

Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #199002121 / FID #17804
Bourbon Shell, Bourbon Mini-Mart, Inc.
Bourbon, Marshall County, Indiana
2013 OEA 9, (09-F-J-4322)

OFFICIAL SHORT CITATION NAME: When referring to 2013 OEA 9 cite this case as
Bourbon Shell, 2013 OEA 9.

TOPICS:

petroleum
release
report
settlement
transferee
owner
operator
commingled
incident
Summary Judgment
Excess Liability Trust Fund (ELTF)
underground storage tanks (USTs)
Facility Identification Number (FID)
I.C. §13-23-7-1(a)(2)
I.C. §13-23-7-1(a)(4)
I.C. §13-23-8-2
I.C. §13-23-8-3
I.C. §13-23-8-4(e)

PRESIDING JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Timothy Junk, Esq.
Petitioner: Patricia Polis McCrory, Esq. Carrie G. Doehrmann, Esq.
(Frost Brown Todd LLC)

ORDER ISSUED:

June 4, 2013

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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2. The IDEM denied reimbursement and notified the Petitioners on October 23, 2009.
3. The Petitioners petitioned for review of this denial on November 10, 2009.
4. The IDEM filed its Motion for Summary Judgment on February 9, 2012.
5. After a series of agreed-upon extensions of time, the Petitioners filed their Motion for Summary Judgment, Response in Opposition to the IDEM's Motion for Summary Judgment and Request for Hearing on September 4, 2012.
6. The IDEM filed its Reply Memorandum in Support of Department's Motion for Summary Judgment on September 24, 2012.
7. The Petitioners filed their Supplemental Designation of Evidence in Support of Its Motion for Summary Judgment and Designation of Material Issues of Fact in Opposition to the Indiana Department of Environmental Management's Motion for Summary Judgment and their Reply in Support of Its Motion for Summary Judgment and in Opposition to the Indiana Department of Environmental Management's Motion for Summary Judgment on November 16, 2012.
8. The IDEM filed the Department's Reply to Bourbon's Citations on November 20, 2012.
9. Oral argument was heard on January 15, 2013.
10. The parties filed their Tender of Parties' Stipulations of Facts on March 13, 2013. The Petitioners filed their Proposed Findings of Fact and Conclusions of Law on March 13, 2013.

FINDINGS OF FACT¹

1. In 1932, Shell Oil built a gas station at 203 West Center Street, on the south side of Center Street, [Bourbon, Marshall County, Indiana] ("Bourbon Shell") (Bourbon Mini-Mart's Responses to Shell Oil Co.'s Interrogatories, No. 13).
2. In September, 1968 Shell sold the station to Seth Lewis. (Bourbon Mini-Mart's Responses to Shell Oil Co.'s Interrogatories, no. 13).
3. Lewis Oil, Inc. was later incorporated on May 23, 1974 with Seth Lewis being a Director of Lewis Oil, Inc. (Indiana Secretary of State Certification, Ex. 2 IDEM's Motion for Summary Judgment).

¹ Findings of Fact #1 through #25, #27 through #34, #36 and #37 are stipulations submitted by the IDEM and the Petitioners. As such, the ELJ has incorporated these findings verbatim. Where the ELJ has determined it is necessary in order to avoid confusion, changes made to the stipulations shall be indicated by brackets []. Findings made by the ELJ are **in bold**.

