IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DAUPHIN ISLAND PROPERTY OWNERS ASSOCIATION, INC., a non-profit corporation; and JAMES W. HARTMAN, et. al.,	
Plaintiffs,	
v.	No. 00-115-L
THE UNITED STATES OF AMERICA,	Hon. Bohdan A. Futey
Defendant.	

JOINT NOTICE OF PROPOSED SETTLEMENT AND PROCESS FOR PRELIMINARY APPROVAL OF CLASS-ACTION SETTLEMENT, CERTIFICATION OF CLASS, APPROVAL OF NOTICE PLAN, AND SCHEDULING OF FAIRNESS HEARING

Respectfully submitted July 15, 2005.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. PROCEDURAL HISTORY 1

III. SETTLEMENT AGREEMENT TERMS 2

A. BACKGROUND OF THE SECTION 111 FRAMEWORK 2

B. THE PROPOSED TRANSACTIONAL SOLUTION 3

IV. DISCUSSION 6

A. CLASS CERTIFICATION IS WARRANTED IN THIS UNIQUE SETTLEMENT CONTEXT 6

B. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE PRELIMINARILY APPROVED BY THE COURT 10

1. THE PROPOSED SETTLEMENT MEETS THE CRITERIA FOR PRELIMINARY APPROVAL 10

C. THE COURT SHOULD APPROVE THE NOTICE PLAN 13

V. CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Allied Sanitation, Inc. v. Waste Management Holdings, Inc., 97 F. Supp. 2d 320, (E.D.N.Y. 2000) 2

Applegate v. United States, 35 Fed. Cl. 406 (1996) 8

Banner v. United States, 38 Fed. Cl. 700 (1997) 7

Berkley v. United States, 59 Fed. Cl. 675 (2004) 10, 11, 12

Buchan v. United States, 27 Fed. Cl. 222 (1991) 7

Christensen v. United States, __ Fed. Cl. __, 2005 WL 1201428 ..... 10, 12

Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 825 (E.D.N.C. 1994) 10

Kingsport Horizontal Property Regime v. United States, 46 Fed. Cl. 691 (2000) 11

Moore v. United States, 63 Fed. Cl. 781 (2005) 12

National Treasury Employees Union v. United States, 54 Fed. Cl. 791 (2002) 12

Petrovic v. Amoco Oil Co., 200 F.3d 1140 (8th Cir. 1999) 13

Quinault Allottee Ass'n v. United States, 197 Ct. Cl. 134, 453 F.2d 1272 (1972) 6

Testwuide v. United States, 56 Fed. Cl. 755 (2003) 7

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir. 2005) 13

Statutes

Rivers and Harbors Act of 1968, 33 U.S.C. § 426i ("Section 111") .....passim

Uniform Relocation and Real Properties Acquisition Policies Act, 42 U.S.C. § 4654(c).....6, 12

Rules

RCFC, Rule 23.....6, 10, 14

I. INTRODUCTION

Plaintiffs, Dauphin Island Property Owners Association, Inc. ("Association") and individual Association member and property owner James Hartman ("Hartman") (collectively "Plaintiffs") and Defendant, the United States of America, have reached a proposed settlement, memorialized in the executed Litigation Settlement Agreement ("Agreement"), attached hereto as Exhibit A.[1/]

II. PROCEDURAL HISTORY

On March 6, 2000, Plaintiffs, the Association and Hartman, filed a Complaint for Class Action Relief and Incidental Injunctive Relief ("Complaint") alleging that Defendant's dredging and maintenance operations have taken their property through erosion to Dauphin Island, in contravention of the Fifth Amendment. Doc. No. 1.[2/] Plaintiffs also filed a Motion for Class Certification ("Motion"), seeking an opt-out class consisting of all members of the Association.

[1/]The parties had hoped to finalize the lengthy proposed individualized notice to potential class members, the proposed published notice to potential class members, and the proposed form to be used for potential class members to opt-in to the class, comment on the proposed settlement, request permission to speak at a proposed fairness hearing. Unfortunately, in the wake of Hurricane Dennis, the parties have been unable to finalize this prior to the United States' lead counsel's departure. The parties anticipate that by August 5, 2005, and under signature of new counsel for the United States, they will be able to submit the necessary proposed notices and formally request that this Court preliminarily approve the parties' settlement agreement, certify a class, approve a plan to provide notice to that class and allow for comments, and schedule a final fairness hearing at which point the Court would formally consider and rule on the proposed settlement. Because the legal standard and reasons for certifying a class, the merits of the settlement agreement itself, the legal standard and reasons for approving that settlement, and the general format of the notice and notice procedures are completed and will require some review by this Court, the parties submit this filing now.

[2/] Plaintiffs' complaint also asserted claims for alleged violation of due process and requested injunctive relief claims, which they subsequently withdrew. Doc. No. 25.

Doc. No. 3, at ¶ 2. Defendant opposed class certification. Doc. No. 10. A hearing on the motion for certification was scheduled for January 17, 2001, but – at the parties' request – was eventually stayed. Doc. Nos. 27, 28, and 64.[3/]

As this Court is aware, the parties (along with the State of Alabama) engaged in a very lengthy settlement process encompassing considerable attorney time over several years. These negotiations have been detailed in approximately 40 joint status reports filed with the Court and in numerous status conferences. On June 28, 2005, the parties received the final approval necessary to execute the Agreement, attached as Exhibit A.

III. SETTLEMENT AGREEMENT TERMS

A. BACKGROUND OF THE SECTION 111 FRAMEWORK

The proposed settlement is complicated. Generally, the settlement calls for a study to be undertaken pursuant to Section 111 of the Rivers and Harbors Act of 1968, 33 U.S.C. § 426i and (depending on the findings of the study), work to mitigate erosion. Under Section 111, the U.S. Army Corps of Engineers ("Corps") is authorized to study, plan and then expend up to $5,000,000 in federal money to implement a project to prevent or mitigate shore damage attributable to a federal navigation work such as the Mobile Channel ("Channel"). If a Channel-caused impact is shown, but the federal cost of the remedial project to repair damage caused by the Channel exceeds $5,000,000, by law no federal funds may be expended on implementation

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[3/] It "is appropriate for the parties to a class action suit to negotiate a proposed settlement of the action prior to certification of the class." *Allied Sanitation, Inc. v. Waste Management Holdings, Inc.*, 97 F. Supp. 2d 320, 330 (E.D.N.Y. 2000) (citations omitted).

without Congressional authorization. If such a remedial project is feasible within the federal spending limit, the Corps will be authorized to implement the project.

