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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

UNITED STATES OF  
AMERICA and the STATE  
OF UTAH,

Plaintiffs,

v.

KENNECOTT UTAH  
COPPER CORPORATION,

Defendant.

CIVIL ACTION NO. \_\_\_\_\_

**RD/RA CONSENT DECREE**

Exhibit A

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## I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of Utah (“State”), by and through the Utah Department of Environmental Quality (“UDEQ”), filed a joint complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9606 and 9607. The United States in the joint complaint seeks: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at that portion of the Kennecott South Zone Site known as groundwater Operable Unit 2 (“OU2”), in Salt Lake County, Utah, together with accrued interest; and (2) performance of response actions addressing the Zone A Portion of OU2 consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) (“NCP”). The State in the joint complaint seeks a declaration of KUCC’s liability for costs that UDEQ may incur in the future in overseeing response actions at the OU2 Site pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, and for the performance of response actions pursuant to the Utah Hazardous Substances Mitigation Act, UCA Section 19-6-301 et seq., or UCA Section 19-6-115 of the Utah Solid and Hazardous Waste Act. The Complaint also seeks reimbursement of past costs incurred by EPA and the Department of Justice for certain other operable units at the Kennecott South Zone Site and the Kennecott North Zone Site.

B. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Department of Interior (“DOI”) of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury

to the natural resources under Federal trusteeship and provided DOI with an opportunity to participate in the negotiation of this Consent Decree.

C. The named defendant, Kennecott Utah Copper Corporation (“KUCC” or “Settling Defendant”) is actively mining, milling, and smelting ore in the Oquirrh Mountains south of the Great Salt Lake. KUCC’s operation principally includes: (i) a large open pit copper mine (the “Bingham mine”) and associated waste rock dumps; (ii) a concentrator which processes ore from the Bingham pit; (iii) a smelter where copper anodes are produced from copper concentrate; (iv) a refinery that produces copper cathodes and precious metals including gold and silver; (v) a large tailings impoundment near the Great Salt Lake (the “North Tailings Facility”) where tailings from the concentrator are slurried; (vi) conveyance systems connecting all the preceding facilities; and (vii) miscellaneous and ancillary facilities (historic, environmental response, or operation-related). The State regulates various aspects of KUCC’s active mining operation pursuant to various UPDES, groundwater protection, and other permits.

D. By entering into this Consent Decree neither KUCC, nor any of its affiliates, successors or assigns, and their directors, officers, or employees, admit any liability to the Plaintiffs or any other person or entity arising out of the transactions or occurrences alleged in the joint complaint, nor any of the factual allegations set forth in the joint complaint, and do not acknowledge that the release or threatened release of hazardous substances at or from the OU2 Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

E. In 1986 the State filed a lawsuit against KUCC in the United States District Court for the District of Utah (Civil Action No. 86-C-0902G) seeking natural resource damages for injuries to the groundwater impaired by releases of hazardous substances from KUCC's past mining operations at or near the Bingham mine and the past diversion of the flow of Bingham Creek. The Salt Lake County Water Conservancy District intervened. That action was resolved by a consent decree among the State and its Trustee for the State's natural resources, the Salt Lake County Water Conservancy District, and KUCC. The consent decree was approved and entered by the Court on August 21, 1995 (the "NRD CD"). The NRD CD required, among other things, that KUCC establish a trust fund, to be administered by the Trustee, funded by a \$9 million cash contribution and by an initial \$28 million irrevocable letter of credit ("ILC") that escalated annually. The NRD CD provided that KUCC could receive a reduction in the amount of the ILC by providing treated groundwater to a municipal and industrial water purveyor in a manner that met specific requirements of the credit provisions. Pursuant to the NRD CD KUCC was also required to complete source control measures, described as the eastside collection system.

F. KUCC and the Jordan Valley Water Conservancy District ("JVWCD" or the "District"), the successor to the Salt Lake County Water Conservancy District, and the State, through the NRD Trustee, entered into an agreement dated August 31, 2004 (the "3-Party Agreement"), regarding a project for the development and construction of a groundwater extraction and treatment system (the "NRD Project"). Pursuant to the 3-Party Agreement KUCC

is required to build, own, and operate a reverse osmosis (“RO”) water treatment plant to treat sulfate contaminated water from Zone A. A similar RO water treatment plant to treat water from Zone B will be funded by KUCC and built, owned, and operated by the JWCD. Under the NRD Project it is expected that the Zone A and Zone B RO water treatment plants will deliver drinking water to a purveyor of municipal and industrial water to the public in the affected area for a period of approximately 40 years.