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4. Lewis Oil, Inc. operated the underground storage tanks and Shell Station [FID # 009513] at 203 West Center Street from 1976 to 1989. ((Affidavit of Carl Middaugh (“Middaugh Aff.” ¶¶ 3-4, 6-11, 13, 15, 18); IDEM’s RFA Responses No. 1-3, 5-10, 48-49).
5. Lewis Oil, Inc. was the owner of the USTs at the Shell Station [FID #009513]. (M. Rader Depo., p. 115, ll. 19-p. 116, l. 10 & Exhibit 17, pp. 1-2). Joe Rader as Secretary/Treasurer of Lewis Oil, Inc. expressly certified “under penalty of law” that Lewis Oil was the owner of the tanks at the Shell Station [FID #009513]. (*Id.*)
6. On May 13, 1986, Lewis Oil, Inc., timely submitted its Notification for Underground Storage Tanks for the Bourbon Shell [FID #009513] at 203 West Center Street. IDEM Ex. 3.
7. The Department assigned the unique Facility Identification Number 009513 to the three USTs located on the Bourbon Shell property at 203 West Center Street. (*Id.*)
8. Bourbon Mini-Mart, at all relevant times, was a gasoline station and convenience store located at 211 West Center Street in Bourbon, Indiana (“Mini-Mart Property”) [FID #17804] which was owned by Robert E. Wanemacher. (Bourbon Mini-Mart’s Responses to Shell Oil Co.’s Interrogatories, No. 13).
9. Robert Wanemacher purchased the Mini-Mart Property [FID #17804] in 1975. (Petitioners’ Responses to IDEM’s Requests for Admissions, No. 8).
10. The Bourbon Mini-Mart, Inc. was incorporated in August 1989, and in 1991 the Mini-Mart property [FID #17804] was then transferred to the Bourbon Mini-Mart, Inc. IDEM Ex. 4, RFA 8. Wanemacher has always been the sole shareholder of Bourbon Mini-Mart, Inc. (*Id.* No. 10).
11. On September 21, 1988, Bourbon Mini-Mart submitted a Notification for Underground Storage Tanks to IDEM for the Mini-Mart Property, which indicated that there were four or five USTs located at 211 West Center Street. (IDEM’s Motion for Summary Judgment, Ex. 6). The Department assigned the unique Facility Identification Number 17804 to the Mini-Mart Property located at 211 West Center Street, Bourbon, Indiana. (*Id.*)
12. On July 10, 1991, the Bourbon Mini-Mart submitted another Notification for Underground Storage Tanks. IDEM Ex. 7.
13. The Shell Station located at 203 West Center Street (FID 009513) and the Mini-Mart Property located at 211 West Center Street (FID 17804) were located immediately adjacent to each other. (Petition ¶¶ 2-6; IDEM’s Responses to Petitioners’ Request for Admissions (“IDEM’s RFA Responses No. 5, 48-49)).

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14. In 1989, Robert Wanemacher wanted to purchase the Shell Station Property located at 203 West Center Street so that he could add onto the Bourbon Mini-Mart store. (Deposition of R. Wanemacher taken on October 6, 1993, p.39, l.13-16 (“Wanemacher 10/6/93 Depo.”).
15. On August 24, 1989, Robert Wanemacher and Dave Kinzel formed K & W Investments, Inc. (IDEM’s Responses to Petitioners’ Requests for Admissions, No. 12). Each owned an equal number of shares of the corporation. IDEM Ex. 5, pgs. 38-39.
16. On September 11, 1989, Seth V. Lewis deeded the Shell Station Property located at 203 West Center Street to K & W Investments, Inc. (*Id.* No. 14).
17. In November 1989, K&W Investments, Inc. conveyed 64 feet on the west end of the former Shell Station/Lewis Oil property to Bourbon Mini-Mart. (Deposition of Robert Wanemacher taken on October 10, 2002, p. 29, ll. 17-25; p. 30, l. 1). The portion conveyed included the property where the three USTs were located. (Reynolds Aff ¶ 12).
18. On December 11, 1989, K&W wrote to IDEM to advise that it intended to close the three USTs formerly owned and operated by Lewis Oil, Inc. and listed on the Notification of Underground Storage Tanks by Joseph W. Rader on May 13, 1986, which were now part of the Bourbon Mini-Mart Property [FID #17804]. (IDEM’s Response to Petitioners’ Request for Admissions no. 18, 19). IDEM authorized the removal of the three USTs. (*Id.*).
19. By letter dated December 28, 1989, IDEM authorized the removal of the three USTs. IDEM Ex. 4, RFA 20 & 21; IDEM Ex. 10.
20. Beginning in 1989, IDEM began assessing a tank registration fee to the owners of underground storage tanks. On March 17, 1989, tank registration fees were paid on behalf of UST facility identification number 9513 by Lewis Oil Inc. (“Tank Fee Record”).²
21. Again on February 19, 1990, Lewis Oil Inc. paid tank registration fees on behalf of UST facility identification number 9513. (*Id.*).
22. The pump island at the Shell Station [FID #009513] was located in front of the building, between the building and Center Street. (Deposition of Matt Rader and Rule 30(b)(6) Deposition of Lewis Oil, Inc. (“M. Rader Deposition”), taken May 22, 2012, p. 154, l. 18-p. 156, l. 18 & Exhibit 23). The tanks were on the side of the Lewis Oil building. Product lines extended underground from the pump island back to the USTs. (*Id.*)

² Based upon the agreement of counsel, IDEM has stipulated to the authenticity of the attached Tank Registration Fee Record which was produced by IDEM in response to a public record request by the undersigned. See the accompanying electronic correspondence from T. Junk which accompanied the Record.

