

UNITED STATES DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE REGION 4  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10  
IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: )  
)  
)  
Smoky Canyon Phosphate Mine )  
)  
)  
)  
J. R. Simplot Company )  
)  
)  
Respondent )  
)  
)  
Proceeding Under Sections 104, 122(a) )  
and 122(d)(3) of the Comprehensive )  
Environmental Response, Compensation )  
and Liability Act as amended (42 U.S.C. )  
§§ 9604, 9622(a) and 9622(d)(3)), and )  
Idaho Code §§ 39-4413 and 39-108 )  
\_\_\_\_\_ )

ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON  
CONSENT/CONSENT ORDER FOR NON-TIME-CRITICAL REMOVAL ACTION

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## **I. INTRODUCTION**

1.1 This Administrative Settlement Agreement and Order on Consent/Consent Order ("Settlement Agreement") is entered into voluntarily by the United States Department of Agriculture, Forest Service ("Forest Service"), the United States Environmental Protection Agency ("EPA"), the Idaho Department of Environmental Quality ("IDEQ"), and J. R. Simplot Company ("Simplot"), the latter as Respondent (hereinafter collectively referred to as "Parties"). This Settlement Agreement provides for the performance by Simplot of a Non-Time-Critical Removal Action for the Smoky Canyon Phosphate Mine (the "Site") and the reimbursement of certain response costs incurred by the United States and IDEQ in connection with the Site. The Site is located partly on public land that is under the jurisdiction, custody, or control of the Forest Service and partly on privately owned land subject to the jurisdiction of the Forest Service, IDEQ, and/or the EPA. A more detailed description of the Site is provided in Section IV of this Settlement Agreement ("Definitions"). The Work required for performance of the Non-Time-Critical Removal Action for the Site is specified in the Statement of Work ("SOW") attached and incorporated by reference as Appendix 1 to this Settlement Agreement, and is governed by Section IX of this Settlement Agreement ("Work to be Performed"). The United States Department of the Interior ("DOI"), including the Bureau of Land Management ("BLM") and the U.S. Fish and Wildlife Service ("FWS"), and the Shoshone-Bannock Tribes ("Tribes"), while not Parties to this Settlement Agreement, participate in this Settlement Agreement as Support Agencies, as contemplated by the Memorandum of Understanding ("MOU") dated July 17, 2000.

1.2 The Shoshone-Bannock Tribes are federally recognized Indian Tribes with a governing body known as the Fort Hall Business Council. The Tribes exercise their authority pursuant to, among other authorities, CERCLA, their inherent sovereign powers, the Fort Bridger Treaty, the Constitution and By-Laws of 1936, and various provisions of the Land Use Policy Ordinance, the Law and Order Code of 1982, and the 1994 Fort Hall Water Rights Agreement.

1.3 The Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice, or her designee has concurred in this Settlement Agreement, in accordance with the requirements of Section 4 of Executive Order 12580 (52 Fed. Reg. 2926 (January 23, 1987), 3 C.F.R., 1987 Compilation, p.193).

## II. JURISDICTION

2.1 This Settlement Agreement is entered into by EPA and the Forest Service under the authority vested in the President of the United States by Sections 104, 107, 122(a), and 122(d)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9604, 9607, 9622(a), and 9622(d)(3). The President's CERCLA response authority is delegated to EPA. 42 U.S.C. §§ 9601 et seq.; Executive Order 12580 §§ 2(g) & 4(d)(1)&(2). The President's CERCLA response authority for land under the jurisdiction, custody, or control of the Forest Service is delegated to the Secretary of the Department of Agriculture (the "Secretary") by Executive Order 12580. The Secretary's authority is further delegated to the Chief of the Forest Service (the "Chief") by 7 C.F.R. § 2.60(a)(39). The Chief's

authority is re-delegated to Regional Foresters, pursuant to the Forest Service Manual § 2164.04c, 2.1, effective November 10, 1994.

2.2 This Settlement Agreement is entered into by IDEQ pursuant to the Idaho Environmental Protection and Health Act ("EPA"), Idaho Code §§ 39-101 to 39-130, and the Hazardous Waste Management Act of 1983 ("HWMA"), Idaho Code §§ 39-4401 to 39-4432, and any authority that IDEQ has or may have pursuant to applicable laws (statutory and common law) or regulations administered or enforced by the Department, including without limitation CERCLA and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq.

2.3 Without admitting any liability, by signing this Settlement Agreement Simplot agrees to the terms and conditions of this Settlement Agreement without the issuance of a Notice of Violation or the holding of a compliance conference under applicable Idaho law.

2.4 In any action to enforce the terms of this Settlement Agreement, the Parties agree not to contest its validity or the authority and jurisdiction of the United States to issue and enforce this Settlement Agreement, and the Parties agree to comply with and be bound by the terms and conditions of this Settlement Agreement. In addition, the Parties agree not to contest the authority and jurisdiction of the IDEQ, EPA, the Forest Service, BLM, and FWS to enforce the provisions in Section XXV ("Reimbursement of Future Response Costs") and Section XXVI ("Reimbursement of State Response Costs") of this Settlement Agreement. By signing this Settlement Agreement, however, Simplot does not concede or waive its right to object to the

authority of the United States or the IDEQ to issue, take, or enforce any other order or action relating to this Site.

### **III. PARTIES BOUND**

3.1 This Settlement Agreement shall apply to, and be binding upon the Forest Service, EPA, and the IDEQ, and upon Simplot and its officers, employees, agents, successors and assigns. Any change in ownership or corporate status of Simplot including, but not limited to, any transfer of assets or real or personal property shall not alter Simplot's obligation to comply with the requirements of this Settlement Agreement or to ensure compliance by any successor or assign of Simplot, regardless of whether Simplot continues to exist following such transaction. The signatories to the Settlement Agreement certify that they are authorized to execute and legally bind the Parties they represent to this Settlement Agreement.

3.2 Simplot shall provide a copy of this Settlement Agreement and all of its Appendices to each contractor, subcontractor, laboratory, and consultant retained to perform Work under the Settlement Agreement within fourteen (14) days after the effective date of this Settlement Agreement or the date of retaining their services, whichever is later, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Settlement Agreement and its Appendices. Notwithstanding the provisions of any such contract, however, Simplot is, and shall remain, responsible for compliance with this Settlement Agreement.

### **IV. DEFINITIONS**

4.1 Unless otherwise expressly provided herein, terms used in this Settlement Agreement 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 Settlement Agreement or in the attached Appendices, the following definitions shall apply:

“Action Memorandum” shall mean the October, 2006, Non-Time-Critical Removal Action Memorandum signed by the Forest Service Regional Forester for Region 4, and all attachments thereto. The Action Memorandum is attached as Appendix 2.

“BLM” shall mean the United States Department of the Interior, Bureau of Land Management.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq.

“Day” shall mean a calendar day unless expressly stated to be a Working Day. “Working Day” shall mean a day other than Saturday, Sunday, or a Federal holiday. In computing any period of time under this Settlement Agreement, where the last day falls on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next Working Day.

“Deliverable” shall mean the documents identified in Paragraph 9.6 that Simplot must submit pursuant to this Settlement Agreement, and any additional documents identified in writing by the Lead Agency under Section XXII (“Additional Work”) of this Settlement Agreement. All Deliverables under this Settlement Agreement are subject to review, comment, and approval as described in Paragraph 9.7 of this Settlement Agreement.

“DOI” shall mean the United States Department of the Interior.

"Effective Date of this Settlement Agreement" or "Effective Date" shall mean the date on which the Settlement Agreement has been executed by all Parties and concurred in by the United States Department of Justice.

"EPA" shall mean the United States Environmental Protection Agency.

"EPHA" shall mean the Idaho Environmental Protection & Health Act, Idaho Code §§ 39-101 to 39-130.

"Forest Service" shall mean the United States Department of Agriculture, Forest Service and other USDA agencies.

"FWS" shall mean the United States Department of the Interior, Fish and Wildlife Service.

"HWMA" shall mean the Hazardous Waste Management Act of Idaho, Idaho Code §§ 39-4401 to 39-4432.

"IDEQ" shall mean the Idaho Department of Environmental Quality.

"IDL" shall mean the Idaho Department of Lands.

"Lead Agency" shall mean the Forest Service, which provides the On-Scene Coordinator to direct the Work under this Settlement Agreement.

"MOU" shall mean the July 2000 "Memorandum of Understanding Concerning Contamination from Phosphate Mining Operations in Southeastern Idaho" between several federal agencies (Forest Service, EPA, BLM, BIA, and FWS), IDEQ and the Shoshone-Bannock Tribes.

"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, and codified at 40 C.F.R. Part 300, and amendments thereto.

“Pollutant and/or deleterious materials” shall mean materials currently defined under Idaho law and regulation as such. Use of the term “pollutant and/or deleterious materials” in this Settlement Agreement in connection with any of the federal entities shall not be construed as extending the entities’ jurisdiction to those materials.

“Settlement Agreement” shall mean this Administrative Settlement Agreement and Order on Consent/Consent Order and all attached Appendices. In the event of a conflict between this Settlement Agreement and any Appendix, this Settlement Agreement shall control.