G. In 1994 EPA proposed listing two geographic areas on the NPL (referred to as the Kennecott “South Zone” and “North Zone” Sites). The “South Zone” Site, as proposed for listing by EPA, includes the Bingham mine, concentrator, numerous historic facilities, and impacted groundwater. The “North Zone” Site, as proposed for listing by EPA, includes the area closest to the Great Salt Lake, including the smelter, refinery, past process areas, the Magna tailings facilities, and isolated areas of impacted groundwater. There are a total of 24 operable units at the combined South Zone and North Zone sites, some of which are not associated with KUCC or its operations. This Consent Decree solely addresses impacted groundwater within the OU2 Site.

H. The proposed listing on the NPL was deferred by agreement of the parties as expressed in a September 27, 1995 Memorandum of Understanding (“MOU”). EPA, KUCC, and UDEQ subsequently worked cooperatively and closely together for the streamlined environmental investigation and cleanup of the South Zone and North Zone Sites. Pursuant to its commitment in the MOU, in 1995 KUCC commenced a Remedial Investigation and Feasibility

Study (“RI/FS”) for OU2 pursuant to 40 C.F.R. § 300.430. KUCC completed a RI/FS Report on March 16, 1998.

I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the Proposed Plan for Remedial Action on July 31, 2000, in the Salt Lake Tribune and Deseret News, the local newspapers of general circulation. EPA provided an opportunity for written and oral comments from the public on the Proposed Plan for Remedial Action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, based the selection of the response action.

J. EPA issued a record of decision (“ROD”) for OU2, with which the State concurred, on December 13, 2000. The ROD selected a health-based remedial action level of 1500 ppm for sulfate in the groundwater. The ROD also differentiated two plumes of groundwater contamination, referred to as the “Zone A” and “Zone B” plumes, within OU2. The two plumes are depicted on Figure 2 of the ROD. The ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA. EPA subsequently modified the remedy, with the concurrence of the State, by two Explanations of Significant Differences (“ESD”), one dated June 23, 2003, and the second dated June 2007. The ROD, as modified by the ESDs, will be referred to collectively as the “OU2 ROD.”

K. The Zone B plume comprises that portion of the shallow aquifer which was impacted by the past diversion of the intermittent flow of Bingham Creek, downstream of Bingham Canyon, and the past mining operations of KUCC and others. The Zone B plume contains waters with sulfate levels greater than the State's secondary drinking water standard of 250 ppm but less than EPA's remedial action level of 1,500 ppm, and has a neutral pH. Pursuant to the NRD CD and the 3-Party Agreement, the Zone B plume is to be pumped and the extracted water treated to meet drinking water quality standards and delivered to a purveyor for municipal use. Because of the NRD CD and work thereunder, the OU2 ROD did not select a remedy for the Zone B plume.

L. The Zone A plume consists of that portion of the shallow aquifer contaminated by acid leachates from past leaching of the waste rock dumps and other contaminants from the Bingham Canyon mining district. Residual contamination from those past activities is now intercepted by the eastside collection system. The Zone A plume has concentrations of sulfate that exceed 1,500 ppm. The Zone A plume includes an acidic "core area" which is currently approximately two square miles in size and which has the highest concentrations of sulfate and some metals of concern. The OU2 ROD selected a long-term remedy for the Zone A plume, providing for a transition from mining to a post-mining closure scenario. The OU2 ROD also coordinated CERCLA remedial actions with activities to be performed pursuant to the NRD CD or State permits and programs already in place.

M. The OU2 ROD provides for the following elements of the remedy for the OU2 Site:

(a) monitoring source control measures, known as the eastside collection system, which KUCC constructed and operates pursuant to Permit No. UGW350010 (Kennecott Bingham Canyon Mine and Water Collection System) issued and administered by UDEQ's Ground Water Protection Program;

(b) preventing human exposure by limiting access to contaminated groundwater through institutional controls administered by the Utah State Engineer (Division of Water Rights) ("State Engineer") and point-of-use management;

(c) containing the acid plume by barrier wells at the leading edge of the plume and putting the extracted water to one or more beneficial uses such as feed water for the NRD Project or make-up water for KUCC's industrial processes;

(d) reducing the areal extent of the acid plume by extraction wells within the core area;

(e) during the period of time prior to mine closure, routing water extracted from the core area of the acid plume to the existing pipeline which KUCC uses to slurry tailings, having excess acid neutralizing capacity, to the North Tailings Facility, provided that the residuals combination meets applicable requirements prior to being discharged;

(f) developing a Closure Transition Plan to manage, as applicable, treatment concentrates and extracted acid plume waters when the mine, mill and associated slurry pipeline, or other mining infrastructure or facilities, will no longer be operated; and

(g) long-term monitoring of the plume and the effectiveness of active treatment and natural attenuation until the remedial action objectives are met.

N. The status of implementation of response activities selected in the OU2 ROD as of the date of the lodging of this Consent Decree is as follows.

(a) In June, 2002, the State Engineer implemented certain institutional controls under state groundwater management plans.

(b) KUCC submitted a Final Remedial Design for Remedial Action Report in May of 2003, which EPA approved, in consultation with UDEQ, on July 22, 2003.