All phases of a Section 111 project must be cost-shared by a local sponsor. A local sponsor must provide 50 percent of any study costs. This includes not only the costs of studying the impact caused by the Channel but also the costs of any studies on the feasibility of any remedial project. If a remedial project is constructed, the federal government may only bear these costs in the same ratio as the navigation project causing the damage. In the case of the Channel, the federal share is 65%, with the local sponsor responsible for 35%. Thus, the total cost of any possible Section 111 project would be $7,692,308, equal to a Corps contribution of $5 million (65%) and a local sponsor contribution of $2,692,308 (35%).

B. THE PROPOSED TRANSACTIONAL SOLUTION

The proposed Section 111 process would proceed in three phases. First, an "Impacts Study" would be completed. Second, if that Study finds the Corps has contributed to the erosion occurring on Dauphin Island, then a Feasibility Study would be prepared to examine ways to remedy the problem. Third and finally, the Corps would, subject to the caveats explained below, proceed with a remedial project to relieve project-induced erosion. The State of Alabama would be the local cost-sharing partner in all three phases.

The Impacts Study will analyze the effect of the Channel on shoreline loss. Ex. A at 5-9, ¶ 3.[4/] The parties have agreed that a privately-employed coastal geomorphologist will serve as the Impact Study's principal investigator ("PI"), assisted by an Independent Technical Review

[4/] The paragraph numbers in the text refer to the paragraphs in the proposed settlement agreement, which accompanies this memorandum as Exhibit A.

Team ("Team") consisting of Plaintiffs' technical advisor, a Corps coastal engineer, and a scientist with the Alabama Geological Survey. *Id.* ¶ 3(b). Under the proposed settlement, the Impacts Study will be completed within twelve months at a cost of approximately $274,000, with the costs divided between the Corps and the State. *Id.* ¶ 9(a).

Collectively, this study team will first define a "minimum measurable quantity" of erosion by which to assess the impact of the Corp's activities and then make its finding. *Id.* ¶ 3(c). The completed Impacts Study will result in one of three findings: (1) that the Corps has had no or negligible impact on erosion on the island (a "Negative" finding); (2) that the Corps has contributed to the erosion problem (a "Positive" finding); or (3) that there is no reasonable scientific certainty as to whether the Corps has contributed to the erosion (an "Inconclusive" finding). *Id.* ¶¶ 3(e),(f), (g).

Should the Impacts Study result in a "Negative" finding, Plaintiffs will dismiss their Fifth Amendment takings suit with prejudice (*id.* ¶ 3(f)), with the caveat that they could ask this Court to appoint an ADR Judge to review the Negative finding to determine whether it should have properly been a finding of "Inconclusive." *Id.* ¶ 3(f).

Should the Impacts Study result in a "Positive" finding, the Corps will undertake a Feasibility Study to design a project to remedy the Channel's erosive effects. *Id.* ¶ 3(e). Subject to certain limitations (such as an injunction initiated by third parties or a change in law not initiated by the Corps that precludes a project), if a remedial project can be designed within the limits of Section 111 (*i.e.* no more than $7,692,308, including both federal and state contributions), the Corps will construct the project. *Id.* ¶ 5(a). If the selected remedy is above this amount, the Corps is not allowed by statute to undertake the project unless Congressional

authorization and funding were obtained. *Id.* ¶ 9(c). If funding is not obtained, or a project is for some other reason not constructed, Plaintiffs may reinstate the lawsuit. *Id.* ¶ 5(a).

In any reinstated lawsuit, the United States would retain its statute of limitations defense. *Id.* ¶ 7. If that defense were unsuccessful, however, a Positive Section 111 determination would be binding on the United States as to causation and binding on both parties as to the extent of erosion. *Id.* The litigation would thus move directly to quantifying just compensation due and owing to the Plaintiffs' Class. If the failure of the Corps to build the project is outside of the Corps' control – such as the result of a successful legal challenge to a project, a change in law, or the failure of Congress (in the beyond-the-scope-of Section 111 scenario) to authorize a project – any recovery in the re-instituted suit would be capped at $7,692,308, the limit of a Corps-initiated Section 111 project. *Id.* ¶ 5(a).

Should the Impacts Study result in an "Inconclusive" finding, the Corps will proceed with a Feasibility Study, without a commitment for the Corps to deliver a project or for Plaintiffs to accept any project. *Id.* ¶¶ 3(g), 5(b). In this Inconclusive scenario, if no project is proposed or accepted, Plaintiffs has the option to return to court. The United States would retain its defenses, including statute of limitations and causation, with any damages in the re-instituted suit in the Inconclusive scenario capped at no more than $7,692,308. ¶ 5(b).

Concomitant with the initiation of these studies, and in addition to the above-discussed project, the Corps agrees to certain dredging and disposal practices. Specifically, the Corps agrees to conduct its ongoing Channel maintenance operations to deposit material dredged from

the Channel into the shallowest alternate disposal site currently available. *Id.* ¶ 4.[5/] Such practices will continue even if the case were dismissed.

In addition, the agreement contemplates payment of $485,522.68 in fees and costs prior to April 1, 2005 and the possible reimbursement of up to $417,480 in future fees and costs incurred after that date (all pursuant to the Uniform Relocation and Real Properties Acquisition Policies Act, 42 U.S.C. § 4654(c)). *Id.* ¶ 9(d). Finally, the State of Alabama agrees to participate as the local cost-sharing entity; in return, the United States will provided the State with a covenant not to enforce an existing Federal/State hold-harmless agreement for any suits involving erosion to Dauphin Island. *Id.* ¶ 8.