“Site” shall mean the Smoky Canyon Phosphate Mine and the area of overburden disposal associated with the mine. Both the mine and the associated overburden disposal area are located approximately 24 miles east of Soda Springs, Idaho. The Smoky Canyon Phosphate Mine is located on National Forest System land on the Caribou/Targhee National Forest, under Forest Service Special Use Permit 4067-02 to Simplot, and BLM phosphate leases I-12890, I-15259, I-26843, I-30369, and I-27801 to Simplot in Sections 24, 25 and 36, Township 8 South, Range 45 East; Sections 17, 18, 19, 20, 29, 30, 31, and 32, Township 8 South, Range 46 East; Sections 6, 7, and 18, Township 9 South, Range 46 East and Sections 1, 12 and 13, Township 9 South, Range 45 East of the Boise Meridian in Caribou County in southeast Idaho. The Site also includes the areal extent of contamination from the mine and overburden disposal area and all suitable areas in very close proximity to the contamination necessary for response action implementation. This Settlement Agreement does not

address and the Site does not include privately owned land where Simplot has disposed of tailings from its milling operations associated with the Smoky Canyon Phosphate Mine located in W ½ of W ½ Section 15, S ½ Section 16, E ½ Section 20, Section 21, W ½ of W ½ Section 22, and NE ¼ Section 29, Township 8 South, Range 46 East of the Boise Meridian. Maps of the immediate vicinity and general vicinity of the Site are attached to this Settlement Agreement as Appendix 3 and Appendix 4, respectively, and are incorporated by reference into this Settlement Agreement.

“Statement of Work” or “SOW” shall mean the document that describes in detail the Work to be performed by Simplot to implement the Non-Time-Critical Removal Action, and to satisfy the requirements of this Settlement Agreement as set forth in Appendix 1 of this Settlement Agreement, and any modifications made thereto in accordance with Section XXXIII (“Modification”) of this Settlement Agreement.

“Support Agency” means an agency that provides a support agency coordinator or project manager to furnish necessary data to the Lead Agency, reviews response data and documents, and provides other assistance as requested by the OSC.

“Tribes” shall mean the Shoshone-Bannock Tribes.

“United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

“USDA” shall mean the United States Department of Agriculture.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (4) any substances defined under Idaho

Code § 39-7203(3); (5) any "pollutants" as defined by Idaho Administrative Procedures Act (IDAPA) § 58.01.02.003.87; (6) any "deleterious materials" as defined by IDAPA § 58.01.02.003.22; and (7) any "hazardous material" as defined by IDAPA § 58.01.02.003.48.

"Work" shall mean all tasks that Simplot is required to perform pursuant to this Settlement Agreement, and its attached Appendices, and all Deliverables produced pursuant to this Settlement Agreement.

#### **V. FINDINGS OF FACT, CONCLUSIONS OF LAW AND DETERMINATIONS BY FOREST SERVICE, EPA AND IDEQ**

5.1 The Smoky Canyon Phosphate Mine is located in Caribou County, Idaho primarily on National Forest System land, owned by the United States and leased to Simplot for phosphate mining. The Forest Service exercises jurisdiction, custody or control over National Forest System land on behalf of the United States. On behalf of the United States, the BLM is responsible for the issuance and administration of leases for mineral extraction on those lands. Simplot has conducted extensive mine-related operations at the Smoky Canyon Phosphate Mine on National Forest System lands covered by the federal phosphate leases described below, and on National Forest System land not included in the leases, under a special use permit issued and administered by the Forest Service. Simplot currently operates the Smoky Canyon Phosphate Mine and it is contemplated that the Mine will continue to be an operating facility during the activities to be conducted under this Settlement Agreement.

5.2 Five Federal Phosphate Leases and a Forest Service Special Use Permit are associated with the Site (Leases I-12890, I-15259, I-26843, I-30369, and I-27801 and Special Use Permit 4067-02). Simplot acquired Lease I-12890, consisting of 2520

acres, in 1962. Simplot acquired Leases I-15259, I-26843 I-30369, and I-27801, consisting of a total of 560 acres, in 1996, 1989, 1995, and 1991, respectively. Simplot signed Special Use Permit 4067-02 in 2000. Simplot is the lessee under these leases and the permittee under the Special Use Permit 4067-02.

5.3 Simplot began production at the Smoky Canyon Phosphate Mine in 1984, using an open pit method of extraction. Simplot's open pit mining operations at the Site include removing overburden, which is either placed in piles or in a previously mined portion of the pit. The shale portion of the overburden contains selenium, as well as metals that are designated hazardous substances.

5.4 Selenium and other hazardous and deleterious substances have been detected above background concentrations in monitoring and sampling conducted at the Site by Simplot under the Record of Decision signed in 1983 that permitted mining on the Federal Phosphate Leases. Subsequent sampling conducted by the Forest Service, BLM, their contractors, and the University of Idaho indicate that selenium and other hazardous and deleterious substances are being leached from waste rock at the site into the environment, and may be impacting vegetation and surface water.

5.5 Pursuant to the July 2000 MOU, the Forest Service has been selected as the Lead Agency for conducting response actions at the Site.

5.6 Effective January 28, 2003, Simplot entered into an Administrative Order on Consent/Consent Order ("AOC/CO") with the Forest Service, EPA and IDEQ. Under the AOC/CO Simplot undertook to complete a Site Investigation ("SI") and an Engineering Evaluation/Cost Analysis ("EE/CA"). In the Final SI Report (Newfields 2005), overburden waste disposal in a Cross Valley Fill ("CVF") in the Pole Canyon

Creek drainage was identified as the primary source of most of the hazardous substance, selenium, found in the Site surface and groundwater emanating from the Pole Canyon CVF.

Flows from Pole Canyon Creek, run on from adjacent hillsides and direct precipitation pass through Pole Canyon CVF, contacting the overburden and releasing dissolved selenium. Run on and direct precipitation infiltrate through the CVF to join Pole Canyon Creek as it flows through coarse overburden at the base of the CVF. A portion of the impacted Pole Canyon Creek flow recharges the shallow Sage Valley alluvial groundwater aquifer, while another portion recharges the deep Wells Formation aquifer. Groundwater from the Wells Formation aquifer flows south for approximately two miles along a high conductivity fracture zone associated with the West Sage Valley Branch Fault, discharging at Hoopes Springs.

Selenium releases from the CVF in Pole Canyon are detected through monitoring surface water at Hoopes Springs. Concentrations of up to 15.0 micrograms per liter have been measured. The applicable cold water biota standard for selenium is 5.0 micrograms per liter. Hoopes Springs may contain habitat suitable for Yellowstone Cutthroat Trout to spawn. The EE/CA identified, as a priority, the need for response actions to reduce selenium transport from the CVF to groundwater and surface water. Correspondingly, the Action Memorandum identified the isolation of the Pole Canyon CVF from Pole Canyon Creek and diversion of run on from adjacent slopes as removal actions to be initiated in 2006.

5.7 Subject to Paragraph 6.1, and based on the Findings of Fact set forth above in Paragraphs 5.1-5.6, and the Administrative Record supporting this removal

action, the Forest Service, EPA, and IDEQ have made the determinations in Paragraphs 5.7.1 through 5.7.12.

5.7.1 The Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

5.7.2 The contaminants found at the Site, including selenium and other hazardous substances, are "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and are "hazardous and deleterious materials" subject to the provisions of IDAPA § 58.01.02.800, or are otherwise "pollutants" as defined by IDAPA § 58.01.02.003.78.

5.7.3 There has been an actual or threatened "release," as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), of one or more hazardous substances from the facility.

5.7.4 There has been an actual discharge, as defined in IDAPA 58.01.02.003.25, of one or more pollutants or hazardous or deleterious materials from the facility to waters of the State of Idaho.

5.7.5 Simplot is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21) and IDAPA 58.01.02.003.74.

5.7.6 Simplot is liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), as a past and/or current owner and/or operator of the Site and/or as a person who arranged for the disposal of hazardous substances at the Site.

5.7.7 Simplot is liable to the State of Idaho under IDAPA 58.01.02.080.01.a-b. as a result of discharge to waters of the State of pollution and/or hazardous and deleterious materials.

5.7.8 The actual or threatened release of pollutants, hazardous substances and/or deleterious materials from the Site may present an imminent and substantial endangerment to the public health, welfare, or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), or will otherwise injure designated beneficial uses of waters of the State within the meaning of IDAPA § 58.01.02.080.01.b.

5.7.9 The continued release of selenium and other hazardous substances to groundwater and surface water from the Pole Canyon CVF results in selenium concentrations in excess of cold water biota standards (5 micrograms per liter) in Hoopes Springs. A non-time-critical removal action is needed to control the release of selenium from the CVF to groundwater and surface water due to:

5.7.9.1 Actual or potential exposure to nearby human populations, animals, or the food chain to hazardous substances;

5.7.9.2 Actual or potential contamination of drinking water supplies or sensitive ecosystems; and

5.7.9.3 Weather conditions that may cause hazardous substances to migrate or be released.

5.7.10 A planning period of more than six (6) months exists between the completion of the removal site evaluation (the SI) in July 2005 and the 2006 field season during which the Non-Time-Critical Removal Action is planned.

5.7.11 The Work to be performed under this Settlement Agreement is necessary to protect public health, welfare, or the environment, will be consistent with

CERCLA, the NCP, EPHA, and HWMA, and will expedite effective response actions, and is in the public interest.

5.7.12 Based on information currently available, the Forest Service has determined, for purposes of Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), that Simplot is qualified to properly and promptly perform the Work required by this Settlement Agreement.