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23. There were underground product lines (which carried gasoline) that extended from the gas pumps on the gas pump island in front of the Shell Station back to the USTs which were located on the side of the Shell Station Property. (Reynolds Aff. ¶ 11). The USTs were located on the Shell Station Property [FID #009513]. (*Id.*)
24. Contamination existed on the Shell Station Property [FID #009513]. (Department's Responses to Petitioners' Request for Admissions Sept. 30, 2011 (IDEM RFA Responses No. 40-43; Reynolds Aff. ¶ 14).
25. In February, 1990, K&W removed the three USTs from the former Bourbon Shell property [FID #009513]. IDEM Ex. 8, pg. 27.
26. **On February 22, 1990, Carl Middaugh, the Fire Chief of the Bourbon Volunteer Fire Department reported to the IDEM that two homes in the vicinity of the Shell Station had petroleum vapors in the basements and that the residents were evacuated. The Initial Incident Report noted that contaminated soil had been found at the Bourbon Shell Station [FID #009513].³ This incident was assigned Incident No. 199002121.⁴**
27. Roy E. Harbert, IDEM, attributed contamination of soil and groundwater at 211 West Center Street to a release from the Shell Station Property [FID #009513]. (IDEM RFA Responses No. 35). Releases from both sites resulted in a mixed plume of contamination on both sites. (*Id.*).
28. On February 21, 2006, Roy E. Harbert, IDEM sent electronic correspondence to Robert Reynolds, on behalf of Bourbon Mini-Mart, which indicated "in this case it is pretty hard to tell what percent of contamination is from Bourbon Mini Mart vs. the Shell property or if the Shell property is overshadowed by the Bourbon Mini Mart. It is my intention after talking with the ELF (sic) staff to approve a comprehensive CAP that addresses the entire plume instead of splitting hairs." (IDEM RFA Responses No. 36).
29. On March 29, 1990, IDEM employee, Jill Stevens, was advised by Robert Wanemacher that he wanted to do further investigation to determine whether contamination determined at the time of removal of the Shell Station USTs was from the Shell Station [FID #009513]. (IDEM's RFA Responses No. 22).
30. On April 3, 1990, K&W Investments, Inc. submitted a Notification for Underground Storage Tanks to the Department, reporting that the property at 203 West Center Street contained three USTs [FID #009513]. IDEM Ex. 13.

³ IDEM's Motion for Summary Judgment, filed February 9, 2012, Exhibit 11, Initial Incident Report Log.

⁴ Incident numbers are assigned on the basis of year (1990), month (02), and a sequential number (121).

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31. The adjacent homeowners later filed suit against petitioners alleging nuisance, trespass and negligence.
32. On June 28, 1991, IDEM filed a lawsuit against petitioners captioned *Commissioner, Indiana Department of Environmental Management v. Bourbon Mini-Mart, Inc. and Robert E. Wanemacher*, Marshall Circuit Court, Cause No. 50C01-9106-CP-107 (“IDEM Action”). Petitioners subsequently filed a Third-Party Complaint, which was subsequently amended twice, seeking contribution from a number of surrounding property owners and/or operators who may have contributed to the contamination, of whatever nature and form, including, among others, Lewis Oil, Inc. This action is presently pending in the Marshall Circuit Court, Cause No. 50C01-9106-CP-107a.
33. On February 5, 2002, the Bourbon Mini-Mart submitted a request for an ELTF eligibility determination. IDEM Ex. 16; IDEM Ex. 4, RFA 44 & 45. On April 3, 2002, the Department denied eligibility. IDEM Ex. 4, RFA 46. The Bourbon Mini-Mart timely sought administrative review of the Department’s denial. The administrative review was conducted by the Office of Environmental Adjudication under Cause Number 02-F-J-2875. IDEM Ex. 4, RFA 47 & 48.
34. On June 24, 2004, two separate Settlement Agreements were entered into between (1) IDEM and (2) Robert E. Wanemacher and Bourbon Mini-Mart. (See, Exhibit 6 & Supplemental Designation of Evidence, Exhibit 2, ¶¶ 1-4 and Exhibits A and B) (IDEM’s RFA Responses No. 58).
35. **The June 24, 2004 ELTF Appeal Settlement Agreement (the ELTF Settlement), resolved the issues raised in the Office of Environmental Adjudication’s case (Cause No. 02-F-J-2875). The pertinent portions of the ELTF Settlement provided as follows:**

RECITALS

...