IV. DISCUSSION

A. CLASS CERTIFICATION IS WARRANTED IN THIS UNIQUE SETTLEMENT CONTEXT

As discussed above, Defendant initially objected to the motion for class certification, and the issue was stayed without a determination. Docket Nos. 10, 23, and 64. When the parties originally briefed the class certification issue in 2000, the criteria for certifying and maintaining a class action was that set forth in *Quinault Allottee Ass'n v. United States,* 197 Ct. Cl. 134, 453 F.2d 1272 (1972), and its progeny. *See* Docket Nos. 3, 10, 17, and 23. In 2002, RCFC, Rule 23 was "completely rewritten." RCFC Rules Comm Notes for 2002 Revision. The standard for

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[5/] Exceptions to such disposal are outlined in paragraph 4 of the Agreement. There could be other measures arising out of this process, such as changes to dredging and/or disposal practices not specified in the Agreement.

certification of a class is now "modeled largely on the comparable federal rule." *Id.* However, the amended RCFC, Rule 23 adopts the criteria set forth in *Quinault*. *Id. See also Testwuide v. United States*, 56 Fed. Cl. 755, 761 (2003). Thus, the legal standard remains largely the same, namely that:

> (1) members must constitute a large but manageable class; (2) there is a question of law . . . common to the whole class; (3) a common legal issue overrides any separate factual issues affecting the individual members; (4) the claims of the present plaintiffs are typical of the claims of the class; (5) the Government must have acted on grounds generally applicable to the whole class; (6) the claims of many claimants must be so small that it is doubtful they would be otherwise pursued; (7) the party plaintiffs must adequately and fairly protect the interests of the class without conflicts of interest; and (8) the prosecution of individual lawsuits must create a risk of inconsistent or varying adjudications.

Testwuide, 56 Fed. Cl. at 761 (quoting the interpretation of *Quinault* set forth in *Buchan v. United States*, 27 Fed. Cl. 222, 224 (1991)).

The heart of Defendant's initial objection to certification was that complex factual questions involving causation, especially factual differences among potential plaintiffs, precluded certification. Defendant argued that these factual differences would make the class an unwieldy mass, dwarf any purely legal determinations, outweigh common questions of law, and defeat the typicality requirement. Doc. No. 10 at 6-15. As Defendant noted, the "question of whether a takings has occurred is frequently fact-intensive" and "cannot be applied uniformly to all members of the proposed class." *Banner v. United States*, 38 Fed. Cl. 700, 705-04 (1997). Such

factual distinctions in takings cases are multiplied in erosion cases, where "the existence of multiple plaintiffs with similar claims does not alter the applicable burdens, including proof of loss and causation. Evidence of a taking of one property does not, absent additional proof, support a finding of taking of other properties." *Applegate v. United States*, 35 Fed. Cl. 406, 417 (1996). Even a finding as to the general effect of the Corps dredging would "not establish Fifth Amendment takings liability with respect to any individual plaintiff absent evidence of causation and actual loss." *Id.* at 418.

Defendant stands by these contentions, and maintains that they would preclude certification of a typical litigation class. However, as discussed above, this settlement envisions a study of erosion to Dauphin Island, eventual dismissal of this matter based on the results of that study, and a project to remediate and prevent erosion (if warranted). Thus, no determination of liability by a court will likely be required. Moreover, if the Impacts Study is Positive, but in the unlikely event that a project is not completed and the parties nonetheless return to Court, the United States has agreed that such a determination shall be binding on it as to causation, and both parties have agreed that the determination shall be binding regarding the extent of measurable erosion. Ex. A at 13, ¶ 7. Thus, unless the case were dismissed on statute of limitations grounds, the litigation would move directly to a determination of the amount of just compensation due, without a need for a liability inquiry. *Id.*[6/]

[6/] If the Impact Study were Inconclusive, such a determination would not be binding on either party in any future litigation. Ex. A at 13, ¶ 7. In such an event, the issues discussed above *Applegate* regarding burdens of proof and differences among Plaintiffs might arise. The parties do not believe that any difficulties that might arise in such a remote scenario should prevent certification of a class where the intention and likely outcome of the proposal is resolution by other means.

In such a unique context, to achieve an effective and comprehensive compromise resolution for – and address the hydrological forces involved in – the underlying matter, the parties agree (without concession as to liability or compensability) that an opt-in settlement class pursuant to Rule 23 of the Rules of the U.S. Court of Federal Claims is appropriate. The proposed class of owners of real property on Dauphin Island constitute a large (perhaps approximately 3,000 members) but manageable class. The settlement is structured so that the issue of causation will likely be determined by joint scientific study. As explained in the paragraph above, there are not likely to be separate factual issues affecting individual members for this Court to decide. The goals of the named Plaintiffs in this settlement– beach renourishment – are typical of the goals of the class. The Government proposes to act on grounds generally applicable to the entire class.[7/] The recommended transactional approach would not be pursued on a claimant-by-claimant basis. The party Plaintiffs have and will continue to adequately and fairly protect the interests of the class without conflicts of interest. Finally, the prosecution of individual actions (seeking a damages remedy) would be inconsistent with the proposed transactional approach.

Thus, in this unique settlement context, certification of an opt-in class of owners of real property interests on Dauphin Island is warranted.[8/]

[7/] In fact, due of the general applicability of any project, Defendant has, by terms of the settlement, reserved the option of withdrawing from the settlement if fewer than 100% of those owners of beachfront property (or the adjacent or contiguous owners of beachfront property if the beachfront is owned or claimed owned by the Dauphin Island Property Owners Association, Inc.) on the Southern coast of Dauphin Island opt in to the class. Ex. A at 3, ¶ 1(d).

[8/] Defendant's support of certification of an opt-in class is based on, and expressly contingent on, this Court's approval of the proposed settlement.

B. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE PRELIMINARILY APPROVED BY THE COURT

1. The Proposed Settlement Meets the Criteria for Preliminary Approval

The Court must approve any proposed settlement of the claims of a certified class and must direct notice in a reasonable manner to all class members that may be bound by the settlement. RCFC 23 (e)(1)(A) and (B). The Court is further required to hold a hearing on the proposed settlement, and must ultimately conclude that "the settlement is fair, reasonable, and adequate." RCFC 23(e)(1)(C); *Christensen v. United States*, __ Fed. Cl. __, 2005 WL 1201428 at *3 (May 18, 2005).

In implementing Rule 23(e), courts typically follow a two-step procedure. *See, e.g.*, *Berkley v. United States*, 59 Fed. Cl. 675, 676 (2004). "First, the court conducts a preliminary approval or pre-notification hearing to determine whether the proposed settlement is within range of possible approval or, in other words, whether there is probable cause to notify the class of the proposed settlement." *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 825, 827 (E.D.N.C. 1994) (internal quotation marks and citations omitted). Second, after the court preliminarily approves the settlement, notice is sent to the class, comments from the class are received, and the court conducts a fairness hearing at which all interested parties are afforded an opportunity to be heard on the proposed settlement. The ultimate purpose of the fairness hearing is to determine if the proposed settlement is "fair, reasonable, and adequate."