#### **VI. COLLATERAL USE OF THIS SETTLEMENT AGREEMENT**

6.1 Except as set forth in Paragraph 2.4, nothing in this Settlement Agreement shall constitute or be construed as an admission of liability or fact by any of the Parties. Specifically, Simplot does not admit the jurisdiction of, or any responsibility or liability to, or the findings of fact, conclusions of law, or determinations made by the Forest Service, EPA, the United States, the IDEQ, or any other entity regarding or relating to the presence or sources of hazardous or deleterious substances at the Site, or arising out of or relating to the Site or the matters described herein, nor does it acknowledge or concede that any release or threatened release of hazardous substances at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment. The United States, including its agencies, and the IDEQ similarly do not admit any liability arising out of or relating to the Site. None of the provisions of this Settlement Agreement shall be admissible in evidence in any proceeding, other than in a proceeding to enforce this Settlement Agreement or any judgment related to it, or for the purpose of demonstrating the consistency of the actions taken under this Settlement Agreement with the NCP and CERCLA, and/or the EPHA and HWMA, or in an action to recover response costs from any third party or parties.

Nothing in this Settlement Agreement creates any rights or claims in any entity not a Party to this Settlement Agreement, with the exception of the right of FWS and BLM to recover costs under Section XXV ("Reimbursement of Future Response Costs").

#### **VII. SETTLEMENT AGREEMENT AND ORDER**

7.1 Based upon the foregoing provisions of this Settlement Agreement, and the Administrative Record for the Site, it is hereby ordered and agreed that Simplot shall comply with the provisions of this Settlement Agreement, including but not limited to all Appendices to this Settlement Agreement and documents incorporated by reference into this Settlement Agreement, and perform the actions required in this Settlement Agreement, including any modifications thereto.

#### **VIII. ON-SCENE COORDINATOR/PROJECT COORDINATOR**

8.1 The Forest Service has been designated as the Lead Agency for the Site pursuant to the MOU. The Forest Service will coordinate with EPA, FWS, BLM, the Tribes, IDEQ, and IDL (Support Agencies) pursuant to the terms of the MOU. The Forest Service, as Lead Agency, will appoint an On-Scene Coordinator ("OSC"). The initial OSC for the Site is:

Jeffrey L. Jones  
USDA Forest Service  
Caribou/Targhee National Forest  
Soda Springs Ranger District  
410 E. Hooper  
Soda Springs, ID 83276  
Phone: 208-547-1111  
Fax: 208-547-1112  
e-mail: jjones13@fs.fed.us

Simplot has designated as the Project Coordinator for the Site:

Alan Prouty  
J.R. Simplot Company  
P.O. Box 27, One Capital Center  
999 Main St., Suite 1300  
Boise, ID 83707-0027  
Phone: 208-389-7365  
Fax: 208-389-7333  
e-mail: alan.prouty@simplot.com

8.2 The OSC and the Project Coordinator shall be responsible for overseeing implementation of the Work and/or activities required at the Site under this Settlement Agreement. All written communications between the Parties concerning implementation of this Settlement Agreement shall be directed to the OSC or Project Coordinator, by regular or overnight mail or by facsimile or other electronic means, with copies to such other persons as the Parties reasonably designate. The Parties may change their respective OSC/Project Coordinator and shall notify each other in writing at least five (5) days prior to any such change.

8.3 Deliverables and other written communications submitted under this Settlement Agreement shall be sent to the following persons:

For the Forest Service: the OSC designated in Paragraph 8.1.

For the IDEQ:

Mary Kauffman  
Idaho Department of Environmental Quality  
444 Hospital Way #300  
Pocatello, ID 83201  
Phone: (208) 236-6160  
Fax: (208) 236-6168  
e-mail: mary.kauffman@deq.idaho.gov

For the Tribes:

Christina Cutler  
Shoshone-Bannock Tribes  
P.O. Box 306  
Fort Hall, Idaho 83203  
Phone: (208) 478-3740  
Fax: (208) 237-0797  
e-mail: ccutler@shoshonebannocktribes.com

For BLM:

Jeff Cundick  
Bureau of Land Management  
4350 South Cliffs Drive  
Pocatello, ID 83204  
Phone: (208) 478-6354  
Fax: (208) 478-6396  
e-mail: Jeff\_Cundick@blm.gov

For FWS:

Sandi Arena, Biologist  
United States Fish and Wildlife, Eastern Idaho Field Office  
4425 Burley Drive  
Suite A  
Chubbock, Idaho 83202  
Phone: 208-237-6975 extension 34  
e-mail: sandi\_arena@fws.gov

For EPA:

Matt Wilkening  
1435 N. Orchard St.  
Boise, ID 83706  
Phone: (208) 378-5760  
e-mail: wilkening.matt@epa.gov

For Simplot: the project coordinator designated in Paragraph 8.1.

For IDL:

Chris Morris  
Idaho Department of Lands  
3563 Ririe Highway  
Idaho Falls, Idaho 83401  
Phone: 208-525-7167  
Fax: 208-525-7178  
e-mail: cmorris@idl.state.id.us

8.4 The OSC shall have the authority vested in the OSC by the NCP.

Absence of the OSC from the Site shall not be cause for stoppage of Work unless specifically directed by the OSC.

#### **IX. WORK TO BE PERFORMED**

9.1 Simplot agrees to perform a Non-Time-Critical Removal Action for the Site, consistent with the SOW. The Parties agree to use their best efforts to coordinate activities under this Settlement Agreement with existing and future mining operations at or in the vicinity of the Site, in order to minimize interference between Settlement Agreement activities and mining activities.

9.1.1 The general objectives of the Non-Time-Critical Removal Actions are to reduce the transport of selenium and other hazardous substances from the Pole Canyon CVF by:

- a. Reducing the annual flow of Pole Canyon Creek through the CVF; and
- b. Controlling runoff to the CVF surface.

The Non-Time-Critical Removal Action shall consist of:

- a. A pipeline to convey diverted Pole Canyon Creek flow around the Pole Canyon CVF;
- b. An infiltration basin to direct remaining Pole Canyon Creek flow into the Wells Formation aquifer upstream of the CVF;

- c. A run-on control ditch adjacent to the northern edge of the overburden disposal area to direct run-on from the adjacent slopes into Pole Canyon Creek below the CVF;
- d. Monitoring the effectiveness of the Non-Time-Critical Removal Action.

9.2 All Work to be performed under this Settlement Agreement shall be under the direction and supervision of qualified personnel of Simplot or its consultants with experience in CERCLA investigations and response actions. Simplot shall notify the Lead Agency of the name and qualifications of any other contractors or subcontractors retained to perform the Work under this Settlement Agreement at least fifteen (15) days prior to commencement of such Work. The Lead Agency retains the right to disapprove of any of the contractors and/or subcontractors retained by Simplot, or of Simplot's choice of itself to do the Work. If the Lead Agency disapproves of a selected contractor or Simplot's choice of itself, Simplot shall retain a different contractor or notify the Lead Agency that Simplot will perform the Work in place of the disapproved contractor, within thirty (30) days following the Lead Agency's disapproval. Simplot shall notify the Lead Agency of that contractor's name and the qualifications of the contractor or Simplot within that same time.

9.3 All samples analyzed shall be analyzed by a laboratory that participates in a Quality Assurance/Quality Control program equivalent to that specified in the SOW.

9.4 All Work under this Settlement Agreement shall be conducted in accordance with CERCLA, the NCP, EPHA, HWMA, and applicable guidance documents. The OSC will provide Simplot with copies of the relevant guidance documents upon request. All Work performed by and for Simplot in compliance with the requirements of this Settlement Agreement, its Appendices, or the Deliverables

specified in Paragraph 9.6, infra, and approved by the Lead Agency, shall be deemed to be necessary and consistent with CERCLA, the NCP, EPHA, and HWMA.

9.5 During performance of the Work required under this Settlement Agreement, Simplot shall provide the Lead Agency with data and Deliverables as described below and/or in the SOW. Upon the written request of the OSC, Simplot shall provide the Lead Agency with non-validated analytical data within thirty (30) days of receiving such data. Simplot shall also notify the Lead Agency in writing of the seasonal completion of field activities within seven (7) days of the date of completion.

9.6 The documents required under this Settlement Agreement to be prepared, submitted for approval, and implemented by Simplot shall be known as "Deliverables." For the purposes of this Settlement Agreement, Deliverables shall include the Reports and Plans specified in the following paragraphs 9.6.1 – 9.6.5. The scope and content of these Deliverables is further defined in the SOW.

9.6.1 Removal Design Report ("RDR"). Simplot shall submit a Removal Design Report consisting of plans and specifications for the Non-Time-Critical Removal Action pursuant to the Statement of Work and upon approval shall implement the Removal Design. The RDR will contain all of the design parameters, drawings and specifications necessary for the implementation of the Removal Action.

9.6.2 Removal Action Implementation Work Plan ("RAIWP"). Simplot shall submit a work plan for implementation of the designs presented in the final RDR. The RAIWP will include:

- a. Implementation approach and schedule;
- b. Construction QA/QC and Performance Monitoring Plan;

- c. A Health and Safety Plan covering all Work under this Settlement Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable safety and health regulations
- d. Best Management Practices including an Erosion and Sediment Control Plan; and
- e. An Operation and Maintenance Plan.

9.6.3 Effectiveness Monitoring Plan ("EMP"). The EMP will present a plan for monitoring surface and groundwater suitable for evaluation of the effectiveness of the planned Removal Actions. The EMP will include procedures for collecting, transporting and analyzing all samples collected at the Site, as well as procedures for quality assurance/quality control ("QA/QC"). These procedures shall be consistent with 40 C.F.R. § 300.415(b)(4)(ii) and EPA Requirements for Quality Assurance Project Plans, EPA QA/G 5. The EMP shall identify laboratories to be used during performance of the Work of this Settlement Agreement. Simplot will implement the EMP.