D. In February 1990, two homeowners located near the Property reported to IDEM that they smelled gaseous vapors in their basements, which resulted in IDEM assigning an incident number to this matter (“Incident”) . . .

...

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement, the actions taken pursuant thereto, and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

...

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2. **ELTF Eligibility.** The Parties agree that Mini-Mart shall be eligible for reimbursement of fifty percent (50%) of its eligible expenses under the ELTF in accordance with 328 IAC § 1-3-3(b). With the \$2,000,000 limit on reimbursement of eligible expenses for each incident under the ELTF, Mini-Mart will be limited to a total recovery of no more than \$1,000,000 from the ELTF for expenses and claims relating to and/or arising from the Incident, including any payments made by Mini-Mart for the IDEM Reimbursement Claim to reimburse IDEM's expenses incurred at the Property. Any expenses and claims that Mini-Mart shall submit to the ELTF for reimbursement shall be processed and paid by IDEM, the Indiana Attorney General and the ELTF in accordance with the applicable statutes and rules of IDEM and the ELTF.

...

3. In addition to the June 24, 2004 ELTF Appeal Settlement Agreement, the other June 24, 2004 Settlement Agreement was entered into between (1) IDEM and (2) Robert E. Wanemacher and Bourbon Mini-Mart, Inc., related to the cost recovery litigation pending in the Marshall Circuit Court under Cause No. 50C01-9106-CP-107. ("Cost Recovery Settlement Agreement"). In this second Settlement Agreement the Bourbon Mini-Mart and Wanemacher agreed to pay \$1.5M to the Department and complete the cleanup of Incident Number 9002121.
4. Both June 24, 2004 Settlement Agreements are executed by a representative of the Indiana Department of Environmental Management.

Applicable Law

The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). The OEA may enter summary judgment for a party if it finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual

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issue. All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).

Each party has requested summary judgment in this matter. “The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992). A genuine issue exists if the trial court would be required to resolve disputed facts. *Jones v. City of Logansport*, 436 N.E.2d 1138, 1143 (Ind. App. 1982). Summary judgment is likewise inappropriate if conflicting inferences arise from the facts. *McKenna v. City of Fort Wayne*, 429 N.E.2d 662, 664 (Ind. App. 1981), *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172, 1175 (Ind. App. 1983).

Pursuant to I.C. § 13-23-7-1(a)(2), the Excess Liability Trust Fund was established to provide “a source of money to satisfy liabilities incurred by owners and operators of underground petroleum storage tanks under IC 13-23-13-8 for corrective action.”⁵ Pursuant to I.C. §13-23-8-4(e), in order for the transferee of a property to be eligible to receive reimbursement from the ELTF:

- (e) A transferee of property upon which a tank was located is eligible to receive money from the fund under this section if any of the following conditions are met:
 - (1) The transferor of the property was eligible to receive money under this section with respect to the property.
 - (2) The:
 - (A) transferee acquires ownership or operation of an underground petroleum storage tank as a result of a bona fide, good faith transaction, negotiated at arm's length, between parties under separate ownership;
 - (B) transferor failed to pay fees due under I.C. § 13-23-12-1; and
 - (C) department failed to record a lien against the property under I.C. § 13-23-7-10.
 - (3) The transferee pays all applicable tank fees under I.C. §13-23-12-1, including past due fees and interest for each tank not more than thirty (30) days after receiving notice of the indebtedness.

⁵ The statute also provides that the ELTF was established to satisfy third party liability, but this is not relevant to this particular cause.

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Chapter 8 specifies how the money in the ELTF is to be used. Certain provisions provide for varying deductibles for each “occurrence” (I.C. § 13-23-8-3) and for a maximum amount of reimbursement per “occurrence” (I.C. § 13-23-8-2). “Occurrence” is defined in 328 IAC 1-1-7 as “an incident that results in a release of petroleum, including a continuous or repeated release of petroleum, from an UST system.” Other provisions provide for the approval of corrective action plans for “releases” (I.C. § 13-23-8-4(a)(4)).

CONCLUSIONS OF LAW

1. The OEA has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env’tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-21.5-3-27(d).
4. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).
5. As stated above, a genuine issue exists if the trial court would be required to resolve disputed facts. *Jones v. City of Logansport*, 436 N.E.2d 1138, 1143 (Ind. App. 1982). Summary judgment is likewise inappropriate if conflicting inferences arise from the facts. *McKenna v. City of Fort Wayne*, 429 N.E.2d 662, 664 (Ind. App. 1981), *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172, 1175 (Ind. App. 1983). The ELJ concludes that there are disputed facts at issue. In addition, even if there are no disputed facts, if the ELJ must resolve conflicting inferences from the facts, summary judgment is not appropriate.