The Federal Circuit has not adopted criteria for final approval of a proposed class settlement or for the less exacting standard of whether a proposed settlement is within the broad range of reasonableness that warrants notifying the class of the proposal. *Berkley*, 59 Fed. Cl. at

681-82 (citations omitted), provides a list of some factors a court might consider prior to final approval after notice and a fairness hearing.[9/] The parties will attempt to briefly sketch why the proposed settlement here is well above the "probable cause" line for preliminary approval.

One of the principal factors for a court's consideration – the relative strength of any plaintiff's case in comparison to a proposed settlement – is difficult to assess in this case; "causation" will likely be determined here by a scientific study of a very complex factual question. What can be stated with certainty is that the burden that any plaintiff or group of plaintiffs outside of the proposed settlement would have to carry in order to show that the Corps' Channel activities are "the direct and proximate cause of erosion to private property above the high-water mark," *Kingsport Horizontal Property Regime v. United States*, 46 Fed. Cl. 691, 693 (2000), would be extensive and expensive. By joining in the proposed transactional solution, the study will be funded by Defendant and the State of Alabama.

In addition, a court also may consider the maintainability of a class outside of the settlement context. Although only this Court knows whether it would have certified a class

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[9/] Many of these are not germane to this stage of the proceeding, a discussion of *preliminary* approval to send out that notice and to schedule a fairness hearing. For example, the reaction of the class to the settlement is not germane to a question of conditional approval, where notice of the settlement has not been sent to potential class members and the time for any objections has not yet occurred. Similarly, because a class has not been certified, and it is unknown who will opt-in, any question of fairness to the "entire class" is premature before there even is an "entire class." Other factors will never be at play in this case. For example, there is no "settlement fund" being created by this transactional approach. Similarly, because this is a transactional, instead of a damages-based settlement, there is no "judgment" to exceed. And lastly, the defendant's "ability to withstand greater judgment has little bearing on a decision to approve or reject a proposed class action settlement in which the government is a party." *Berkley*, 59 Fed. Cl. at 713 (citations omitted).

based on the parties' original briefing, it is at least questionable whether, without this settlement, a class action would have been viable.

Further, the Class counsels' recommendation of the proposed settlement is entitled to deference. *National Treasury Employees Union v. United States,* 54 Fed. Cl. 791, 797 (2002). Such deference is heightened where an lengthy, arms-length negotiating process lead to the settlement. *Christensen*, 2005 WL 1201428 at *4. This Court is acutely aware of the very lengthy back-and-forth settlement efforts since 2001.

The provision of attorney fees here favors approval of settlement for at least three reasons. First, unlike the "vast majority of cases" where class counsels' fees are charged to the plaintiff class, *Berkley*, 59 Fed. Cl. at 712, here the stipulated amount is to be borne by Defendant alone, under Uniform Relocation Act 42 U.S.C. § 4654(c). Ex. A at 16, ¶ 9(d).[10/] Second, as this Court is aware from past reports and conferences, the parties tabled the discussion of attorney's fees until after reaching agreement on the merits. Third, class counsel had entered a contingency agreement with their clients to recover a percentage of any award. Thus, had Plaintiffs litigated and won, their expected recovery would be considerably larger than $485,522.68 in fees and costs prior to April 1, 2005, and the possible reimbursement of up to $417,480 in future fees and costs incurred after that date. In fact, limiting counsel to the statutory rate here certainly provided counsel "an incentive not to settle." *Cf. Moore v. United States*, 63 Fed. Cl. 781, 788 n.13 (2005). Where, as here, settlement was for less than would have otherwise been obtained, it

[10/]Should the case return to litigation, and if the case results in an award of money damages, Class Counsel retains the right to pursue litigation costs.

makes it even more clear that such settlement of fees "did not unduly influence the settlement of the merits." *Cf. id.*, at 785 n.6.

Therefore, the parties submit that there will be (once the notification format is finalized) sufficient justification to notify the class of the proposed settlement, as described below, and to set a date for the final fairness hearing.

C. THE COURT SHOULD APPROVE THE NOTICE PLAN

The parties are not aware of any case law within the Federal Circuit or the Court of Federal Claims setting out with specificity the issue of adequate notice. Turning to other courts,

> The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness. There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." Notice is "adequate if it may be understood by the average class member."

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 113-114 (2d Cir. 2005). As stated elsewhere, "the notice need only satisfy the 'broad 'reasonableness' standards imposed by due process.'" *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999).

As discussed in the attached motion, the parties are still in the process of finalizing the notices for mailing (what will become Exhibit B) and publication (what will become Exhibit C). The notice plan will include sending notice of the class and the settlement by mail to all the real property owners on Dauphin Island that can be reasonably identified, as well as providing notice by publication in the *Mobile Register* (the largest newspaper of general circulation in the area) and in a local Dauphin Island newspaper.

The parties proposed schedule will be as follows:

(1) Mailed notice will be sent within 10 days of this Court preliminarily approving the settlement and certifying the class, advising owners of real property (including condominiums) on Dauphin Island that they have 45 days from the date of mailing to decide whether to opt-in to the class, to lodge any objections or comments, and to request to speak at a fairness hearing. A single form will be provided as attached to the mailed notice that will allow potential Class Members to accomplish all three tasks in one form.

(2) Published notice to be made twice and within 15 days and 30 days, respectively, from the date of the mailed notice,

(3) The Court's calendar permitting, the Final Fairness Hearing to be scheduled in Mobile, Alabama approximately 70 days from the date the Court issues its preliminary approval of the settlement.

The parties suggest that this notice plan will comport with the due process standards as required under RCFC, Rule 23.

V. CONCLUSION

For the foregoing reasons, the parties intend to request that (once the proposed notices are received by the Court) the Court certify a settlement class, as defined above, and preliminarily approve the proposed settlement, proposed notices, and the notice plan, and schedule a fairness hearing.

Respectfully submitted July 15, 2005

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EXHIBIT A

LITIGATION SETTLEMENT AGREEMENT

This Litigation Settlement Agreement is entered into this 15th day of July, 2005, by and among THE UNITED STATES OF AMERICA including those of its Executive branch agencies involved in those matters outlined in Plaintiffs' Complaint (collectively, the "United States"), the STATE OF ALABAMA (the "State"), and the DAUPHIN ISLAND PROPERTY OWNERS' ASSOCIATION, INC. and JAMES HARTMAN on behalf of the Plaintiff Class (as more particularly described below) (collectively "Plaintiffs").