9.6.4 Monthly Progress Reports, as required by the SOW.

9.6.5 Construction Completion Report, upon completion of the Work, as required by the SOW.

9.6.6 Post-Removal Site Control Plan. In accordance with the SOW schedule, or as otherwise directed by the OSC, Simplot shall submit a plan for post-removal site control, consistent with NCP § 300.415(I) and OSWER Directive No. 9360.2-02 (the "Post-Removal Site Control Plan"). The Post-Removal Site Control Plan shall include long-term operation and maintenance requirements and specific tasks to monitor the integrity and effectiveness of the Non-Time-Critical Removal Action. Upon

approval by the Forest Service, Simplot shall implement the Post-Removal Site Control Plan.

9.7 All Deliverables shall be submitted initially by Simplot in draft form, in accordance with the schedule in the SOW, or as otherwise established by the OSC, and are subject to review, comment, and written approval or disapproval by the Lead Agency. The Lead Agency agrees to consolidate any comments received from Support Agencies and to provide a single set of instructions to Simplot. Within thirty (30) days of Simplot's receipt of the comments from the Lead Agency on each draft document, Simplot shall amend and submit a revised document to the Lead Agency that incorporates all comments and corrects all deficiencies identified by the Lead Agency, unless such comments have been revised or withdrawn in writing. Deliverables approved by the Lead Agency shall be incorporated herein, shall be enforceable as a part of this Settlement Agreement, and may be modified only upon the written approval of the Lead Agency. The Lead Agency may also approve a Deliverable with modifications. Once approved with modifications, the Deliverable shall be incorporated herein, shall be enforceable as part of this Settlement Agreement, and may be modified only upon written approval of the Lead Agency.

9.8 The Deliverables shall be submitted to the Lead Agency in accordance with the schedule set forth in Table 1 of the SOW.

9.9 The absence of written comments by the Lead Agency in response to the submission of any Deliverable by Simplot pursuant to this Settlement Agreement shall not be construed as approval of the Deliverable under this Settlement Agreement.

9.10 Simplot shall not implement the actions described in a Deliverable in connection with any Work at the Site until it receives written approval of the Deliverable from the Lead Agency. Each Deliverable approved in writing by the Lead Agency shall be incorporated by reference into this Settlement Agreement. All Work performed pursuant to this Settlement Agreement shall be in accordance with approved Deliverables, unless otherwise authorized in writing by the OSC. Failure to materially comply with any provision of an approved Deliverable shall be considered a violation of this Settlement Agreement.

9.11 Unless the OSC authorizes a smaller number in writing, Simplot shall provide to the Lead Agency an electronic copy and four (4) paper copies of each draft and final Deliverable, including one unbound copy. Simplot shall also provide one paper copy and, if requested, an electronic copy to each Support Agency listed in Paragraph 8.3 of this Settlement Agreement. All reports, maps and supporting information shall be provided in readily reproducible form.

9.12 The Forest Service has prepared a Community Relations Plan for the Site in accordance with applicable EPA guidance and the NCP. Simplot shall provide information and otherwise cooperate in support of the implementation of the Community Relations Plan.

9.13 Upon request by the Lead Agency, Simplot shall provide copies of plans, task memoranda, field modifications, recommendations for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports and other documents generated in connection with the Work performed under this Settlement Agreement. Any claim that Simplot need not disclose such materials based

on a claim of privilege shall be governed by Paragraphs 19.3 and 19.4 ("Field Events and Data Availability") of this Settlement Agreement.

9.14 Off-Site Shipments. Simplot shall, prior to any off-Site shipment to an out-of-state waste management facility of Waste Material generated by or resulting from the Work, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the OSC. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

9.14.1 Simplot shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Simplot shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

9.14.2 The identity of the receiving facility and state will be determined by Simplot following the award of the contract for the removal action. Simplot shall provide the information required by this Paragraph 9.14 as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

9.14.3 Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Simplot shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Simplot

shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

#### **X. ADMINISTRATIVE RECORD AND CONSTRUCTION COMPLETION REPORT**

10.1 The Forest Service retains the responsibility for releasing to the public the Construction Completion Report and any decision documents for the Site.

10.2 Simplot shall submit to the Forest Service, upon submission of the draft Construction Completion Report, any non-privileged documents developed during the performance of Work under this Settlement Agreement to the extent such documents have not already been submitted during the course of the Work. Documents developed during performance of the Work under this Settlement Agreement that Simplot shall submit to the Forest Service include, but are not limited to, copies of plans, designs, task memoranda, documentation of field modifications, recommendations for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports and other reports required pursuant to this Settlement Agreement. Simplot shall also submit any correspondence between Simplot and state, local, or other federal authorities concerning the performance of the Work under this Settlement Agreement.

10.3 In accordance with 40 C.F.R. §§ 300.800-825, the Forest Service has established the contents and location of the administrative record for the Action Memorandum. The Forest Service will determine the contents of any supplements to the administrative record.

## **XI. OTHER APPLICABLE LAWS**

11.1 All actions required to be taken pursuant to this Settlement Agreement shall be performed in accordance with the requirements of all applicable local, state, and federal laws and regulations, except that, pursuant to Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and 40 C.F.R. § 300.400(e), no Federal, State, or local permit shall be required for the portion of the Removal Action conducted entirely on-site, where such Removal Action is carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621(e), and the NCP. Where any portion of the Work performed off-site requires a federal or state permit or approval, Simplot shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

11.2 Compliance by Simplot with the terms of this Settlement Agreement shall not relieve Simplot of its obligation to comply with CERCLA, RCRA, EPHA, HWMA, or any other applicable local, state, or federal laws and regulations.

## **XII. RECORD PRESERVATION**

12.1 The original or one copy of all records and documents in the possession, custody, or control of Simplot, excluding internal drafts of Deliverables, that are generated or collected pursuant to this Settlement Agreement shall be preserved during performance of the Work and for a minimum of ten (10) years after completion of the Work required under this Settlement Agreement, unless the Lead Agency notifies Simplot in writing that these documents may be destroyed earlier. After the expiration of this ten-year period, Simplot shall notify the Lead Agency at least sixty (60) days before the documents are scheduled to be destroyed and shall provide the Lead Agency with the opportunity to take possession of or copy non-privileged material.

### **XIII. CLAIMS AGAINST THIRD PARTIES**

13.1 The Parties to this Settlement Agreement reserve any claims they now have, or may have in the future, against any third party including, but not limited to, claims under Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, for recovery of response costs, including oversight or enforcement costs arising out of or related to this Settlement Agreement, and any future and/or past costs incurred in connection with the Site or this Settlement Agreement. Nothing in this Settlement Agreement shall constitute or be construed as a release from any claim, cause of action, or demand against any person, firm, partnership, or corporation not a signatory to this Settlement Agreement for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, pollutants and/or deleterious materials found at, taken to, or taken from the Site, or from the ownership or operation of the Site or any portion thereof.

### **XIV. MODIFICATION OF SETTLEMENT AGREEMENT, PLANS, OR SCHEDULES**

14.1 The terms of this Settlement Agreement may be modified only by the written agreement of the Parties; provided, modifications to any plan or schedule may be made, in writing, by the OSC or at the OSC's direction, as provided in Paragraph 33.1 (Modification).

### **XV. THREATENED/ENDANGERED SPECIES**

15.1 Simplot shall immediately notify the OSC and FWS of any and all threatened or endangered species encountered on the Site in the course of performing activities under this Settlement Agreement.

## **XVI. COUNTERPARTS AND EFFECTIVE DATE**

16.1 This Settlement Agreement may be executed in any number of counterparts, each of which when executed and delivered to the OSC shall be deemed to be an original, but such counterparts shall together constitute a single, integrated document. This Settlement Agreement shall be effective on the date it has been signed by all the Parties and concurred in by the United States Attorney General or her/his designee.

## **XVII. ACCESS**

17.1 Beginning on the Effective Date of this Settlement Agreement, the Forest Service shall permit access to the portions of the Site located on National Forest System land to Simplot and its authorized representatives, as necessary to perform the Work required under this Settlement Agreement. Simplot shall provide access to the Site and to off-Site areas under the ownership and/or control of Simplot to the Forest Service and Support Agencies as may be needed to implement this Settlement Agreement, and shall provide access to such Parties to all records and documentation related to the conditions at the Site and the actions conducted pursuant to this Settlement Agreement, subject to the procedures described in Paragraphs 19.3 and 19.4 ("Field Events and Data Availability") for documents which Simplot claims are privileged. Simplot shall use its best efforts to obtain such access as may be needed, if any, to private lands not under its ownership and/or control that are necessary to perform the Work required under this Settlement Agreement. Simplot will use its best efforts to have any access agreement that it obtains include such access by the Lead Agency as may be necessary for the Lead Agency and its authorized representatives,

and for Support Agency personnel accompanied or authorized by the OSC, to implement the terms of this Settlement Agreement, and shall specify that Simplot is not the representative of the Lead Agency for purposes of liability associated with Site activities. Simplot shall provide the Lead Agency with copies of all relevant access agreements prior to initiation of field activities on the area covered by the access agreement. To the extent that Simplot is unable to obtain consensual access to any private lands, the United States and/or IDEQ may exercise their authorities to obtain access. All persons with access to the Site under this Paragraph shall be required to comply with all applicable health and safety plans. For the purpose of this Paragraph, "best efforts" include the payment of reasonable sums of money.