(c) KUCC has certified completion of construction of the following components of the OU2 ROD and Final Design for Remedial Action, for which EPA, in consultation with UDEQ, issued a certificate of completion to KUCC: (i) installation of barrier wells at the leading edge of the Zone A plume; (ii) installation of extraction wells within the core area of the Zone A plume; and (iii) installation of the piping and related infrastructure connecting the various components of the selected remedy.

(d) KUCC has commenced operation and maintenance activities.

(e) The remaining operation, maintenance, and replacement (“OM&R”) activities include the continued operation and maintenance, and as necessary replacement, of components of the Remedial Action to contain and eliminate the Zone A plume as described in the OM& R Plan attached as Appendix C until final cleanup standards are met.

O. Kennecott Land Company, a Delaware Corporation, and its affiliated companies, including OM Enterprises Company, a Utah corporation (“OM Enterprises”) founded a master planned community of South Jordan, Utah known as Daybreak. On or about November 30, 2001, by a deed recorded in the Official Records of Salt Lake County, Utah on December 4, 2001 as Instrument No. 8080014, Book 8536, Page 0682, KUCC conveyed to OM Enterprises certain lands in the South Jordan area situated in Township 3 South, and Ranges 1 and 2 west, Salt Lake Base & Meridian. By an Amended and Restated Deed dated August 9, 2002 and recorded in the Official Records of Salt Lake County, Utah on August 23 2002, as Instrument No. 8330941, Book 8636, Page 9160, KUCC and OM Enterprises established, among other things, easements for placement of, and access to, monitoring wells, extraction wells, and pipelines for implementation of the Final Remedial Design for Remedial Action Report, and also a prohibition of drilling furthering the institutional controls component of OU2 ROD.

P. The Parties expect that much of the surface area above the Zone A plume will be converted to residential and other non-mining/industrial uses over time. Section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), provides bona fide prospective purchasers whose potential

liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

Q. Based on the information presently available to EPA and UDEQ, they believe that the Work will be properly and promptly conducted by KUCC if conducted in accordance with the requirements of this Consent Decree and its appendices. Because of the past cooperative working relationship between EPA, UDEQ, and KUCC related to the environmental investigation and cleanup activities at the South Zone and North Zone sites, EPA and UDEQ intend to seek to coordinate and streamline oversight activities by, among other things, defining specific areas of oversight and other responsibility pursuant to a Site Specific Enforcement Agreement, and annually meeting with KUCC to review its work during the prior and upcoming year and an appropriate level and estimated cost of overseeing such activities.

R. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the OU2 ROD and the work to be performed by the Settling Defendant under this Consent Decree shall constitute a response action taken or ordered by the President.

S. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the OU2 Site and will avoid prolonged and

complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

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

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over KUCC. Solely for the purposes of this Consent Decree and the underlying complaints, KUCC waives all objections and defenses it may have to jurisdiction of the Court or to venue in this District. KUCC shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

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

3. KUCC shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing KUCC with respect to the OU2 Site or the Work and shall condition all contracts

entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. KUCC or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. KUCC shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with KUCC within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“2006 Dollars” shall mean an amount that is escalated to a later year by means of the Consumer Price Index – All Urban Consumers (CPI-U), U.S. City Average, all items, base period 1982-84 = 100, as published by the U.S. Department of Labor, Bureau of Labor Statistics. Values that are expressed in this Consent Decree as “2006 Dollars” will be escalated on an annual basis for the period February 1 through January 31. The reference period shall be the

2006 annual CPI-U, and an annual adjustment shall be calculated by multiplying the amount to be escalated by the quotient of the most recent annual CPI-U divided by the 2006 annual CPI-U. For example, for the period February 1, 2008 to January 31, 2009, an amount stated in this Consent Decree would be multiplied by the quotient of the 2007 annual CPI-U divided by the 2006 annual CPI-U. In the event the CPI-U ceases to be published or is materially altered, the Parties shall mutually agree upon an alternative index comparable to the CPI-U.

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

“Cleanup Levels” shall mean the applicable measures of contamination of the Zone A plume as set forth at pages 87 -89 of the December 13, 2000 ROD for purposes of determining when, as applicable: (i) KUCC shall no longer be required to actively pump and treat the Zone A plume but thereafter monitor the natural attenuation of the Zone A plume; and (ii) when work is deemed complete and KUCC shall no longer be required to monitor the natural attenuation of the Zone A plume.

“Closure Transition Plan” shall mean that plan, approved by EPA, in consultation with UDEQ, and following as necessary an amendment to the OU2 ROD pursuant to CERCLA and the NCP, for the replacement of any components of the Remedial Action, or other changes to the Remedial Action, necessary in anticipation of the transition from active mining to mine closure by KUCC and as described in the OU2 ROD and OM&R Plan.