RECITALS

1. On March 6, 2000, Plaintiffs filed a lawsuit in the United States Court of Federal Claims styled Dauphin Island Property Owners' Association, et al. vs. United States, No. 00-115-L (Fed. Cl.) ("the Litigation") alleging, among other things, that the United States' (acting by and through the Corps of Engineers) Dredging Practices (as defined herein) have caused significant shoreline erosion of Plaintiffs' property on Dauphin Island, Alabama resulting in an uncompensated taking of their property in contravention of the Fifth Amendment to the Constitution. Plaintiffs seek money damages against the United States. The United States disagrees with those assertions and demands.

2. 33 U.S.C. § 426i, commonly known as Section 111 ("Section 111"), authorizes the United States Army Corps of Engineers (the "Corps") to investigate, study, plan, and implement measures to prevent or mitigate shore damages attributable to federal navigation works such as the Mobile Ship Bar Channel (the "Channel").

3. Since at least the 1950's the Corps has been and continues to be the Federal agency involved in the construction, operation and maintenance, including the periodic dredging, of the Channel. Such Channel maintenance, and specifically the dredging, is generally accomplished by removing through various means sediment from the Channel and disposing of the same in the nearshore, littoral, or offshore locations in the Gulf of Mexico ("Maintenance Dredging Practices").

4. The State, in order to provide its citizens with economic development and security and to obtain federal funding for the Mobile Harbor Project, by and through the Alabama State Port Authority, formerly known as the Alabama State Docks Department, had entered into cooperation agreements with the United States wherein it promised to hold and save the United States free from damages arising from construction and maintenance of the Channel.

5. The United States has notified the State about the Litigation and of the United States' potential claim against the State under the indemnity clauses referred to in the aforesaid cooperation agreements. The State disputes that it has any liability in this matter.

6. The parties have met in a good faith attempt to resolve their differences and, after due and good faith consideration of all claims and defenses, are entering into this Litigation Settlement Agreement to resolve all of their differences and to settle the claims between and among the parties.

NOW, THEREFORE, for and in consideration of the mutual promises, covenants, agreements, releases, and other consideration as set forth herein, the adequacy of which is hereby

acknowledged by the parties, the parties agree as follows:

1. Settlement Class.

This Litigation Settlement Agreement anticipates conduct of a study and eventual dismissal of this matter based on the results of that study, and potentially a project to mitigate and prevent erosion (if any) along a portion of Dauphin Island. In such a unique context, to achieve an effective and comprehensive compromise resolution for and address the hydrological forces involved in the underlying matter, the parties agree that an opt-in class pursuant to Rule 23 of the Rules of the U.S. Court of Federal Claims is warranted and necessary.

(a) The parties agree (without concession as to liability or compensability) that:

(i) (A) the class is so numerous that joinder of all members is impracticable, (B) there are questions of law or fact common to the settlement class, (C) the claims of the representative settlement parties are typical of the claims of the settlement class, and (D) the representative settlement parties will fairly and adequately protect the interests of the settlement class;

(ii) the United States has acted or refused to act — and, pursuant to this settlement, is proposing to act — on grounds generally applicable to the class;

(iii) questions of law or fact common to the members of the settlement class would predominate over any questions affecting only individual members, and certification of a settlement class is superior to other available methods for the fair and efficient

implementation of the settlement.

(b) The parties agree to request the Court, upon certification as requested in Paragraph 1(a), to direct to the potential members of the class the best notice practicable under the circumstances, including notice to all individuals who can be identified through reasonable effort. The notice shall advise that (i) the Court will include the individual in the class action if the individual so requests by a specified date; and (ii) the Litigation Settlement Agreement will bind the member(s) of the class.

(c) For purposes of (and in furtherance of) this settlement, and subject to the court's decisions as requested in Paragraphs 1(a) and 1(b), the parties agree that this settlement will bind and be a compromise and resolution for all respects of the claims of all those to whom notice is directed and who the court finds to be members of the settlement class.

(d) The United States and the State of Alabama each reserves the option of withdrawing from the settlement if fewer than 100% of those owners of beachfront property (or the adjacent or contiguous owners of beachfront property if the beachfront is owned or claimed owned by the Dauphin Island Property Owners Association, Inc.) on the Southern coast of Dauphin Island opt in to the class. This option shall be exercised by either the United States or the State of Alabama within 60 days of its receipt from Plaintiffs' counsel of a final list of Plaintiffs and properties included in the opt-in class.

2. Status of Litigation. With the Court's consent, the Litigation will be stayed, and the parties will submit quarterly status reports to the Court. The terms upon which either the stay

will be lifted or the litigation will be dismissed are detailed elsewhere in this Litigation Settlement Agreement. In the event the stay of the Litigation is lifted and the Litigation is not dismissed, this Litigation Settlement Agreement shall be null and void, except for (1) such provisions herein as expressly apply to the Litigation under these circumstances and (2) the Covenant Not to Sue between the United States and the State of Alabama as set forth in paragraph 8 below.

3. Impacts Study Phase.

(a) The United States will conduct an Impacts Study pursuant to Section 111. As more fully set forth in Exhibit "A," the process will begin with Dr. Mark Byrnes of Applied Coastal Research and Engineering (the principal investigator ("PI")) and will include meaningful participation by an Independent Technical Review Team ("ITRT").

(b) As set forth in Exhibit "A," the ITRT shall consist of: Dr. Robert Dean, University of Florida (Plaintiffs); Dr. Nicholas Kraus, U.S. Army Corps of Engineers, Engineering Research Development Center (United States or Corps); and Mr. Robert Mink, Geological Survey of Alabama (State). Should any member of the ITRT resign or be unable to serve for any reason, his or her successor shall be named by the party identified in parentheses following his name.

(c) The PI and the ITRT shall attempt to determine at an early stage in the Impacts Study, once the system is better understood (but before an estimate is made as to actual Corps-causation) what, based on a reasonable scientific certainty, is the lowest/smallest

accurately measurable, peer-reviewable, quantitative (in cubic yards) loss of beachfront (if any) attributable to the Corps' construction, operation, and Maintenance Dredging Practices of and at the Channel – alone and singly, not in combination with any other causes (hereinafter "Minimum Measurable Quantity"). The PI and ITRT should attempt to come to a resolution of this Minimum Measurable Quantity within 4 months from the later of either the effective date of this Litigation Settlement Agreement or the date the related Feasibility Cost Sharing Agreement ("FCSA") is signed. If the PI and the ITRT to this Litigation Settlement Agreement are not unanimously in agreement as to the Minimum Measurable Quantity, then the opinion of Plaintiffs' representative shall control, leaving the Corps the option – if it cannot abide by this – of terminating this Litigation Settlement Agreement by written notice to the other parties, whereupon the Litigation stay shall be lifted and the Litigation reactivated as if this Litigation Settlement Agreement had never been entered, except for the Covenant Not to Sue between the United States and the State of Alabama as set forth in paragraph 8 below.

(d) The PI shall commence the Impacts Study, as set forth in Exhibit "A," immediately upon the execution of this Litigation Settlement Agreement and approval by the Court. In addition to informal communication between the PI and ITRT, the PI shall provide regular status reports and preliminary findings-to-date to the ITRT and arrange an in-person or telephonic meeting by no later than the end of each phase of the Study. A Draft Impacts Study shall be completed and presented to the ITRT, Plaintiffs' counsel, Defense counsel, and counsel for the State of Alabama by not later than 10 months from the later of either the effective date of

this Litigation Settlement Agreement or the date the related Feasibility Cost Sharing Agreement ("FCSA") is signed. Each member of the ITRT shall have 30 days to review and transmit comments regarding the Draft Impacts Study to the PI, who shall have 30 days to respond and submit a Final Report, as set forth in Exhibit "A".

(e) If the determination in the Final Report is Positive (i.e., the quantity of erosion attributable to the Corps' construction, operation and Maintenance Dredging Practices of and at the Channel is above the Minimum Measurable Erosion of Dauphin Island's shoreline), then the settlement process shall move to the Feasibility Study Phase, as described below in this Litigation Settlement Agreement.

(f) If the determination in the Final Report is Negative (i.e., a determination that the Corps' construction, operation and Maintenance Dredging Practices of and at the Channel have not resulted in at least Minimum Measurable Erosion of Dauphin Island's shoreline), then the Litigation will be dismissed with Prejudice. However, in the event that Dr. Dean (or Plaintiffs' representative to the ITRT at the time of the Final Report) dissents in writing, with detailed reasons, and opines that the PI's determination in the Final Report is fundamentally flawed, plainly wrong, or arbitrary, then the following process shall apply:

(i) Within 60 days, the United States and the State, acting together, may elect at their option to declare the finding in the Final Report "Inconclusive" or,

(ii) If, for any reason, the United States and the State fail to make the election in (f)(i) within 60 days, the Plaintiffs may request (with each party to bear its own costs)

that an ADR Judge assigned by the Court of Federal Claims to this litigation hold a confidential neutral evidentiary evaluation on the question of whether the PI determination in the Final Report is fundamentally flawed, plainly wrong, or arbitrary.

(aa) This neutral evaluation will be considered a part of ADR proceedings and conducted, except to the extent noted in subparagraph (f)(ii), pursuant to Appendix H of the Rules of Practice of the United States Court of Federal Claims;

(bb) The proceedings and any resulting evaluation will be governed by the confidentiality provisions of Appendix H.

(cc) Plaintiffs would be required to show by a preponderance of the evidence that the PI's determination in the Final Report is fundamentally flawed, plainly wrong, or arbitrary.

(dd) Testimony at any such evaluation would be limited to the PI and the members of the ITRT (as constituted on the date of the Final Report);

(ee) The Final Report, along with any underlying data or modeling of the PI and the ITRT members (but not communications), shall be considered by the ADR Judge.

(ff) If the ADR Judge determines that Plaintiffs did not meet the burden of proof set forth, then the PI's determination shall be binding, and Plaintiffs shall dismiss their suit with Prejudice; if the ADR Judge determines that such burden of proof is met, then the determination shall be deemed "Inconclusive," the implications of which are addressed

directly below.

(g) If the determination in the Final Report is Inconclusive (i.e., whether the Corps' construction, operation and Maintenance Dredging Practices of and at the Channel have resulted in Minimum Measurable Erosion of Dauphin Island's shoreline could not be determined to a reasonable degree of scientific certainty), then the settlement process shall, nevertheless, move to the Feasibility Study Phase, as described below in this Litigation Settlement Agreement.

(h) If no Positive, Negative, or Inconclusive determination is concluded within 12 months from the later of either the effective date of this Litigation Settlement Agreement or the date the related Feasibility Cost Sharing Agreement ("FCSA") is signed, then Plaintiffs shall be entitled to petition the Court to lift the stay and reactivate the Litigation without opposition. Any reactivation of the Litigation under this subparagraph will in no way effect the Covenant Not to Sue between the United States and the State of Alabama as set forth in paragraph 8 below.

4. Dredging Practices. For as long as a stay of litigation is in effect (or after the case is dismissed), the Corps shall conduct its Maintenance Dredging Practices to deposit Channel material in the Sand Island Beneficial Use Area and/or the Feeder Berm Disposal Area ("the alternate disposal areas"), subject, however, to (i) Channel shoaling that materially adversely affects or could reasonably be expected to materially adversely affect shipping traffic before the routine, scheduled dredging cycle occurs; (ii) the absence of competitive bid proposals from operators owning equipment capable of disposing material in the alternate disposal areas (i.e.,

where disposal in these alternate disposal areas would thus violate the "least costly" restriction imposed by applicable laws); (iii) currently unforeseen negative consequences from repeated use of these alternate disposal areas are discovered; (iv) a change in the law, certifications, authorizations, or regulations that prohibits the deposit of such material in these two disposal areas; or (v) identification and authorization of a more beneficial area. Plaintiffs agree that neither they nor their agents will in any manner or method suggest or imply that the Corps' undertaking in this paragraph is an admission or evidence of any detrimental impact arising from other Corps practices. Similarly, the parties understand that while the Corps will – if none of the five "subject to" caveats listed above prevent it from doing so – deposit Channel material in the Feeder Berm Disposal Area as opposed to the Sand Island Beneficial Use Area, these same caveats may prevent disposal in the Feeder Berm Disposal Area while allowing it in the Island Beneficial Use Area.