#### **XVIII. FINANCIAL ASSURANCE**

18.1 Within thirty (30) days of the Effective Date of this Settlement Agreement, Simplot shall establish and maintain financial security in the amount of \$2,392,450 in one or more of the following forms:

18.1.1 A surety bond guaranteeing performance of the Work;

18.1.2 One or more irrevocable letters of credit equaling the total estimated cost of the Work;

18.1.3 A trust agreement establishing a trust fund containing the estimated cost of the Work with terms and conditions acceptable to the Forest Service;

18.1.4 A written guarantee to perform the Work executed in favor of the Forest Service by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with Simplot, provided, however, that any company providing such a guarantee must demonstrate to

the satisfaction of the Forest Service that it satisfies the financial test requirement of 40 C.F.R. § 264.143(f) with respect to the estimated cost of the Work and must also comply with the requirements of the following Paragraph 18.2; or

18.1.5 A demonstration that Simplot satisfies the requirements of 40 C.F.R. § 264.143(f).

18.2 If Simplot seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to the preceding Paragraph 18.1 of this Settlement Agreement, Simplot shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. § 264.143(f). If Simplot seeks to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to the preceding Paragraph 18.1, it shall resubmit sworn statements conveying the information required by 40 C.F.R. § 264.143(f) annually, on the anniversary of the Effective Date.

18.3 In the event that the Forest Service, after a reasonable opportunity for review and comment by EPA and the State, determines at any time that the financial assurances provided pursuant to this Section are inadequate, Simplot shall, within thirty (30) days of receipt of notice of the Forest Service's determination, obtain and present to the Forest Service for approval one of the other forms of financial assurance listed in the preceding Paragraph 18.1 of this Settlement Agreement. Simplot's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Settlement Agreement.

18.4 If Simplot can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 18.1, above, Simplot may, on any anniversary date of the Effective Date of this Settlement Agreement, or at

any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Simplot shall submit a proposal for such reduction to the Forest Service, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by the Forest Service. In the event of a dispute, Simplot may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

18.5 Simplot may change the form of financial assurance provided under this Section at any time, upon notice to and approval by the Forest Service, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Simplot may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### **XIX. FIELD EVENTS AND DATA AVAILABILITY**

19.1 Simplot shall notify the Lead Agency at least five (5) Working Days prior to conducting field events, including construction, excavation, drilling and sampling events. The five-day notice period may be shortened if the Lead Agency and Simplot agree that this notice period would impede or prevent necessary or desirable field events. Any Party, including its contractors, that is taking samples, will, at the request of any other Party, allow split or duplicate samples to be taken by or for the other Party of any samples collected in the course of implementing this Settlement Agreement.

19.2 All Parties waive any objection to the validity and admissibility of data generated in the course of performance of Work under this Settlement Agreement, if such data have been collected or generated in compliance with this Settlement

Agreement, and validated in accordance with the QA/QC procedures set forth in the SAP. No Party waives its right to object to the relevance or the interpretation of, or the conclusions to be drawn from, such validated data.

19.3 Simplot agrees not to assert any business confidentiality claim, or attorney-client or attorney work product privilege, with respect to any analytical data relating to sampling, monitoring, or other activities required to be performed under this Settlement Agreement, or with respect to observations of conditions at or resulting from releases at the Site made or generated in the course of the performance of the Work pursuant to this Settlement Agreement. Simplot may assert a claim of business confidentiality or other privilege covering any other type of information generated pursuant to the requirements of this Settlement Agreement, provided, in the case of a business confidentiality claim only, that such claim is consistent with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and is asserted in the manner described in 40 C.F.R. § 2.203. If no claim of confidentiality or other privilege accompanies the information when it is received by the Lead Agency, it may be made available to the public without further notice.

19.4 In the event Simplot decides to withhold any document or information otherwise required to be disclosed by the provisions of this Settlement Agreement on the basis of a claim of privilege, it shall inform the Lead Agency of that decision and provide the Lead Agency with the date, author, recipient(s), title, and description of the document or information withheld. Simplot shall also identify which privilege(s) it asserts applies to the document or information withheld and explain the basis for its assertion. Based on the information supplied by Simplot, the Lead Agency shall

determine whether to accept Simplot's claim of privilege. In the event the Lead Agency disagrees with Simplot's claim of privilege, Simplot shall promptly disclose the document or information previously withheld, unless Simplot disputes the Lead Agency's determination by invoking the Dispute Resolution provisions of Section XXIII of this Settlement Agreement.

19.5 The Lead Agency and its authorized representatives, and Support Agency personnel accompanied or authorized by the OSC, shall have the authority at all reasonable times to inspect activities at the Site. The Lead Agency also may conduct such tests on the Site as deemed necessary and may use cameras, sound recording devices, or any other equipment needed to verify data submitted or monitor activities undertaken by Simplot. Simplot may request split or duplicate samples under Paragraph 19.1 of this Settlement Agreement and, upon request, shall also be entitled to inspect and make copies of any test results, recordings, photographs, or other non-privileged information or materials generated during or as a result of the inspection conducted by the Lead Agency. Subject to the provisions in Paragraphs 19.3 and 19.4 of this Settlement Agreement, the Lead Agency and its authorized representatives shall be allowed to inspect and make copies of all records, operating logs, contracts, files, photographs, sampling and monitoring data, or any other non-privileged documents related to the Work required under this Settlement Agreement. Any claim that such materials may be privileged shall be governed by Paragraph 19.4 of this Settlement Agreement. Nothing herein is intended to limit or to expand in any way the right of entry or inspection authority of the Lead Agency or the Support Agencies under CERCLA or any other applicable legal authority.

## **XX. WORK STOPPAGE**

20.1 The Lead Agency reserves the right to stop Work from proceeding, either temporarily or permanently, on any task, activity, or Deliverable at any point during performance of the Work required under this Settlement Agreement if Simplot materially fails to comply with the terms of this Settlement Agreement.

## **XXI. EMERGENCY RESPONSE AND NOTIFICATION**

21.1 If any incident, or change of Site conditions, during the Work conducted by Simplot pursuant to this Settlement Agreement on this Site, causes or threatens to cause an endangerment to public health or welfare or the environment, Simplot shall, subject to Paragraph 21.2, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the OSC, or, if the OSC is unavailable, Simplot shall notify the EPA Emergency Unit, Region 10, 24 Hour Duty Officer at 206-553-1263.

21.2 Simplot shall take such actions in consultation with the OSC or other available authorized Forest Service or EPA officer and in accordance with all applicable provisions of the Health and Safety Plans and any other applicable plans or documents developed pursuant to the SOW. In the event that Simplot fails to take appropriate response action as required by this Section, and the Forest Service or EPA takes such action instead, Simplot shall reimburse all costs of the response action not inconsistent with the NCP pursuant to Section XXV ("Reimbursement of Future Response Costs").

## **XXII. ADDITIONAL WORK**

22.1 If the Lead Agency determines that additional Work on the Site is required to meet the objectives of this Settlement Agreement and that work is not covered by

Section IX of this Settlement Agreement ("Work to be Performed"), it may notify Simplot in writing of its determination and specify any proposed changes to any Deliverable to reflect the additional Work. Simplot agrees to conduct this additional Work pursuant to this Settlement Agreement. Within ten (10) working days of receipt of the written determination that additional Work is required, Simplot shall confirm its willingness to perform the additional Work by providing notification to the OSC or invoke dispute resolution. The SOW shall be modified to incorporate the additional Work, in accordance with the final resolution of the dispute. The Forest Service and EPA reserve the right to conduct the Work at any point, to seek reimbursement from Simplot, and or to seek any other appropriate relief.

### **XXIII. DISPUTE RESOLUTION**

23.1 The dispute resolution procedures in this Section are the exclusive mechanism for resolving disputes arising under this Settlement Agreement. A dispute shall be considered to have arisen when Simplot serves the Lead Agency, or if costs are disputed the Agency that has billed the disputed costs, with a written Notice of Dispute. A Notice of Dispute shall be served by facsimile, overnight mail, or some equivalent service.

23.2 In the first instance, the Parties shall attempt to resolve any dispute arising under this Settlement Agreement by informal negotiations. The period for informal negotiations shall not exceed thirty (30) days from the date of receipt of the Notice of Dispute, unless the Lead Agency, or if costs are disputed the Agency that has billed the disputed costs, and Simplot agree in writing to modify the period for informal

negotiations. If the Parties fail to resolve the dispute informally, the formal dispute resolution procedure in the following Paragraphs shall apply.

23.3 In the event the Parties cannot resolve the dispute through informal negotiations, then the position of the Lead Agency, or if costs are disputed the position of the Agency that has billed the disputed costs, shall be binding unless, within seven (7) days after the conclusion of the informal negotiations period, Simplot invokes the formal dispute resolution procedures of this Section by serving on the Lead Agency, or if costs are disputed the Agency that has billed the disputed costs, a written Statement of Position on the matter in dispute. Simplot's written Statement of Position shall be sent by facsimile, other electronic means, overnight mail, or some equivalent service, and shall define the dispute and state the basis of Simplot's objections to the Agency position.