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6. It is undisputed that Mr. Wanemacher and Bourbon Mini-Mart entered into settlement agreements with the IDEM restricting their access to ELTF reimbursement. They have reached the limit on reimbursement set out in those agreements. The only way that either Mr. Wanemacher or Bourbon Mini-Mart could be eligible to receive any additional reimbursement would be as a transferee of Lewis Oil, the original owner of the USTs at the Bourbon Shell site, and if the Settlement Agreements do not prohibit further reimbursement.

Robert Wanemacher

7. Mr. Wanemacher is a Petitioner in this matter, ostensibly as a “transferee” from Lewis Oil. However, as established by the stipulated findings of fact, Mr. Wanemacher is not an actual transferee. Mr. Wanemacher was the sole stockholder in Bourbon Mini-Mart, Inc.⁶ and a partial stockholder in K & W Investments.⁷ Lewis Oil transferred its interest in the Bourbon Shell station to K & W Investments⁸; K & W Investments then transferred its interest in that portion of the property on which the USTs were located to Bourbon Mini-Mart.⁹ At no time was Mr. Wanemacher in the chain of title. Therefore, he is not a transferee of Lewis Oil and is not entitled to reimbursement under the provisions of I.C. § 13-23-8-4(e).
8. No evidence has been produced that Mr. Wanemacher has ever held an individual ownership interest in or operated the USTs located on the Bourbon Shell Station. As such, Mr. Wanemacher is not an owner or operator of these USTs and is therefore, not eligible to receive reimbursement.
9. Mr. Wanemacher was, however, a signatory to the two settlement agreements referenced in Findings of Fact #33, 34 and 35. However, the mere fact that he entered into these agreements does not make him a proper party to this matter. Further, neither of the Settlement Agreements gives him a right to ELTF reimbursement.
10. Mr. Wanemacher must be aggrieved or adversely affected in order to file a petition for review. He alleges that he has been aggrieved or adversely affected by the IDEM’s denial of reimbursement. However, it has been determined that he is not eligible to receive reimbursement as he is not an owner, operator or transferee; therefore, he is not aggrieved or adversely affected.
11. There is no genuine issue of material fact as to whether Mr. Wanemacher is eligible to receive reimbursement from the ELTF. He is not. Summary judgment in favor of the IDEM as to Robert Wanemacher is appropriate.

⁶ Finding of Fact #10.

⁷ Finding of Fact #15.

⁸ Finding of Fact #16.

⁹ Findings of Fact #15, 16 and 17.

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Bourbon Mini-Mart

12. Each of the two facilities involved in this matter, were assigned individual facility identification numbers (FID #). Bourbon Shell Station, located at 203 West Center Street, was assigned FID #009513; and the Bourbon Mini-Mart Property, located at 211 West Center Street, was assigned FID #17804.
13. The IDEM assigns incident numbers as each release of petroleum is reported to the IDEM. At all times relevant to this case, there has been only one incident number, that is, No. 199002121.
14. The Court concludes that only the ELTF Settlement is applicable in this matter. The ELTF Settlement addresses the central issue of this case, that is, whether Bourbon Mini-Mart may receive reimbursement for corrective action to address the release from the Bourbon Shell Station (FID #009513). While the Cost Recovery Settlement Agreement addresses the Incident, it does not contain any terms or conditions that have a direct bearing upon Bourbon Mini-Mart's ELTF eligibility.
15. The stipulations of fact¹⁰ establish that Bourbon Mini-Mart is an indirect transferee of Lewis Oil (Lewis Oil to K & W; K & W to Bourbon Mini-Mart). Under I.C. § 13-23-8-4(e), if Lewis Oil was eligible to receive reimbursement, then Bourbon Mini-Mart should also be eligible. However, the IDEM argues that Bourbon Mini-Mart is bound by the terms of the Settlement Agreements entered into in 2004. The terms of the ELTF Settlement limits the amount of reimbursement that Bourbon Mini-Mart may receive from the ELTF. The IDEM argues that Bourbon Mini-Mart has reached that limit and cannot receive any more money from the ELTF.
16. Bourbon Mini-Mart argues that each facility is entitled to reimbursement under I.C. § 13-23-8. However, it is clear from I.C. § 13-23-8 that reimbursement is tied to an "incident" rather than to an individual facility. Those provisions of the statute that set out the deductibles¹¹ and the limits on the amount of reimbursement¹² reference the "occurrence". The definition of "occurrence"¹³ specifically references an "incident" rather than a facility. Those portions of the statute and regulations which set out the requirements for corrective action reference a "release".¹⁴

¹⁰ Findings of Fact #16 and 17.