5. Feasibility Study Phase.

(a) If the Final Report of the Impacts Study is Positive, the Corps will conduct a Feasibility Study to design a project ("Remedial Project"), consistent with applicable authorization, appropriation, or regulation. The Feasibility Study will evaluate the benefits and costs of a wide variety of alternatives to remediate and compensate for the erosive effects of the Maintenance Dredging Practices, including alternatives for beach nourishment and modification of the operation and maintenance practice for the channel. (In the event a beach nourishment project is determined not feasible, this would not preclude modification of operation and

maintenance practice, should that be determined feasible. The cost cap discussed below applies only to that portion of a Remedial Project considering beach nourishment.) Plaintiffs shall be entitled to petition the Court to lift the stay and reactivate the Litigation without opposition: (i) if the Corps does not present to the Plaintiffs within 18 months after completion of the Final Report a design for a Remedial Project that falls within the cost parameters set forth below; (ii) if a Remedial Project design is presented by the aforesaid date and the Project falls within the said cost parameters but the Corps fails to cause the Remedial Project to begin construction within 24 months from the date the Corps identifies the Selected Alternative (the alternative selected by the Corps of Engineers after completion of the Feasibility Study and related studies to address damages, if any, which the Final Report finds to have been caused by Channel Activities) as the Remedial Project, subject to such modifications as the Corps' Chief of Engineers may deem advisable within his authority as defined in Section III of Appendix F of the Department of the Army Engineering Regulation 1105-2-100, dated 22 April 2000 (any such modification shall be in accordance with all applicable requirements of law, including and subject to judicial review under the Administrative Procedures Act in a court of competent jurisdiction); or (iii) if a Remedial Project design is presented by the aforesaid date but the Project does not fall within the said cost parameters, then unless Congress authorizes and approves the additional funds necessary to begin construction within 36 months from the date the Corps identifies the Selected Alternative, and the Corps, in fact, begins construction of such Project within 24 months from the date Congress authorizes and approves those additional funds necessary to begin

construction; provided, however, if Plaintiffs reactivate the Litigation due to the Corps' failure to begin construction of such Project timely under subparagraph 5(a) above and such failure was due to a matter beyond the Corps' control, such as, without limitation, an injunction initiated by third parties or a change in law not initiated by the Corps that precludes the construction of such Project, then Plaintiffs' potential for recovery would be capped at $7,692,302.69. Any reactivation of the Litigation under this subparagraph will not effect the Covenant Not to Sue between the United States and the State of Alabama as set forth in paragraph 8 below.

(b) If the Final Report of the Impact Study result is Inconclusive and the Corps does not design a project ("Remedial Project") to remediate and compensate for the erosive effects of the Maintenance Dredging Practices and present same to Plaintiffs within 24 months after completion of the Final Report (or, if the Final Report was originally "Negative" but was found – pursuant to (f)(ii)(ff) – to be "Inconclusive," within 24 months from the date of the ADR Judge's determination), or the Corps, despite having timely designed and presented such Project to Plaintiffs and Plaintiffs having decided that such a solution is an acceptable resolution to litigation, fails to begin construction of such Project within 24 months from the date of Plaintiffs' decision, Plaintiffs shall be entitled to petition the Court to lift the stay and reactivate the Litigation, but in this event, Plaintiffs' potential recovery would be capped at a maximum of $7,692,302.69. Any reactivation of the Litigation under this subparagraph will not effect the Covenant Not to Sue between the United States and the State of Alabama as set forth in paragraph 8 below.

6. Date Deadlines. Time is of the essence to the lawful performance of the duties and obligations contained herein. Though this Litigation Settlement Agreement contemplates dates by which certain events will take place, the parties agree to make diligent efforts to meet their respective obligations hereunder as soon as practicable in order to expedite the completion of the Remedial Project.

7. Reactivation of Litigation. If the Litigation stay as provided for in paragraph 2, pages 4-5 is, for purposes of resuming litigation as provided in the Litigation Settlement Agreement, lifted, the Settlement Class contemplated in paragraph 1 above would be deemed the Plaintiff Group for purposes of the Litigation. The United States could seek dismissal of the Litigation on grounds that the applicable statute of limitations for Plaintiffs' causes of action had expired prior to March 6, 2000. The parties agree that while the March 6, 2000, complaint tolls any causes of action that had not yet been time-barred prior to the time of filing suit, none of the actions taken or contemplated by the parties since that time will be argued to have revived any barred claims. If the Final Report of the Impacts Study is Positive, then such determination shall be binding on the United States as to causation and be binding on both parties regarding the extent of the Measurable Erosion, and, unless the Litigation is dismissed on the grounds that the applicable statute of limitations had expired, the Litigation shall move directly to a determination of the amount of damages due Plaintiffs, subject to the maximum recovery that may apply if certain circumstances expressly described in paragraph 5 above exist. If the Final Report is

Inconclusive, such determination shall not be binding on either party, but the Final Report, along with any underlying data or modeling of the PI and the ITRT members (but not communications) shall be admissible. In no event will any work or communications related to the Feasibility Study or the Feasibility Study itself be releasable, discoverable, admissible in any context, or useable in any way. Additionally, the parties to the litigation will jointly move the Court for a protective order recognizing the confidentiality of such materials, preventing their release or dissemination, and holding that these materials and documents are not subject to the Freedom of Information Act, discovery, or other claimed rights to access. Nothing in this paragraph shall change, alter, or in any way effect the Covenant Not to Sue between the United States and the State of Alabama as set forth in paragraph 8 below.

8. Covenant Not to Sue Between the United States and the State of Alabama.

For and in consideration of the entry of the State of Alabama into this Litigation Settlement Agreement, the United States hereby covenants not to bring any action against the State, and any and all of its agencies, including the Alabama State Port Authority (formerly known as the Alabama State Docks), under the cooperation agreements referred to under paragraph 4, page 2 above for any erosion to Dauphin Island allegedly caused by the construction or maintenance dredging of the Channel by the United States or any of its agencies or any other liability, claims, demands or indemnity resulting from or related in any way to erosion to Dauphin Island allegedly caused by the construction or maintenance dredging of the Channel by the United States or any of its agencies. Provided that this Litigation Settlement

Agreement goes into effect pursuant to Paragraph 14, the aforementioned Covenant Not To Sue by the United States shall be binding upon the United States and its related agencies and shall survive termination of this Litigation Settlement Agreement, whether pursuant to Paragraphs 3(c), 3(h), 5(a), or 5(b), or in any other manner, provided that the State of Alabama meets its responsibilities under this Litigation Settlement Agreement up to the point at which this Litigation Settlement Agreement is terminated. Any provisions contained in this Litigation Settlement Agreement indicating that the Litigation Settlement Agreement shall become null and void or that litigation shall be reactivated "as if this agreement had never been entered" have no application and shall not be binding upon the terms of this paragraph and the release by the United States required under this paragraph. It is further agreed that the United States will not seek in any way to enforce any future indemnification and/or hold harmless language in any agreement entered into between the United States and the State pursuant to the utilization of Section 111.