23.4 Following receipt of Simplot's Statement of Position, the Lead Agency, or if costs are disputed the Agency that has billed the disputed costs, shall promptly provide the appropriate supervisory office with a copy of Simplot's Statement of Position and a written response to that Statement. The Lead Agency shall simultaneously send its response to Simplot by facsimile, or other electronic means, overnight mail or some equivalent service. The appropriate supervisory offices are the Region 4 Regional Forester for the Forest Service, the Director of the Department of Environmental Quality for disputes over IDEQ costs, the Region 10 Regional Administrator for disputes over EPA costs, the Idaho State Director for disputes over BLM costs, and the Field Supervisor, Eastern Idaho Field Office for disputes over FWS costs.

23.5 Following receipt of Simplot's Statement of Position and the Agency response, the appropriate Agency supervisory office shall make a final determination resolving the matter in dispute.

23.6 Any decision made by the Forest Service, EPA, FWS or BLM pursuant to this Section shall not constitute a final agency action subject to judicial review unless and until the United States commences a judicial action to enforce this Settlement Agreement, in which case any challenge to the Agency's final determination shall be subject to the Administrative Procedures Act, 5 U.S.C. §§ 702 et seq., or Section 113(j) of CERCLA, 42 U.S.C. § 9613(j).

23.7 Any decision made by the IDEQ pursuant to this Section shall not constitute a final agency action subject to judicial review unless and until the IDEQ commences a judicial action to enforce this Settlement Agreement, in which case any challenge to the Director's final determination shall be subject to the Idaho Administrative Procedures Act, Idaho Code § 67-5273.

23.8 Nothing in this Settlement Agreement precludes the Parties from agreeing to use other forms of alternative dispute resolution in lieu of the procedures described in Paragraphs 23.3 – 26.5.

23.9 Upon completion of all dispute resolution procedures under this Section, Simplot shall proceed in accordance with the final determination regarding the matter in dispute. If Simplot does not perform any required Work in accordance with the final determination, the Lead Agency may perform the Work and/or pursue any other appropriate relief, including judicial enforcement of this Settlement Agreement pursuant

to Section 122(d)(3) of CERCLA, 42 U.S.C. § 9622(d)(3), and cost recovery pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), or other applicable law.

23.10 The invocation of the dispute resolution provisions of this Settlement Agreement shall not extend, postpone or affect in any way any unrelated obligation of Simplot under this Settlement Agreement not directly in dispute, unless the Lead Agency agrees in writing otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of the Settlement Agreement. In the event Simplot does not prevail on the disputed matter, stipulated penalties shall be assessed and paid as provided in Section XXVII, unless otherwise agreed by the Parties in writing.

#### **XXIV. FORCE MAJEURE**

24.1 Delays or inability to perform any of the requirements of the Settlement Agreement within the time limits prescribed shall not be a violation of the Settlement Agreement where performance is prevented or delayed by a force majeure event. Force majeure is defined as any event arising from causes beyond the control of Simplot, of any entity controlled by Simplot, or of Simplot's contractors, that delays or prevents performance of any obligation under this Settlement Agreement, despite Simplot's best efforts to fulfill the obligation. Force majeure does not include the financial inability of Simplot to complete performance of the obligation or increased cost of performance. Simplot shall have the burden of proving force majeure by a preponderance of the evidence.

24.2 If any event occurs that may materially delay performance of any obligation under this Settlement Agreement or submittal of any Deliverable past the applicable deadline, Simplot shall notify the OSC within twenty-four (24) hours of the time Simplot knew that the event would delay such performance or submittal. Within five (5) Working Days thereafter, Simplot shall notify the Lead Agency in writing of the reasons for the delay, its anticipated length, measures taken or to be taken to minimize the delay, and an estimated timetable for implementation of these measures. Simplot shall include with any notice all available documentation supporting its claim that the delay was attributable to force majeure. Failure to comply with these requirements shall waive any claim of force majeure by Simplot.

24.3 The OSC shall notify Simplot in writing of the determination by the Lead Agency as to whether force majeure applies to the event or circumstances within seven (7) days after receipt of written notice from Simplot. If the Lead Agency determines that the delay has been or will be caused by circumstances constituting a force majeure, the due date for each uncompleted task in this Settlement Agreement shall be extended for a sufficient period to complete the tasks that were delayed or prevented. Such period shall be at least equal to the delay resulting from the force majeure circumstance. If the Lead Agency disagrees with Simplot's force majeure claim, or if there is no agreement on the length of an extension of time, the dispute shall be resolved in accordance with the dispute resolution provisions in Section XXIII of this Settlement Agreement or the stipulated penalties provisions of Section XXVII, as appropriate.

## **XXV. REIMBURSEMENT OF FUTURE RESPONSE COSTS**

25.1 Except as specified in this Section XXV, Section XXIX ("Reservation of Rights and Covenants not to Sue") and Section XXX ("Contribution"), this Settlement Agreement does not address or resolve claims that the United States, the Forest Service, or other federal agencies may have against Simplot, or that Simplot may have against the United States, the Forest Service, or other federal agencies, under CERCLA or other applicable law, for the recovery of costs incurred by the United States, the Forest Service, other federal agencies, or Simplot in responding to the release or threatened release of hazardous substances at the Site, including but not limited to costs incurred in performing the Work pursuant to this Settlement Agreement. Each Party hereto expressly reserves any such claims and expressly reserves any defenses it may have to such claims. Irrespective of Simplot's reimbursement of Future Response Costs under this Section XXV, Simplot reserves the right to seek recovery of those costs from the United States. The Forest Service, EPA, FWS and BLM reserve the right to seek recovery of any response costs that Simplot is not required to pay under this Section XXV.

25.2 **REIMBURSEMENT OF EPA, FOREST SERVICE, FWS, AND BLM COSTS**. In accordance with this Section XXV, Simplot shall reimburse EPA, the Forest Service, FWS and BLM for all Future Response Costs incurred by each in connection with this Settlement Agreement. "Future Response Costs," for the purposes of this Settlement Agreement, shall mean all direct and indirect costs incurred by EPA, the Forest Service, FWS and BLM, including contractor and USDA, DOI, United States Department of Justice and EPA attorney costs, after December 29, 2005, in connection

with the development, implementation or enforcement of this Settlement Agreement either in support of the Lead Agency or as the Lead Agency, including but not limited to, negotiation of this Settlement Agreement, oversight and review of the Work performed under this Settlement Agreement as set forth and described in the SOW, communications regarding disputes arising under this Settlement Agreement, the exercise of EPA or Forest Service authority to obtain access, the performance of an emergency response or additional Work, and any other costs incurred in support of the Lead Agency in connection with this Settlement Agreement. Future Response Costs also include Forest Service costs associated with reviewing and responding to public comments on the Engineering Evaluation/Cost Analysis upon which the Action Memorandum is based.

25.2.1 For purposes of this Section, Interest shall accrue at the rate established under Section 107(a) of CERCLA, 42 U.S.C. § 9607. 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.

25.2.2 EPA, the Forest Service, FWS and BLM shall submit to Simplot on a periodic basis, a billing statement for Future Response Costs. All billing statements shall include a SCORPIOs report or other accounting certified by EPA, the Forest Service, FWS or BLM, which shall itemize and describe the specific costs that are reimbursable hereunder.

25.2.3 Within forty-five (45) days of receipt of each billing statement, Simplot shall remit a certified or cashier's check or make payment by wire transfer for the total amount of such costs, except as provided in Paragraph 25.3 of this Settlement

Agreement. Checks to EPA shall be made payable to the Hazardous Substances Superfund and shall be accompanied by a statement referencing SE Idaho Smoky Canyon Phosphate Mine, Site ID# 109Q, In the Matter of Smoky Canyon Phosphate Mine, J.R. Simplot Company. Checks shall be sent to:

Melon Bank  
EPA Region 10 – Superfund  
PO Box 371099M  
Pittsburg, PA 15251

Checks to the Forest Service shall be made payable to the “USDA Forest Service” referencing the name and address of the Party making the payment, SE Idaho Smoky Canyon Phosphate Mine Removal Action Settlement Agreement and the Bill for Collection number. Checks shall be sent to the address provided on the Bill for Collection.

Future Response Costs associated with legal support provided by Forest Service agency counsel will be reflected as a separate item in the Forest Service Bill. Simplot shall pay such legal support costs separately from other Forest Service costs with checks payable to USDA/OGC and sent to:

USDA, Office of the General Counsel  
1400 Independence Ave., SW, Room 2038  
Washington, D.C. 20250  
Attn: Charlene Buckner

Each check to USDA/OGC shall reference: “For costs incurred by the USDA Office of the General Counsel regarding SE Idaho Smoky Canyon Phosphate Mine Removal Action” and Simplot’s Tax Identification Number.”

Checks to FWS shall be made payable to the United States Fish and Wildlife Service and sent to:

U.S. Fish & Wildlife Service  
Attn: Deborah Freeman  
911 N.E. 11<sup>th</sup> Avenue  
Portland, OR 97232-4181

Each check to FWS shall reference: Site Name: SE Idaho Smoky Canyon Phosphate  
Mine Removal Action Settlement Agreement.

Checks to BLM shall be made payable to the Department of the Interior. Checks  
shall be sent to:

Central Hazardous Materials Fund  
NBC Division of Financial Management Services  
Branch of Accounting Operations  
Mail Stop D-2777  
7401 West Mansfield Ave.  
Lakewood, Colorado 80235

Each check to BLM shall reference: Site Name: SE Idaho Smoky Canyon Phosphate  
Mine Removal Action Settlement Agreement.

