ID No. 276381/ Operator ID No. O14199
FID #276374**

STIPULATED FINAL ORDER

This Settlement Agreement, agreed to by the New Mexico Environment Department, Resource Protection Division, Petroleum Storage Tank Bureau and The Inn of the Mountain Gods and Casino Inn of the Mountain Gods Resort and Casino, owners and operators (Owner ID No. 276381/ Operator ID No. O14199) of the storage tanks located at Ski Apache, 1286 Ski Run Road, Alto, New Mexico ("Facility") (Facility ID No. 276374) an enterprise of the Mescalero Apache Tribe (herein referred to collectively as "Ski Apache") is hereby incorporated in its entirety and approved as a Final Stipulated Order pursuant to NMSA 1978, Section 74-4-10.

BY:



**Rick Shean, Director
Resource Protection Division**

DATE:

6/12/23