9. Costs.

(a) Impacts Study. The first $100,000.00 of costs of the Impacts Study has been paid or will be paid by the Corps. The balance of costs to complete the Study will be divided evenly between the Corps and the State. Such costs will include the fees and expenses of all ITRT members.

(b) Feasibility Study. The Corps and the State will divide evenly the costs of the Feasibility Study.

(c) Remedial Project. If the Remedial Project cannot be constructed for an amount less than or equal to $7,692,302.69, the Corps is not required to construct the Remedial Project unless Congress authorizes the Corps to proceed with the Remedial Project and appropriates sufficient funds. In the event the Remedial Project is constructed, (i) the State shall pay 35% of the cost thereof, up to, but not to exceed, $2,692,302.69, and (ii) the Litigation shall be dismissed with prejudice.

(d) Plaintiff Costs and Attorney Fees. The United States agrees to reimburse Plaintiffs for certain of their "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred," 42 U.S.C. § 4654(c).

i. Upon a determination of the Minimum Measurable Quantity pursuant to paragraph 3(c) of the Litigation Settlement Agreement, the United States agrees to pay Plaintiffs $485,522.68 in fees and costs Plaintiffs have actually accrued (or are reasonably expected to accrue) through April 1, 2005. If this Litigation Settlement Agreement does not become effective, or if Litigation is reactivated pursuant to paragraph 3(c), the United States will not have liability for fees and costs (although nothing in this Litigation Settlement Agreement would preclude fees and costs that could arise if litigation were resumed).

ii. Additionally, the United States agrees to reimburse Plaintiffs for certain future fees and costs incurred after April 1, 2005, up to a total maximum of $417,480.

aa. Future hourly rates will be set according to the "Laffey Matrix" published by the U.S. Attorney's Office. As two of Plaintiffs' counsel fall within the

Laffey Matrix's "20+ years" category and two within the "11-19 years" category, their hourly rate will be based on the midpoint between these two categories for the June 1-May 31 year in which Plaintiffs' expend the hours. For any other counsel or paralegals performing service on behalf of Plaintiffs, those respective rates would be similarly set according to the Laffey Matrix.

bb. Future hours will be limited to two categories. The first involves fees and costs incurred from April 1, 2005, *until* this Litigation Settlement Agreement becomes effective, as set forth in paragraph 14, below. The second involves fees and costs incurred *after* the Litigation Settlement Agreement becomes effective, as set forth in paragraph 14, below, and would be limited to those hours reasonably expended (a) in preparing and filing the joint status reports for the Court, or (b) in ADR (and preparation therefor) if ADR is invoked while this Litigation Settlement Agreement is effective.

iii. Request for payment will be made no more than quarterly. Within 30 days of receipt, the United States will either agree to stipulate to the amount and the parties will thereafter reach a compromise, or plaintiffs' may request that the court appoint an ADR judge to assist in resolving any fee dispute.

iv. Notwithstanding the foregoing, if this Litigation is reactivated after the United States has paid any litigation costs and Plaintiffs achieve a result entitling Plaintiffs to an award of litigation costs that includes professional time and expenses already paid by the United States pursuant to the Litigation Settlement Agreement, the Court may credit against such award any amount theretofore paid by the United States pursuant to the Settlement Agreement.

v. The State shall have no obligation to pay any party's cost and/or attorney's fees.

10. The Court of Federal Claims shall have supervisory jurisdiction over this matter for purposes of enforcing the terms hereof, subject to the Court's jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491. Plaintiffs reserve and do not waive any other rights, at law or in equity, that they may have to enforce the terms of this Litigation Settlement Agreement.

11. This Litigation Settlement Agreement and the accompanying Covenant Not to Sue account for the entire and sole understanding of the parties hereto with respect to this settlement, notwithstanding any prior oral or written statements, instructions, agreements, representations, or other communications. Neither this Litigation Settlement Agreement nor any terms or provisions connected herewith may or shall be amended, modified or abrogated, except upon written agreement executed by all parties. The parties acknowledge that the complexities of the settlement process described herein (excluding the Covenant Not to Sue between the United States and the State of Alabama) render unlikely that the parties have contemplated every scenario that may develop during the settlement process; therefore, the parties agree to make good faith effort to resolve any such matters by further negotiation and, failing that, to bring any matters addressing the overall intention of the Litigation Settlement Agreement to the Court of Federal Claims. The United States and the State agree that the provisions of this Litigation Settlement Agreement and the Attached Covenant Not to Sue are to be read identically, such that each effects the same result as the other.

12. Whenever possible, each provision of this Litigation Settlement Agreement shall be interpreted in such a manner as to be valid under applicable law. If any provision of this Litigation Settlement Agreement shall be deemed invalid or prohibited by operation of law, such provision is ineffective only to the extent of such prohibition or invalidation, and the remainder of such provision, and the remaining provisions of this Litigation Settlement Agreement, shall remain valid and enforceable and in full force and effect. This Litigation Settlement Agreement shall inure to the benefit of and fully bind the parties hereto.

13. It is expressly understood and agreed that this Litigation Settlement Agreement represents a compromise of disputed claims and this Litigation Settlement Agreement shall not be construed or deemed to be evidence, admission or concession of any fault or liability or damage on the part of any party hereto.

14. This Litigation Settlement Agreement shall be effective as of the date when signed, either in unity or in separate part, by authorized representatives of the United States, the plaintiffs, and the State of Alabama, approved by the Court of Federal Claims, and neither the United States nor the State of Alabama exercises its option to withdraw from the settlement, pursuant to paragraph 1(d) within 60 days of its receipt from Plaintiffs' counsel of a final list of Plaintiffs and properties included in the opt-in class.

Signed this 15th day of July, 2005.

/s/ David Blackburn by
LEWIS S. WIENER by permission
7/15/05

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Signed this 13th day of July, 2005,

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