25.2.4 At the time of payment, Simplot shall send notice that payment  
has been made to:

EPA:  
Servicing Finance Office  
EPA Finance Center  
MS-MWD  
Cincinnati, OH 45268

Forest Service:

Jeffrey L. Jones  
USDA Forest Service  
Caribou/Targhee National Forest  
Soda Springs Ranger District  
410 E. Hooper  
Soda Springs, ID 83276

FWS:

U.S. Fish & Wildlife Service  
Attn: Deborah Freeman  
911 N.E. 11<sup>th</sup> Avenue  
Portland, OR 97232-4181

BLM:

Department of the Interior  
Central Hazardous Materials Fund  
Attn: Fund Manager  
1849 C Street, N.W.  
Mail Stop 2342  
Washington, D.C. 20240

25.2.5 The total amount to be paid by Simplot to EPA pursuant to this Section shall be deposited in the SE Idaho Smoky Canyon Phosphate Mine Special Account within the Hazardous Substances Superfund to be retained and used to conduct or finance response actions at or in connection with the Site.

25.2.6 In the event that payment for Future Response Costs is not made within forty-five (45) days of receipt of the billing statement, Simplot shall pay Interest on the unpaid balance. Interest is established at the rate specified in 42 U.S.C. § 9607(a). Interest shall begin to accrue on the date of receipt of the billing statement, notwithstanding any dispute or objection to any portion of the cost, and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to EPA, the Forest Service, FWS or BLM by virtue of Simplot's failure to make timely payments under this Section, including but not limited to, the payment of stipulated penalties pursuant to Section XXVII.

25.2.7 The total amount to be paid by Simplot under this Settlement Agreement shall not exceed \$85,000 for the Forest Service, \$7,000 for FWS and \$8,000 for BLM. Provided, any costs Simplot is required to pay to the Forest Service pursuant to Paragraph 35.3 ("Work Takeover"), Section XXI ("Emergency Response and Notification") and Section XXII ("Additional Work) shall not be subject to the \$85,000 limit.

25.3 Simplot may dispute payment of any portion of EPA, Forest Service, FWS, or BLM Future Response Costs, but only on the basis of accounting errors, the inclusion of costs outside the scope of this Settlement Agreement, the inclusion of costs that have not been paid or approved for payment by EPA, the Forest Service, BLM or FWS, or the inclusion of costs inconsistent with the NCP. Disputes regarding EPA, Forest Service, FWS or BLM Future Response Costs will be resolved using the dispute resolution procedures described in Section XXIII. Any objection by Simplot shall be made in writing within forty-five (45) days of receipt of the billing statement and shall specifically identify the disputed costs and the basis of the dispute. Disputed costs shall be paid by Simplot into an interest-bearing escrow account while the dispute is pending. All undisputed costs shall be remitted by Simplot in accordance with the provisions in the preceding Paragraphs of this Section. In any dispute resolution proceeding, Simplot shall bear the burden of establishing an accounting error, the inclusion of costs inconsistent with the NCP, the inclusion of costs for work outside the scope of this Settlement Agreement or the inclusion of costs that have not been paid, or approved for payment by EPA, the Forest Service, BLM or FWS. If EPA, the Forest Service, BLM, or FWS prevails in the dispute resolution proceeding, Simplot shall remit the amount(s) in

question, including any applicable Interest, within 30 days after receipt of the final determination. If Simplot prevails concerning any aspect of the contested costs, Simplot shall pay that portion of the costs for which it did not prevail in the manner described in the preceding sentence. Simplot shall be disbursed any balance of the escrow account.

## **XXVI. REIMBURSEMENT OF STATE RESPONSE COSTS**

26.1 Response costs incurred by IDEQ with respect to the Site under this Settlement Agreement will be reimbursed in the following manner:

26.1.1 Simplot will pay the sum of Five Thousand Dollars (\$5,000) to IDEQ to be deposited in a separate account established for this site.

26.1.2 Hereafter, IDEQ shall provide a quarterly accounting and invoice to Simplot of actual response costs incurred by IDEQ.

26.1.3 Within thirty (30) days of Simplot's receipt of the IDEQ's quarterly accounting invoice, Simplot shall reimburse the State for all costs reflected in the accounting invoice.

26.1.4 The initial deposit will be returned to Simplot within sixty (60) days of the date IDEQ incurs final response costs.

26.2 IDEQ response costs shall include IDEQ costs incurred after December 29, 2005.

26.3 All payments necessary to IDEQ shall be made to:

Administrative Services-Accounts Receivable  
Idaho Department of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706-1255

26.4 Simplot may dispute payment of any portion of IDEQ's response costs, but only on the basis of accounting errors, the inclusion of costs outside the scope of this

Settlement Agreement, the inclusion of costs inconsistent with State regulations or the inclusion of costs that have not been paid or approved for payment by IDEQ. Disputes regarding oversight costs will be resolved using the dispute resolution procedures described in Section XXIII. Any objection by Simplot shall be made in writing within forty-five (45) days of receipt of the Quarterly Billing and shall specifically identify the disputed costs and the basis of the dispute. All undisputed costs shall be remitted by Simplot in accordance with the provisions in the preceding Paragraphs of this Section. In any Dispute Resolution proceeding, Simplot shall bear the burden of establishing its contentions as to inappropriate costs. If the IDEQ prevails in the Dispute Resolution proceeding, Simplot shall remit the amount(s) in question, including any applicable interest, within thirty (30) days after receipt of the final determination, subject to the provisions of Paragraph 23.7 (Dispute Resolution) above.

#### **XXVII. STIPULATED PENALTIES**

27.1 Unless there has been a written modification of a compliance date or other requirement of this Settlement Agreement by the Lead Agency, or a force majeure event as defined herein, in the event Simplot fails to meet any requirement of this Settlement Agreement, Simplot shall pay stipulated penalties in the amount of \$1,000 per day, per violation for the 1<sup>st</sup> through 14<sup>th</sup> days of noncompliance; \$3,000 per day, per violation for the 15<sup>th</sup> through 30<sup>th</sup> day of noncompliance; and \$7,500 per day, per violation for the 31<sup>st</sup> day of noncompliance and every day thereafter. Compliance by Simplot shall include complete and timely performance of each activity required under this Settlement Agreement and complete and timely performance of all Work described in any plan, statement or Deliverable approved under this Settlement Agreement.

27.2 All penalties shall begin to accrue on the day after complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission of a Deliverable under Section IX ("Work to be Performed"), during the period, if any, beginning on the 11<sup>th</sup> day after the Lead Agency's receipt of such submission until the date that the Lead Agency notifies Simplot of any deficiency; and (2) with respect to a matter subject to Section XXIII ("Dispute Resolution"), during the period, if any, beginning on the 11<sup>th</sup> day after the Negotiation Period begins until the date that the Lead Agency issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

27.3 The Lead Agency will advise Simplot in writing of any stipulated penalties owed by Simplot pursuant to this Section. All penalties shall be paid to the Lead Agency, or its designee, by certified or cashier's check within thirty (30) days of the date of receipt of the demand for payment, unless Simplot has properly disputed such demand or related notice of violation. Interest shall begin to accrue on the unpaid balance at the end of the thirty (30) day period. Interest shall accrue at the rate provided in applicable law. Payment shall be made in accordance with instructions provided by the Lead Agency.

27.4 The stipulated penalties provided for in this Section of the Settlement Agreement shall be the exclusive monetary penalty for violations of this Settlement Agreement that are not also violations of federal or state statutes or regulations. The provisions in this Section, however, do not preclude the Forest Service, EPA or IDEQ

from pursuing any other remedies or sanctions that may be available by reason of Simplot's failure to comply with any of the requirements of this Settlement Agreement, nor shall payment of stipulated penalties relieve Simplot of the responsibility to comply with any requirement of this Settlement Agreement. Notwithstanding any other provision of this Section, the Lead Agency may, in its unreviewable discretion, waive any portion of the stipulated penalties that have accrued pursuant to this Settlement Agreement.

#### **XXVIII. OTHER CLAIMS**

28.1 By entering into this Settlement Agreement, the Forest Service, IDEQ and EPA assume no liability for injuries or damages to persons or property resulting from acts or omissions of Simplot. No Party shall be deemed to be a party to any contract entered into by any other Party or its agents, successors or contractors to carry out actions pursuant to this Settlement Agreement.

#### **XXIX. RESERVATION OF RIGHTS AND COVENANTS NOT TO SUE**

29.1 Except as expressly provided in this Settlement Agreement, nothing in this Settlement Agreement shall limit the power of the United States to take, direct, or order all action necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, except as provided in Paragraph 27.4 ("Stipulated Penalties"), nothing in this Settlement Agreement shall prevent the United States from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Simplot in the future to perform

additional activities pursuant to CERCLA or any other applicable law. For the purpose of this Paragraph only, pollutants or contaminants are as defined in CERCLA.

29.2 The covenant not to sue set forth in Paragraph 29.7 does not pertain to any matters other than those expressly identified therein. The United States reserves and this Settlement Agreement is without prejudice to, all rights, claims and defenses the United States may have, including, but not limited to:

a. the right to bring an action against Simplot under CERCLA, or other applicable law, for recovery of any unreimbursed response costs incurred in connection with the Site;

b. claims based on a failure by Simplot to meet a requirement of this Settlement Agreement;

c. liability for performance of response action other than the Work;

d. criminal liability;

d. liability for damages for injury to, destruction of, or loss of natural resources, and for costs of any natural resource damage assessments;

e. liability arising from the past, present, or future disposal, release or threat of release of Waste Material outside of the Site; and

f. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

29.3 The IDEQ expressly reserves the right to seek further relief to address contamination or pollution resulting from the matters addressed herein. Nothing herein shall be deemed to bar such further relief and this Settlement Agreement shall not

operate pursuant to Idaho Code § 39-108(3)(a)(v) to preclude the IDEQ from seeking additional relief.

29.4 Except as expressly provided in this Settlement Agreement, the IDEQ reserves all rights, claims and defenses it may have, including the right to bring an action against Simplot under CERCLA, Idaho Code § § 39-108(3)(a)(v) and 39-4413(A)(1)(d), or other applicable law for recovery of any unreimbursed response costs incurred in connection with the Site. Nothing in this Settlement Agreement shall be construed as releasing Simplot from liability, if any, for its actions. The IDEQ reserves the right to take any enforcement action pursuant to any applicable legal authority for relief, including, but not limited to, injunctive relief, for any violation of this Settlement Agreement, except as provided in Paragraph 27.4 (Stipulated Penalties). Furthermore, nothing in this Settlement Agreement shall be construed to limit the power and authority of the IDEQ to take, direct, or order all actions necessary to protect the public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants at or from the Site.

29.5 Except as expressly provided in this Settlement Agreement, Simplot reserves all rights, claims and defenses it may have, including the right to bring an action against the United States or the State of Idaho under CERCLA, or other applicable law, for recovery of any response costs incurred in connection with the Site. Except as expressly provided in Paragraph 29.6, nothing in this Settlement Agreement shall be construed as releasing the United States or the State of Idaho from any liability for any of its actions. Simplot also reserves any defense that may be asserted by law in

response to any enforcement action taken pursuant to the United States' and/or the State of Idaho's reservation of rights in Paragraphs 29.1, 29.2, 29.3, or 29.4.

29.6 Simplot hereby covenants not to sue and agrees not to assert any cause of action or claim arising out of any action performed under this Settlement Agreement against the United States for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507), pursuant to Sections 106(b)(2), 107, 111, 112, 113 of CERCLA, 42 U.S.C. § § 9606(b)(2), 9607, 9611, 9612, 9613, or any other provision of law.

29.7 In consideration of the actions that will be performed by Simplot under this Settlement Agreement, and except as otherwise specifically provided in the Settlement Agreement, including but not limited to the reservation of rights set forth in this Section XXIX, the United States and the State covenant not to sue or to take administrative action against Simplot pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. § § 9606 and 9607(a), for performance of the Work. This covenant not to sue is conditioned upon the complete and satisfactory performance by Simplot of its obligations under this Settlement Agreement, including but not limited to, payments required by Sections XXV and XXVI. This covenant not to sue extends only to Simplot and does not extend to any other person.

### **XXX. CONTRIBUTION**

30.1 The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Simplot is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of

CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work and the portion of Future Response Costs Simplot pays pursuant to Sections XXV ("Reimbursement of Future Response Costs") and XXVI ("Reimbursement of State Response Costs").

30.2 The Parties agree that this Settlement Agreement constitutes an administrative settlement and resolves Simplot's liability to the United States, as of the Effective Date, for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for the Work and the portion of Future Response Costs Simplot pays pursuant to Sections XXV ("Reimbursement of Future Response Costs") and XXVI ("Reimbursement of State Response Costs").

30.3 Nothing in this Settlement Agreement precludes the United States or Simplot from asserting any claims, causes of action, or demands against any persons not Parties to this Settlement Agreement for indemnification, contribution, or cost recovery.

### **XXXI. INDEMNIFICATION/INSURANCE**

31.1 The United States and the State do not assume any liability by entering into this Settlement Agreement or by virtue of any designation of Simplot as the Forest Service's authorized representative under Section 104(e) of CERCLA, 42 U.S.C. § 9604 (e). Simplot shall indemnify, save and hold harmless the United States, the State, and their officials, agents, employees for all claims or causes of action arising from, or on

account of, negligent or other wrongful acts or omissions of Simplot, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement, including, but not limited to, any claims arising from any designation of Simplot as the Forest Service's authorized representatives under Section 104(e) of CERCLA, 42 U.S.C. §9604(e). Further, Simplot agrees to pay the United States and the State all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Simplot, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Simplot in carrying out activities pursuant to this Settlement Agreement. Neither Simplot nor any such contractor shall be considered an agent of the United States or the State.

31.1.1 The United States and the State shall give Simplot notice of any claim for which the United States or the State plans to seek indemnification pursuant to the preceding Paragraph 31.1, and shall consult with Simplot prior to settling such claim.

31.2 Simplot waives all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between Simplot and any person for performance of Work on or relating to

the Site, including, but not limited to, claims on account of construction delays. In addition, Simplot shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Simplot and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

31.3 No later than fifteen (15 ) days before commencing any on-site Work, Simplot shall secure, and shall maintain until the first anniversary of the Forest Service's Certification of Completion of the Removal Action pursuant to Paragraph 32.1 of Section XXXII (Notice of Completion) comprehensive general liability insurance with limits of \$1,000,000, combined single limit, and automobile liability insurance with limits of \$1,000,000, combined single limit, naming the United States and the State as additional insureds. In addition, for the duration of this Settlement Agreement, Simplot shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Simplot in furtherance of this Settlement Agreement. Prior to commencement of the Work under this Settlement Agreement, Simplot shall provide to the Forest Service and the State certificates of such insurance and a copy of each insurance policy. Simplot shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Simplot demonstrates by evidence satisfactory to the United States and the State that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that

contractor or subcontractor, Simplot need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

## **XXXII. NOTICE OF COMPLETION**

32.1 Upon completion of all requirements under this Settlement Agreement, other than continuing obligations, Simplot shall certify in writing to the Forest Service that all requirements under this Settlement Agreement, including any additional Work and payment of stipulated penalties, have been completed. The certification shall be signed by a representative of Simplot with the requisite knowledge and authority, and shall include the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate and complete." The Lead Agency, if it agrees with Simplot's certification and Simplot has paid all response costs due under Sections XXV ("Reimbursement of Future Response Costs") and XXVI ("Reimbursement of State Response Costs") of this Settlement Agreement, will so notify Simplot in writing, and this Settlement Agreement, with the exception of any continuing obligations, shall be terminated. For the purposes of this Section, continuing obligations shall include, but not be limited to, the following obligations contained in this Settlement Agreement: Paragraph 9.6.5 ("Implementation of Post Removal Site Control Plan"), Section XII ("Record Preservation"), Section XXIX ("Reservation of Rights"), Section XXXI ("Indemnification/Insurance"), Paragraph 9.6.3 ("Implementation of the EMP"), and Paragraph 29.6. If the Lead Agency determines that any requirements of this Settlement Agreement have not been completed by Simplot, the Lead Agency will notify Simplot in writing and specify the deficiencies. Simplot shall correct such deficiencies in accordance with the notice of the Lead Agency. Failure by Simplot to

correct such deficiencies shall be a violation of this Settlement Agreement, subject to the provisions of Section XXIII (Dispute Resolution).

### **XXXIII. MODIFICATION**

33.1 Modification to any plan or schedule may be made, in writing, by the OSC or at the OSC's direction. If the OSC makes an oral modification, it will be memorialized in writing within ten (10 ) days; provided, however, that the modification effective date shall be the date of the OSC's oral direction.

### **XXXIV. SEVERABILITY**

34.1 If a court issues an order that invalidates any provision of this Settlement Agreement or finds that Simplot has sufficient cause not to comply with one or more provisions of this Settlement Agreement, Simplot shall remain bound to comply with all provisions of this Settlement Agreement not invalidated or determined to be subject to a sufficient cause defense by the court order.

### **XXXV. MISCELLANEOUS**

35.1 During the performance of this Settlement Agreement, Simplot agrees that in connection with the performance of Work under this Settlement Agreement, Simplot shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age or handicap. Simplot shall include and require compliance with the above nondiscrimination provision in any contract or subcontract made with respect to this Settlement Agreement. The Lead Agency shall have the right to enforce the foregoing nondiscrimination provisions by suit for specific performance or any other remedy under the laws of the United States or the state in which the breach or violation occurs.

35.2 If, while implementing the terms of this Settlement Agreement, Simplot discovers any objects of historic or scientific interest, it shall notify the OSC and leave such discoveries intact until and unless otherwise instructed by the OSC. For the purposes of this Paragraph, objects of historic or scientific interest include, but are not limited to, historic or prehistoric ruins, fossils, or artifacts. Compliance with any protective and mitigative measures specified by the OSC shall be Simplot's responsibility.

35.3 Work Takeover. In the event the OSC determines that Simplot has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, the Forest Service may assume the performance of all or any portions of the Work as the OSC determines necessary. Simplot may invoke the procedures set forth in Section XXIII (Dispute Resolution) to dispute the OSC's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph, not inconsistent with the NCP, shall be considered Future Response Costs that Simplot shall pay pursuant to Section XXV (Reimbursement of Future Response Costs).

Smoky Canyon Phosphate Mine  
Administrative Settlement Agreement and Order on Consent/Consent Order

UNITED STATES DEPARTMENT OF AGRICULTURE  
FOREST SERVICE REGION 4

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: Regional Forester

Date: \_\_\_\_\_

Smoky Canyon Phosphate Mine  
Administrative Settlement Agreement and Order on Consent/Consent Order

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Smoky Canyon Phosphate Mine  
Administrative Settlement Agreement and Order on Consent/Consent Order

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Smoky Canyon Phosphate Mine  
Administrative Settlement Agreement and Order on Consent/Consent Order

J.R. Simplot Company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_