¹¹ I.C. § 13-23-8-3.

¹² I.C. § 13-23-8-2.

¹³ 328 IAC 1-1-7.

¹⁴ For example, I.C. § 13-23-8-4(a)(4).

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17. The ELTF Settlement refers to the Mini-Mart facility (FID #17804) located at 211 West Center Street, Bourbon, Indiana as the “Property” and references the IDEM’s expenses incurred at the Property. However, the ELTF Settlement does not tie reimbursement to the “Property” but rather to the “Incident”. The critical language is found in Paragraph 2 of the ELTF Settlement, which states, in pertinent part, “... Mini-Mart will be limited to a total recovery of no more than \$1,000,000 from the ELTF for expenses and claims relating to and/or arising from the *Incident*...” (emphasis added).¹⁵
18. Moreover, in this case, the IDEM has consistently treated this occurrence as a single incident during the investigation and the corrective action. It does not appear that Bourbon Mini-Mart has made a conclusive effort to determine which portion of the contamination originated from the Bourbon Shell Station (FID #009513) and which originated from the Bourbon Mini-Mart Property (FID #17804).
19. Furthermore, all of these facts were known by Bourbon Mini-Mart when it signed the ELTF Settlement. Bourbon Mini-Mart Inc. owned the property when (1) the USTs were removed¹⁶; (2) contamination was found; and (3) the initial incident was reported.¹⁷ In particular, at the time the Settlement Agreements were signed, Bourbon Mini-Mart was aware that (1) the contaminant plume was commingled and had been consistently treated as a single incident by the IDEM¹⁸; and (2) Lewis Oil may have been eligible to receive reimbursement¹⁹.
20. By the clear language of the ELTF Settlement, Bourbon Mini-Mart knowingly and willingly agreed to settle its claims to ELTF reimbursement for *Incident Number 199002121*, not for a specific facility. As a result, in accordance with the terms of the ELTF Settlement, Bourbon Mini-Mart cannot receive any further reimbursement.
21. Bourbon Mini-Mart expends considerable time in trying to establish that Lewis Oil was an owner and operator of the Bourbon Shell (FID #009513) USTs, thereby qualifying Lewis Oil as eligible to receive reimbursement from the ELTF. However, Lewis Oil is not a party to this cause. It would be inappropriate for this Court to find that Lewis Oil is eligible to receive ELTF reimbursement without Lewis Oil participating as a party in this cause. This cause is to determine Bourbon Mini-Mart’s right to reimbursement as a transferee of Lewis Oil. It would appear that Lewis Oil is a party needed for just adjudication pursuant to Ind. Trial Rule 19. However, as the Court concludes that Bourbon Mini-Mart is not entitled to any ELTF reimbursement because of the ELTF Settlement, it is not necessary to make a decision about Lewis Oil’s eligibility.

¹⁵ Finding of Fact #35.

¹⁶ Findings of Fact #15 and 25.

¹⁷ Finding of Fact #26.

¹⁸ Findings of Fact #27, 28 and 29.

¹⁹ Finding of Fact #32.

**Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #199002121 / FID #17804
Bourbon Shell, Bourbon Mini-Mart, Inc.
Bourbon, Marshall County, Indiana
2013 OEA 9, (09-F-J-4322)**

22. Bourbon Mini-Mart argues that the IDEM contends that the Settlement Agreements somehow bind other entities, namely Lewis Oil. It is undisputed that Lewis Oil is not a party to the Settlement Agreements. Contrary to Bourbon Mini-Mart's arguments, a decision by this Court regarding whether the Settlement Agreements bar Bourbon Mini-Mart from further reimbursement would have no effect on Lewis Oil's eligibility. This further supports the conclusion that Lewis Oil is not a necessary party to this cause so long as this Order only determines what effect the Settlement Agreements have on Bourbon Mini-Mart's eligibility.
23. As there is no genuine issue as to any material fact, summary judgment is appropriate. As Bourbon Mini-Mart voluntarily entered into an agreement limiting its reimbursement, judgment is entered in the IDEM's favor.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED**. Further, the Petitioners' Motion for Summary Judgment is **DENIED**.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 4th day of June, 2013 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge