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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
ALBUQUERQUE DIVISION**

UNITED STATES OF AMERICA,)
)
and NEW MEXICO OFFICE OF THE)
NATURAL RESOURCES TRUSTEE,)
)
Plaintiffs,)
)
v.)
)
BAYARD MINING CORP.,)
MINING REMEDIAL RECOVERY)
COMPANY, and)
VIACOM INTERNATIONAL, INC.)
(as a result of a merger with)
Paramount Communications)
Inc.),)
)
Defendants.)
)

CONSENT DECREE

I. BACKGROUND

A. (1) The United States of America ("United States") on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), the United States Department of Interior ("DOI"), and the United States Department of Agriculture, Forest Service ("USFS"), and (2) the New Mexico Office of the Natural Resources Trustee ("ONRT"), jointly filed a 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.

B. The United States in the complaint seeks, inter alia:
(1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Cleveland Mill Superfund Site near the town of Silver City, in Grant County, New Mexico,

together with accrued interest; (2) performance of studies and response work by the Defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP"); and (3) damages for injury to, destruction of, or loss of natural resources, including the costs of assessing damages for those injuries. The New Mexico ONRT in the complaint seeks restitution for injury to natural resources, including the costs of assessing damages for those injuries.

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New Mexico (the "State") on November 24, 1993 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the U.S. Department of the Interior on November 24, 1993 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 encouraged the trustee to participate in the negotiation of this Consent Decree.

E. The Defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiffs arising out of the transactions or occurrences alleged in the complaint.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on March 31, 1989 (54 Fed. Reg. 13296);

G. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, the State, acting through its agency the New Mexico Environment Department ("NMED") commenced in August 1991, under a Cooperative Agreement with the EPA, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430;

H. NMED completed a Remedial Investigation ("RI") Report in March 1993, and NMED completed a Feasibility Study ("FS") Report in March 1993;

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 April 7, 1993, in a major local newspaper 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 Regional Administrator based the selection of the response action.

J. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on September 22, 1993, on which the State has had a reasonable opportunity to review and comment. The ROD

includes EPA's explanation for any significant differences between the final plan and the proposed plan as well as a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

K. Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly conducted by the Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

L. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the ROD and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

M. 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 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 the Settling Defendants. Solely for the

purposes of this Consent Decree and the underlying complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants 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, upon ONRT and any of its successor agencies, and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendants 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 any Settling Defendant with respect to the 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. Settling Defendants or their 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. Settling Defendants 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 the Settling Defendants 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:

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

"Consent Decree" or "Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXXI (Appendices)). In the event of conflict between this Decree and any appendix, this Decree shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

"DOI" shall mean the United States Department of the Interior and any successor departments or agencies of the United States.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"USFS" shall mean the United States Department of Agriculture, Forest Service and any successor departments or agencies of the United States.

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, VIII, X (including, but not limited to, attorneys fees and the amount of just compensation), XVI, and Paragraph 89 of Section XXIII. Future Response Costs shall also include all costs, including direct and indirect costs, paid by the United States in connection with the Site between March 31, 1993 and the effective date of this Consent Decree and all interest on the Past Response Costs from December 3, 1993 to the date of payment of the Past Response Costs.

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan

promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including, but not limited to, any amendments thereto.

"NMED" shall mean the New Mexico Environment Department and any successor departments or agencies of the State.

"ONRT" shall mean the New Mexico Office of the Natural Resources Trustee and any successor departments or agencies of the State.

"Operation and Maintenance" or "O & M" shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (SOW).

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" shall mean the United States, ONRT, and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs and interest, that the United States incurred and paid with regard to the Site prior to March 31, 1993.

"Performance Standards" shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations set forth in the ROD or Section I of the SOW.

"Plaintiffs" shall mean the United States and ONRT.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on September 22, 1993 by the Regional Administrator, EPA Region 6, and all attachments thereto.

"Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants to implement the final plans and specifications submitted by the Settling Defendants pursuant to the Remedial Design Work Plan and approved by EPA.

"Remedial Action Work Plan" shall mean the document submitted by the Settling Defendants pursuant to Paragraph 12.a of this Consent Decree and described more fully in Paragraph 12.b.

"Remedial Design" shall mean those activities to be undertaken by the Settling Defendants to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

"Remedial Design Work Plan" shall mean the document submitted by the Settling Defendants pursuant to Paragraph 11.a of this Consent Decree and described more fully in Paragraph 11.b.

"Section" shall mean a portion of this Consent Decree identified by a roman numeral.

"Settling Defendants" shall mean those Parties identified in Appendix D (Settling Defendants).

"Site" shall mean the Cleveland Mill Superfund site, encompassing approximately 18 acres, including, but not limited to, approximately 14 acres in the streambed of Little Walnut Creek, located near Silver City, Grant County, New Mexico and depicted generally on the map attached as Appendix C.

"State" shall mean the State of New Mexico.

"Statement of Work" or "SOW" shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance at the Site, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

"Supervising Contractor" shall mean the principal contractor retained by the Settling Defendants to supervise and direct the implementation of the Work under this Consent Decree.

"Trustees" shall mean DOI, USFS, and ONRT.

"United States" shall mean the United States of America.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous waste" under New Mexico Hazardous Waste Management Regulations.

"Work" shall mean all activities Settling Defendants are required to perform under this Consent Decree, except those

required by Section XXVII (Retention of Records).

V. GENERAL PROVISIONS

5. Objectives of the Parties

The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Settling Defendants; to reimburse response costs of the United States; to reimburse natural resource assessment costs; and to provide for the restoration, replacement, or acquisition of the equivalent of natural resources injured, lost, or destroyed as the result of releases or threatened releases of hazardous substances at or from the Site.

6. Commitments by Settling Defendants

a. Settling Defendants shall finance and perform the Work in accordance with this Consent Decree and all plans, standards, specifications, and schedules set forth in or developed and approved by EPA pursuant to this Consent Decree. Settling Defendants shall also reimburse the United States for Past Response Costs and Future Response Costs, reimburse the Trustees for damages for injury to natural resources, and reimburse the State Trustee for past assessment and restoration costs, as provided in this Consent Decree.

b. The obligations of Settling Defendants to finance and perform the Work and to pay amounts owed the United States, and the State under this Consent Decree are joint and several.

In the event of the insolvency or other failure of any one or more Settling Defendants to implement the requirements of this Consent Decree, the remaining Settling Defendants shall complete all such requirements.

7. Compliance With Applicable Law

All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits

a. As provided in Section 121(e) of CERCLA and §300.5 of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site. Where any portion of the Work requires a federal or state permit or approval, Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendants may seek relief under the provisions of Section XX (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required

for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice of Obligations to Successors-in-Title

a. Within 15 days after the entry of this Consent Decree, the Settling Defendants shall record a certified copy of this Consent Decree with the Grant County Clerk's Office, Grant County, State of New Mexico. Thereafter, each deed, title, or other instrument conveying an interest in the property included in the Site shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

b. The obligations of each Settling Defendant with respect to the provision of access under Section X (Access) and the implementation of institutional controls under Section V shall be binding upon any and all such Settling Defendants and any and all persons who subsequently acquire any such interest or portion thereof (hereinafter "Successors-in-Title"). Within 15 days after the entry of this Consent Decree, each Settling Defendant who owns property within the Site shall record, at the Grant County Clerk's Office, a notice of obligation to provide access under Section X (Access) and related covenants. Each subsequent instrument conveying an interest to any such property included in the Site owned by a Settling Defendant shall

reference the recorded location of such notice and covenants applicable to the property.

c. Any Settling Defendant who owns property within the Site and any Successor-in-Title shall, at least 30 days prior to the conveyance of any such interest, give written notice of this Consent Decree to the grantee and written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree was given to the grantee. In the event of any such conveyance, the Settling Defendants' obligations under this Consent Decree, including their obligations to provide or secure access pursuant to Section X, shall continue to be met by the Settling Defendants. In addition, if the United States approves, the grantee may perform some or all of the Work under this Consent Decree. In no event shall the conveyance of an interest in property that includes, or is a portion of, the Site release or otherwise affect the liability of the Settling Defendants to comply with the Consent Decree.

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendants pursuant to Sections VI (Performance of the Work by Settling Defendants), VII (Additional Response Actions), VIII (EPA Periodic Review), and IX (Quality Assurance, Sampling and Data Analysis) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the

selection of which shall be subject to disapproval by EPA. Within 10 days after the lodging of this Consent Decree, Settling Defendants shall notify EPA in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendants propose to change a Supervising Contractor, Settling Defendants shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Settling Defendants in writing. Settling Defendants shall submit to EPA a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendants may select any contractor from that list that is not disapproved and shall notify EPA of the name of the contractor selected within 21 days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendants from

meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendants may seek relief under the provisions of Section XX (Force Majeure) hereof.

11. Remedial Design.

a. Within 30 days after EPA's issuance of an authorization to proceed pursuant to Paragraph 10, Settling Defendants shall submit to EPA, and the State, a work plan for the design of the Remedial Action at the Site ("Remedial Design Work Plan"). The Remedial Design Work Plan shall provide for design of the remedy set forth in the ROD in accordance with the SOW and, upon its approval by EPA, shall be incorporated into and become enforceable under this Consent Decree. Within 30 days after EPA's issuance of an authorization to proceed, the Settling Defendants shall submit to EPA, and the State, a Health and Safety Plan for field design activities which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the SOW, including, but not limited to, plans and schedules for the completion of: (1) design sampling and analysis plan (including, but not limited to, a Remedial Design Quality Assurance Project Plan (RD QAPP) in accordance with Section IX (Quality Assurance, Sampling and Data Analysis)); (2) a preliminary design submittal; (3) a draft Remedial Design submittal;

(4) a pre-final/final design submittal; (5) a Construction Quality Assurance Plan; and (6) a Site Health and Safety Plan. In addition, the Remedial Design Work Plan shall include a schedule for completion of the Remedial Action Work Plan.

c. Upon approval of the Remedial Design Work Plan by EPA, after a reasonable opportunity for review and comment by the State, and submittal of the Health and Safety Plan for all field activities to EPA, and the State, Settling Defendants shall implement the Remedial Design Work Plan. The Settling Defendants shall submit to EPA, and the State, all plans, submittals and other deliverables required under the approved Remedial Design Work Plan in accordance with the approved schedule for review and approval pursuant to Section XII (Submissions Requiring Agency Approval). Unless otherwise directed by EPA, Settling Defendants shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.

d. The preliminary design submittal shall include, at a minimum, the following: (1) draft reprocessing facility request for bid; (2) design criteria; (3) results of treatability studies; (4) results of additional field sampling and pre-design work; (5) project delivery strategy; (6) preliminary plans, drawings and sketches; (7) required specifications in outline form; and (8) preliminary construction schedule.

e. The draft remedial design submittal, if required by EPA or if independently submitted by the Settling Defendants, shall be a continuation and expansion of the preliminary design.

Any value engineering proposals must be identified and evaluated during this review.

f. The pre-final/final design submittal shall include, at a minimum, the following: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality Assurance Plan (CQAP); (4) Remedial Action Sampling and Analysis Plan (directed at measuring progress towards meeting Performance Standards); and (5) Contingency Plan. The CQAP, which shall detail the approach to quality assurance during construction activities at the site, shall specify a quality assurance official ("QA Official"), independent of the Supervising Contractor, to conduct a quality assurance program during the construction phase of the project.

12. Remedial Action.

a. Within 90 days after the approval of the final design submittal, Settling Defendants shall submit to EPA, and the State, a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan"). The Remedial Action Work Plan shall provide for construction of the remedy, in accordance with the SOW, as set forth in the design plans and specifications in the approved final design submittal. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Consent Decree. At the same time as they submit the Remedial Action Work Plan, Settling Defendants shall submit to EPA, and the State, a Health and Safety Plan for field activities required by the

Remedial Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Action Work Plan shall include the following: (1) the schedule for completion of the Remedial Action; (2) method for selection of the contractor; (3) schedule for developing and submitting other required Remedial Action plans; (4) methodology for implementation of the Construction Quality Assurance Plan; (5) a groundwater monitoring plan; (6) methods for satisfying permitting requirements (7) methodology for implementation of the Operation and Maintenance Plan; (8) methodology for implementation of the Contingency Plan; (9) tentative formulation of the Remedial Action team; (10) construction quality control plan (by constructor); and (11) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The Remedial Action Work Plan also shall include a schedule for implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Settling Defendants' Remedial Action Project Team (including, but not limited to, the Supervising Contractor).

c. Upon approval of the Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by the State, Settling Defendants shall implement the activities required under the Remedial Action Work Plan. The Settling Defendants shall submit to EPA, and the State, all plans,

submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XII (Submissions Requiring Agency Approval). Unless otherwise directed by EPA, Settling Defendants shall not commence physical on-site activities at the Site prior to approval of the Remedial Action Work Plan.

13. The Work performed by the Settling Defendants pursuant to this Consent Decree shall include the obligation to achieve the Performance Standards.

14. Settling Defendants acknowledge and agree that nothing in this Consent Decree, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards. Settling Defendants' compliance with the work requirements shall not foreclose the United States from seeking compliance with all terms and conditions of this Consent Decree, including, but not limited to, the applicable Performance Standards.

15. Settling Defendants shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification

requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

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

b. The identity of the receiving facility and state will be determined by the Settling Defendants following the award of the contract for Remedial Action construction. The Settling Defendants shall provide the information required by Paragraph 15.a as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

VII. ADDITIONAL RESPONSE ACTIONS

16. In the event that EPA determines or the Settling Defendants propose that additional response actions are necessary to meet the Performance Standards or to carry out the remedy selected in the ROD, notification of such additional response actions shall be provided to the Project Coordinator for the

other party(ies).

17. Within 30 days of receipt of notice from EPA or Settling Defendants pursuant to Paragraph 16 that additional response actions are necessary (or such longer time as may be specified by EPA), Settling Defendants shall submit for approval by EPA, after reasonable opportunity for review and comment by the State, a work plan for the additional response actions. The plan shall conform to the applicable requirements of Paragraphs 11 and 12. Upon approval of the plan pursuant to Section XII (Submissions Requiring Agency Approval), Settling Defendants shall implement the plan for additional response actions in accordance with the schedule contained therein.

18. Any additional response actions that Settling Defendants propose are necessary to meet the Performance Standards or to carry out the remedy selected in the ROD shall be subject to approval by EPA, after reasonable opportunity for review and comment by the State, and, if authorized by EPA, shall be completed by Settling Defendants in accordance with plans, specifications, and schedules approved or established by EPA pursuant to Section XII (Submissions Requiring Agency Approval).

19. Settling Defendants may invoke the procedures set forth in Section XXI (Dispute Resolution) to dispute EPA's determination that additional response actions are necessary to meet the Performance Standards or to carry out the remedy selected in the ROD. Such a dispute shall be resolved pursuant to Paragraphs 65-68 of this Consent Decree.

VIII. EPA PERIODIC REVIEW

20. Settling Defendants shall conduct any studies and investigations as requested by EPA in order to permit EPA to conduct reviews at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

21. If required by Sections 113(k)(2) or 117 of CERCLA, Settling Defendants and the public will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the public comment period. After the period for submission of written comments is closed, the Regional Administrator, EPA Region 6, or his/her delegate will determine in writing whether further response actions are appropriate.

22. If the Regional Administrator, EPA Region 6, or his/her delegate determines that information received, in whole or in part, during the review conducted pursuant to Section 121(c) of CERCLA, indicates that the Remedial Action is not protective of human health and the environment, the Settling Defendants shall undertake any further response actions EPA has determined are appropriate, unless their liability for such further response actions is barred by the Covenant Not to Sue set forth in Section XXIII. Settling Defendants shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendants) and shall implement the plan approved by EPA. The Settling

Defendants may invoke the procedures set forth in Section XXI (Dispute Resolution) to dispute (1) EPA's determination that the remedial action is not protective of human health and the environment, (2) EPA's selection of the further response actions ordered as arbitrary and capricious or otherwise not in accordance with law, or (3) EPA's determination that the Settling Defendant's liability for the further response actions requested is reserved in Paragraphs 85, 86, 87 or 88 or otherwise not barred by the Covenant Not to Sue set forth in Section XXIII.

IX. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

23. Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with EPA's "Interim Guidelines and Specifications For Preparing Quality Assurance Project Plans," December 1980, (QAMS-005/80); "Data Quality Objective Guidance," (EPA/540/G87/003 and 004); "EPA NEIC Policies and Procedures Manual," May 1978, revised November 1984, (EPA 330/9-78-001-R); and subsequent amendments to such guidelines upon notification by EPA to Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") to EPA, and the State, that is consistent with the SOW, the NCP and

applicable guidance documents, including, but not limited to, the above-referenced guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendants shall ensure that EPA personnel and its authorized representatives, which may include, but may not be limited to, the State, are allowed access at reasonable times to all laboratories utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree. Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program.

24. Upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA, or its authorized

representatives, which may include, but may not be limited to, the State. Settling Defendants shall notify EPA, not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow the Settling Defendants to take split or duplicate samples of any samples it takes as part of the United States' oversight of the Settling Defendants' implementation of the Work.

25. Settling Defendants shall submit to EPA, three copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

26. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

X. ACCESS

27. Commencing upon the date of lodging of this Consent Decree, the Settling Defendants agree to provide the United States and its representatives, including EPA and its contractors and authorized representatives, which may include, but may not be limited to, the State, access at all reasonable times to the Site and any other property to which access is required for the

implementation of this Consent Decree, to the extent access to the property is controlled by Settling Defendants, for the purposes of conducting any activity related to this Consent Decree including, but not limited to:

- a. Monitoring the Work;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing additional response actions at or near the Site;
- f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXVI; and
- g. Assessing Settling Defendants' compliance with this Consent Decree.

28. To the extent that the Site or any other property to which access is required for the implementation of this Consent Decree is owned or controlled by persons other than Settling Defendants, Settling Defendants shall use best efforts to secure from such persons access for Settling Defendants, as well as for the United States, and the State, and their representatives, including, but not limited to, their contractors, as necessary to effectuate this Consent Decree. For purposes of this Paragraph "best efforts" includes the payment of reasonable sums of money

in consideration of access. If any access required to complete the Work is not obtained within 45 days of the date of lodging of this Consent Decree, or within 45 days of the date EPA notifies the Settling Defendants in writing that additional access beyond that previously secured is necessary, Settling Defendants shall promptly notify the United States, and shall include in that notification a summary of the steps Settling Defendants have taken to attempt to obtain access. The United States may, as it deems appropriate, assist Settling Defendants in obtaining access. Settling Defendants shall reimburse the United States, in accordance with the procedures in Section XVII (Reimbursement of Response Costs), for all costs incurred by the United States in obtaining access.

29. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

XI. REPORTING REQUIREMENTS

30. a. Settling Defendants shall submit weekly progress reports to EPA and the State by the second day (Monday) of every week following the day that the construction of the remedy according to the Remedial Action Work Plan begins as determined by EPA, until EPA notifies the Settling Defendants that EPA has made a preliminary determination that Settling Defendants have placed all Site tailings and sediment (as defined in the ROD) with concentrations of any contaminants which exceed Remedial Action

Goals (as defined in the ROD) at the off-site reprocessing facility. During all other times after the lodging of this Consent Decree, and until EPA notifies the Settling Defendants pursuant to Paragraph 48.b of Section XV (Certification of Completion), the progress reports described in this Section of the Consent Decree shall be monthly progress reports, and Settling Defendants shall submit these progress reports to EPA, and the State by the tenth day of every month. During the time periods when monthly progress reports are required, the reporting period shall be the previous month. During the time periods when weekly progress reports are required, the reporting period shall be the previous week.

b. In addition to any other requirement of this Consent Decree, Settling Defendants shall submit to EPA, and the State, three copies of written progress reports according to the schedule described in subparagraph a. of this paragraph. Settling Defendants shall submit progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous reporting period; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendants or their contractors or agents in the previous reporting period; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous reporting period; (d) describe all actions, including, but not limited to, data collection and implementation of work plans,

which are scheduled for the next two reporting periods and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Settling Defendants have proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous reporting period and those to be undertaken in the next two reporting periods. If requested by EPA, Settling Defendants shall also provide briefings for EPA to discuss the progress of the Work.

31. The Settling Defendants shall notify EPA of any change in the schedule described in the weekly or monthly progress reports for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

32. Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendants shall within 24 hours of the on-set of such event orally notify the EPA Project Coordinator or the Alternate EPA Project

Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 6, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

33. Within 20 days of the onset of such an event, Settling Defendants shall furnish to EPA a written report, signed by the Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

34. Settling Defendants shall submit three copies of all plans, reports, and data required by the SOW, the Remedial Design Work Plan, the Remedial Action Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendants shall simultaneously submit a copy of all such plans, reports and data to the State.

35. All reports and other documents submitted by Settling Defendants to EPA (other than the monthly and weekly progress reports referred to above) which purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendants.

XII. SUBMISSIONS REQUIRING AGENCY APPROVAL

36. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall:

- (a) approve, in whole or in part, the submission;
- (b) approve the submission upon specified conditions;
- (c) modify the submission to cure the deficiencies;
- (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or
- (e) any combination of the above.

37. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 36(a), (b), or (c), Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XXI (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 36(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XXII.

38. a. Upon receipt of a notice of disapproval pursuant to Paragraph 36(d), Settling Defendants shall, within 14 days or such other time as specified by EPA in such notice, correct the

deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXII (Stipulated Penalties), shall accrue during the 14-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraph 39.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 36(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties under Section XXII (Stipulated Penalties).

39. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to amend or develop the plan, report or other item. Settling Defendants shall implement any such plan, report, or item as amended or developed by EPA, subject only to their right to invoke the procedures set forth in Section XXI (Dispute Resolution).

40. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Settling

Defendants invoke the dispute resolution procedures set forth in Section XXI (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XXI (Dispute Resolution) and Section XXII (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXII (Stipulated Penalties).

41. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XIII. PROJECT COORDINATORS

42. Within 20 days of lodging this Consent Decree, Settling Defendants and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other parties at least 5 working days before the changes occur, unless impracticable, but in no event later than

the actual day the change is made. The Settling Defendants' Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendants' Project Coordinator shall not be an attorney for any of the Settling Defendants in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

43. The United States may designate other representatives, including, but not limited to, EPA, and State employees, and federal, and State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

44. EPA's Project Coordinator and the Settling Defendants'

Project Coordinator will meet as necessary as determined by EPA.

XIV. ASSURANCE OF ABILITY TO COMPLETE WORK

45. Within 30 days of entry of this Consent Decree, Settling Defendants shall establish and maintain financial security in the amount of \$6,500,000 in one of the following forms:

- (a) A surety bond guaranteeing performance of the Work;
- (b) One or more irrevocable letters of credit equaling the total estimated cost of the Work;
- (c) A trust fund;
- (d) A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of the Settling Defendants; or
- (e) A demonstration that one or more of the Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f).

46. If the Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 45(d) of this Consent Decree, Settling Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendants seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 45(d) or (e), they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of

this Consent Decree. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendants shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 45 of this Consent Decree. Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

XV. CERTIFICATION OF COMPLETION

47. Completion of the Remedial Action

a. Within 90 days after Settling Defendants conclude that the Remedial Action has been fully performed and the Performance Standards have been attained, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA and its authorized representatives, which may include, but may not be limited to, the State. If, after the pre-certification inspection, the Settling Defendants still believe that the Remedial Action has been fully performed and the Performance Standards have been attained, they shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XII (Submissions Requiring Agency Approval) within 30 days of the inspection. In the report, a registered professional engineer and the Settling Defendants' Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of

the requirements of this Consent Decree. The written report shall include as-built drawings, if any, signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of a Settling Defendant or the Settling Defendants' Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendants in writing of the activities that must be undertaken to complete the Remedial Action and achieve the Performance Standards. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XII (Submissions Requiring Agency Approval). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XXI (Dispute

Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been fully performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendants. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXIII (Covenants Not to Sue by Plaintiffs). Certification of Completion of the Remedial Action shall not affect Settling Defendants' obligations under this Consent Decree.

48. Completion of the Work

a. Within 90 days after Settling Defendants conclude that all phases of the Work (including O & M), have been fully performed, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA and its authorized representatives which may include, but may not be limited to, the State. If, after the pre-certification inspection, the Settling Defendants still believe that the Work has been fully performed, Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate

official of a Settling Defendant or the Settling Defendants' Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken to complete the Work. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XII (Submissions Requiring Agency Approval). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XXI (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendants and after a reasonable opportunity for review and comment by the State, that the Work has been fully performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

XVI. EMERGENCY RESPONSE

49. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendants shall, subject to Paragraph 50, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendants shall notify the EPA Emergency Response Unit, Region 6. Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendants fail to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendants shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVII (Reimbursement of Response Costs).

50. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action or to seek an order from the Court to protect human health and the

environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

XVII. REIMBURSEMENT OF COSTS

51. Within 30 days of the effective date of this Consent Decree, Settling Defendants shall pay to the United States \$979,718.89, in reimbursement of Past Response Costs, by Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice lockbox bank, referencing the CERCLA Number 69 and the U.S.A.O. file number _____. Payment shall be made in accordance with instructions provided by the United State to the Settling Defendants upon execution of the Consent Decree. Any EFTs received at the U.S. D.O.J. Lock box bank after 11:00 A.M. (Eastern Time) will be credited on the next business day. Within 60 days from the date that EPA receives notification from the Settling Defendants that Settling Defendants have paid Past Response Costs, as described in this Section of the Consent Decree, the United States will notify the Grant County (New Mexico) Clerk's Office to release the Superfund lien(s) which the EPA may have perfected on any Site property owned by the Settling Defendants prior to that date.

52. Settling Defendants shall reimburse the United States for all Future Response Costs not inconsistent with the National Contingency Plan incurred by the United States. The United States will send Settling Defendants a bill requiring payment

that includes a Superfund Cost Organization and Recovery Enhancement System (SCORES) report, or the future equivalent, which includes direct and indirect costs incurred by EPA, DOJ, and their contractors on an annual basis. Settling Defendants shall make all payments within 30 days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 53. The Settling Defendants shall make all payments required by this Paragraph in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund" and referencing CERCLA Number G9 and DOJ case number 90-11-3-1171. The Settling Defendants shall forward the certified check(s) to EPA-Superfund, Cleveland Mill Superfund Site, Superfund Accounting, P.O. Box 360582 M, Pittsburgh, PA 15251, Attn: Collection Officer for Superfund, and shall send copies of the check(s) to the United States as specified in Section XXVIII (Notices and Submissions) and to EPA.

53. Settling Defendants may contest payment of any Future Response Costs under Paragraph 52 if they determine that the United States has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States pursuant to Section XXVIII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendants shall within

the 30 day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 52. Simultaneously, the Settling Defendants shall establish an interest bearing escrow account in a federally-insured bank duly chartered in the State of New Mexico and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendants shall send to the United States, as provided in Section XXVIII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendants shall initiate the Dispute Resolution procedures in Section XXI (Dispute Resolution). If the United States prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 52. If the Settling Defendants prevail concerning any aspect of the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States in the manner described in Paragraph 52; Settling Defendants shall be disbursed any balance of the escrow

account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XXI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse the United States for its Future Response Costs.

54. In the event that the payments required by Paragraph 51 are not made within 30 days of the effective date of this Consent Decree or the payments required by Paragraph 52 are not made within 30 days of the Settling Defendants' receipt of the bill, Settling Defendants shall pay interest on the unpaid balance at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607. The interest to be paid on Past Response Costs shall begin to accrue on the effective date of the Consent Decree. The interest on Future Response Costs shall begin to accrue on the date of the Settling Defendants' receipt of the bill. Interest shall accrue at the rate specified through the date of the Settling Defendant's payment. Payments of interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Settling Defendants' failure to make timely payments under this Section.

55. Within 30 days of the effective date of this Consent Decree, the Settling Defendants shall pay to the State the amount of \$35,000 in reimbursement of natural resource assessment costs. Payment shall be made by cashier's or certified check payable to "New Mexico Natural Resources Trustee Fund," and shall be

delivered to:

New Mexico Office of the Natural Resources Trustee
P.O. Box 26110
Santa Fe, New Mexico 87502.

The check shall be accompanied by a transmittal letter referencing the Cleveland Mill Site, the Civil Action Number, and NM-ONRT #107. A copy of the check and transmittal letter shall be sent to the United States in accordance with Section XXVIII (Notices and Submissions).

XVIII. INDEMNIFICATION AND INSURANCE

56. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendants shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendants agree to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or

on account of, claims made against the United States based on acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendants nor any such contractor shall be considered an agent of the United States.

57. Settling Defendants waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendants shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

58. No later than 15 days before commencing any on-site work, Settling Defendants shall secure, and shall maintain until

the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 47.b. of Section XV (Certification of Completion) comprehensive general liability insurance and automobile insurance with limits of \$2 million dollars, combined single limit naming as additional insured the United States. In addition, for the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendants shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the effective date of this Consent Decree. If Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XIX. RESTORATION OF NATURAL RESOURCES

59. Within 30 days of the effective date of this Consent Decree, the Settling Defendants shall pay to the Trustees

\$165,000.00, in damages for injury to, destruction of, or loss of natural resources resulting from the release or threatened release of hazardous substances at or from the Site. Payment shall be made in accordance with the attached Order directing the deposit of Natural Resource Damages into the Registry of the Court. Payment shall be made by cashier's or certified check payable to "Cleveland Mill Natural Resource Trustees Account," and shall be delivered to:

John J. Kelly

U.S. Attorney for the District of New Mexico

P.O. Box 607

Albuquerque, New Mexico 87103

The check shall be accompanied by a transmittal letter referencing the Cleveland Mill Site, the Civil Action Number, DJ # 90-11-3-1171, and NM-ONRT #107. A copy of the check and transmittal letter shall be sent to the United States, DOI, USFS and ONRT in accordance with Section XXVIII (Notices and Submissions).

60. In accordance with Section 107(f)(1) of CERCLA, 42 U.S.C. § 9607(f)(1), the Trustees shall use the sums paid pursuant to this Section to restore, replace, or acquire the equivalent of the natural resources injured, lost, or destroyed by the release or threatened release of hazardous substances at or from the Site, including administrative costs, interest, and

the costs of assessing those damages. Such restoration, replacement, or acquisition of equivalent natural resources shall be implemented jointly by the Trustees.

XX. FORCE MAJEURE

61. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants or of any entity controlled by Settling Defendants, including, but not limited to, their contractors and subcontractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

62. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, [other than an obligation under Section XIX (Restoration of Natural Resources),] whether or not caused by a force majeure event, the Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are

unavailable, the Director of the Hazardous Waste Management Division, EPA Region 6, within 48 hours of when Settling Defendants first knew or should have known that the event might cause a delay. Within 5 working days thereafter, Settling Defendants shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure for that event. Settling Defendants shall be deemed to have notice of any circumstance of which their contractors or subcontractors had or should have had notice.

63. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as

is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendants in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

64. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XXI (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 61 and 62, above. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

XXI. DISPUTE RESOLUTION

65. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

66. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

67. a. In the event that EPA and the Settling Defendants cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 10 days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants.

The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under paragraph 68 or 69.

b. Within fourteen (14) days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 68 or 69.

c. If there is disagreement between EPA and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 68 or 69, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendants ultimately appeal to the court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 68 and 69.

68. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or

appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Paragraph. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Hazardous Waste Management Division, EPA Region 6, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 68.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 68.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 68.b. shall be reviewable by this Court, provided that a notice of judicial appeal is filed by the Settling Defendants with the Court and served on all Parties within 10 days of receipt of EPA's decision. The notice of judicial appeal shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to

ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' notice of judicial appeal.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Hazardous Waste Management Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 68.a.

69. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 67, the Director of the Hazardous Waste Management Division, EPA Region 6, will issue a final decision resolving the dispute. The Hazardous Waste Management Division Director's decision shall be binding on the Settling Defendants unless, within 10 days of receipt of the decision, the Settling Defendants file with the Court and serve on the parties a notice of judicial appeal setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file

a response to Settling Defendants' notice of judicial appeal.

b. Notwithstanding Paragraph L of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable provisions of law.

70. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 79. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXII (Stipulated Penalties).

XXII. STIPULATED PENALTIES

71. Settling Defendants shall be liable for stipulated penalties as set forth in Paragraphs 72, 73, and 74 for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XX (Force Majeure). "Compliance" by Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in

accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

72. a. The following stipulated penalties shall be payable per violation per day to the United States for what EPA determines to be any failure to submit timely or adequate Remedial Design Work Plans, Preliminary Remedial Design Submittals, Draft Remedial Design Submittals, Pre-final/Final Remedial Design Submittals, or Remedial Action Work Plans, or for what EPA determines to be any failure to timely or adequately perform any work other than work required pursuant to Section XI:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,500	1 - 10 days
\$2,500	11 - 30 days
\$7,500	31 or more days

73. The following stipulated penalties shall be payable per violation per day to the United States for failure to submit what EPA determines to be timely or adequate reports pursuant to Section XI:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$750	1 - 10 days
\$1,500	11 - 30 days
\$3,000	31 or more days

74. In the event that EPA assumes performance of all of the remaining work pursuant to Paragraph 89 of Section XXIII (Covenants Not to Sue by Plaintiffs), Settling Defendants shall

be liable for a stipulated penalty in the amount of \$250,000.

75. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

76. Following EPA's determination that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendants written notification of the same and describe the noncompliance. EPA may send the Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendants of a violation.

77. All penalties owed to the United States under this Section shall be due and payable within 30 days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XXI (Dispute Resolution). All payments under this Section shall be paid by certified check made payable to "EPA Hazardous Substances Superfund," shall be mailed to EPA-Superfund, Cleveland Mill Superfund Site, Superfund Accounting, P.O. Box 371003 M, Pittsburgh, PA 15251, Attn: Collection Officer for Superfund; and shall reference CERCLA Number G9 and DOJ Case Number 90-11-3-1171. Copies of check(s)

paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVIII (Notices and Submissions).

78. The payment of penalties shall not alter in any way Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

79. Penalties shall continue to accrue as provided in Paragraph 75 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or

to Settling Defendants to the extent that they prevail.

80. a. If Settling Defendants fail to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. Settling Defendants shall pay interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 77 at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607.

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA. No payments made under this Section shall be tax deductible for Federal tax purposes.

81. All penalties owed to the United States under this Section shall be due and payable within 30 days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XXI (Dispute Resolution).

XXIII. COVENANTS NOT TO SUE BY PLAINTIFFS

82. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 85, 86, and 88 of this Section, the United

states covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) (including Section 107(a)(4)(C)) of CERCLA and Section 7003 of RCRA relating to the Site and/or performance of the Work. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA and the Trustees of the payments required by Paragraphs 51 and 55 of Section XVII (Reimbursement of Costs) and, as to liability under Section 107(a)(4)(C), upon receipt by the Trustees of the payment required under Section XIX (Restoration of Natural Resources). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 47.b of Section XV (Certification of Completion). These covenants not to sue are conditioned upon the complete and satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

83. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA relating to the off-site storage, reprocessing and disposal of the Waste Material removed from the Site in accordance with this Consent Decree, including, but not

limited to, the SOW. This covenant relating to the off-site storage, reprocessing and disposal of the Waste Material removed from the Site, as described in this Paragraph, applies only to the Waste Material removed from the Site which is placed at the off-site reprocessing facility pursuant to the terms of this Consent Decree, and the residuals of that Waste Material after treatment. The covenant shall not apply to any other Waste Material, nor will it apply to the Site Waste Material prior to the time that it is placed at the off-site reprocessing facility in accordance with the Consent Decree and the SOW.

84. In consideration of the payments to be made to the Trustees under Section XIX (Restoration of Natural Resources) and under Section XVII (Reimbursement of Costs), the State covenants not to sue or to take administrative action against the Settling Defendants for damages for injury to, destruction of, or loss of natural resources pursuant to Section 107(a)(4)(C) of CERCLA or pursuant to analogous provisions of any state statute analogous to CERCLA which is enacted after the effective date of this Decree relating to the Site. This State covenant not to sue shall take effect upon receipt by the Trustees of the payments required under Section XIX (Restoration of Natural Resources) and under Paragraph 55 of Section XVII (Reimbursement of Costs). This State covenant not to sue extends only to the Settling Defendants and does not extend to any other person.

85. United States' Pre-certification reservations.
Notwithstanding any other provision of this Consent Decree, the

United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, prior to certification of completion of the Remedial Action:

- (i) conditions at the Site, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

86. United States' Post-certification reservations.

Notwithstanding any other provision of this Consent Decree (except as provided in this Consent Decree's covenant relating to the off-site storage, reprocessing and disposal of the Waste Material removed from the Site, as described in Paragraph 83), the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, subsequent to the Certification of Completion of the Remedial Action:

- (i) conditions at the Site, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

87. For purposes of Paragraph 85 the information and the conditions known to EPA shall include only that information and those conditions set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 86, the information and the conditions known to EPA shall include only that information and those conditions set forth in the Record of Decision, the administrative record supporting the Record of Decision, and any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

88. General reservations of rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraphs 82, 83, and 84. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including but not limited to, the following:

(1) claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;

(2) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site. The United States reservation of rights expressly excludes Site Waste Material received by the off-site reprocessing facility in accordance with this Consent Decree, including, but not limited to, the SOW;

(3) criminal liability;

(4) liability for violations of federal or state law which occur during or after implementation of the Remedial Action.

89. In the event EPA determines that Settling Defendants have failed to implement any provisions of the Work in an adequate or timely manner, EPA may perform any and all portions of the Work as EPA determines necessary. Settling Defendants may invoke the procedures set forth in Section XXI (Dispute Resolution) to dispute EPA's determination that the Settling Defendants failed to implement a provision of the Work in an adequate or timely manner as arbitrary and capricious or otherwise not in accordance with law. Such dispute shall be resolved on the administrative record. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVII (Reimbursement of Response Costs).

90. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

91. Notwithstanding any other provision of this Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right to institute proceedings against the Settling Defendants in this action or in a new action seeking recovery of damages for injury to, destruction of, or loss of natural resources if, after completion of the remedial action (1) conditions at the Site, previously unknown to the United States or the State, are discovered, and such conditions result in the release or threatened release of a hazardous substance that contributes to injury to, destruction of, or loss of natural resources; or (2) information, previously unknown to the United States or the State, is received that indicates that there is injury to, destruction of, or loss of natural resources that was previously unknown. For the purposes of this Paragraph, the conditions and the information known to the United States and the State shall include only that information and those conditions set forth in the Record of Decision for the Site and the Administrative Record supporting the Record of Decision.

XXIV. COVENANTS BY SETTLING DEFENDANTS

92. Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to the Site or this Consent Decree,

including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 111, 112, 113 or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site. However, the Settling Defendants reserve, and this Consent Decree is without prejudice to, actions against the United States based on negligent actions taken directly by the United States (not including oversight or approval of the Settling Defendants plans or activities) that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d). The Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the ONRT with respect to damages for injury to, destruction of, or loss of natural resources at the Site.

XXV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

93. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person

not a signatory to this decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

94. With regard to claims for contribution against Settling Defendants for matters addressed in this Consent Decree, the Parties hereto agree that the Settling Defendants are entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

95. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

96. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

97. In any subsequent administrative or judicial proceeding

initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXIII (Covenants Not to Sue by Plaintiff).

XXVI. ACCESS TO INFORMATION

98. Settling Defendants shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

99. a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or

information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

100. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XXVII. RETENTION OF RECORDS

101. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 48.b of Section XV (Certification of Completion of the Work), each Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 48.b of Section XV (Certification of Completion), Settling Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

102. At the conclusion of this document retention period, Settling Defendants shall notify the United States, at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendants shall deliver any such records or documents to EPA. The Settling

Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

103. Each Settling Defendant hereby certifies, individually, that it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA and Section 3007 of RCRA.

XXVIII. NOTICES AND SUBMISSIONS

104. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and the Settling Defendants, respectively.

As to the United States:

John C. Cruden
Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DJ # 90-11-3-1509

and

Allyn M. Davis
Director, Hazardous Waste Management Division (6H)
United States Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

As to EPA:

Kathleen Aisling
EPA Project Coordinator (6H-SA)
United States Environmental Protection Agency
Region 6

1445 Ross Avenue
Dallas, Texas 75202-2733

As to the State:

New Mexico Environment Department
Groundwater Protection and Remediation Bureau
Kerrie Neet
Superfund Program Manager
Harold Runnels Building
1190 St. Francis Drive
Santa Fe, New Mexico 87502
or
PO Box 26110
Santa Fe, New Mexico 87502

As to DOI:

Glenn B. Sekavec
Regional Environmental Office
U.S. Department of the Interior
P.O. Box 649
Albuquerque, New Mexico 87103

As to USFS:

Penny Luehring
Region 3 Regional Office
U.S. Forest Service
517 Gold Avenue S.W.
Albuquerque, New Mexico 87102

As to ONRT:

Steve Cary
Deputy Director
New Mexico Office of the Natural Resources Trustee
P.O. Box 26110
Santa Fe, New Mexico 87502

As to the Settling Defendants:

Michael Baum
President
Mining Remedial Recovery Company
P.O. Box 866
Price, Utah 84501

XXIX. EFFECTIVE DATE

105. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXX. RETENTION OF JURISDICTION

106. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XXI (Dispute Resolution) hereof.

XXXI. APPENDICES

107. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is the ROD.

"Appendix B" is the SOW.

"Appendix C" is the description and map of the Site.

"Appendix D" is the complete list of the Settling Defendants.

XXXII. COMMUNITY RELATIONS

108. Settling Defendants shall propose to EPA their participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

XXXIII. MODIFICATION

109. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendants. All such modifications shall be made in writing.

110. No material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendants, and the Court. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendants.

111. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

112. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

113. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXXV. SIGNATORIES/SERVICE

114. Each undersigned representative of a Settling Defendant to this Consent Decree, the undersigned representative of ONRT, and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

115. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

116. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS _____ DAY OF _____, 19___.

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States, and New Mexico Office of the Natural Resources Trustee v. Bayard Mining Corp., Mining Remedial Recovery Company, and VIACOM International, Inc. (as a result of a merger with Paramount Communications Inc.), relating to the Cleveland Mill Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, DC 20530

Michael McNulty
Michael J. McNulty
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, DC 20530

John Zavitz
Assistant United States Attorney
District of New Mexico
U.S. Department of Justice
P.O. Box 607
Albuquerque, New Mexico 87103


Steven A. Herman
Assistant Administrator
Office of Enforcement and
Compliance Monitoring
U.S. Environmental Protection
Agency
401 M Street SW
Washington, DC 20460

for

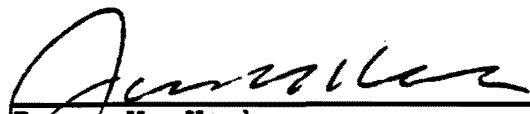
WB Hathaway 1/19/95

Jane N. Saginaw
Regional Administrator, Region 6
U.S. Environmental Protection
Agency
1445 Ross Avenue
Dallas, TX 75202-2733

J E Costello

James E. Costello
Assistant Regional Counsel (6C-WA)
U.S. Environmental Protection
Agency Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733
(214) 665-8045

FOR THE NEW MEXICO NATURAL
RESOURCES TRUSTEE:


James H. Koch
New Mexico Natural Resources
Trustee
P.O. Box 26110
Santa Fe, New Mexico 87502

Tom Udall
Attorney General of New Mexico

By:


Charles de Saillan
Assistant Attorney General for
Natural Resources
Bataan Memorial Building
P.O. Drawer 1508
Santa Fe, New Mexico 87504

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States, and New Mexico Office of Natural Resources Trustee, plaintiffs, v. Bayard Mining Corp., Mining Remedial Recovery Company, and Paramount Communications Inc., defendants, relating to the Cleveland Mill Superfund Site.

FOR BAYARD MINING CORP.

Date: August 29, 1994



Gary L. Barker
President
P.O. Box 887
Price, Utah 84501

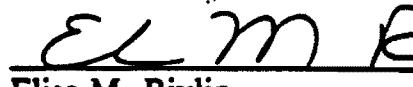
Agent Authorized to Accept Service on Behalf of Above-signed Party:

A. John Davis, Esq.
PRUITT GUSHEE & BACHTELL
1850 Beneficial Life Tower
Salt Lake City, Utah 84111
(801)531-8446

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States and New Mexico Office of Natural Resource Trustee, plaintiffs v. Bayard Mining Corp., Mining Remedial Recovery Company, and Viacom International Inc. (as successor by merger to Paramount Communications Inc.), defendants, relating to the Cleveland Mill Superfund Site.

**For: Viacom International Inc.
(as successor by merger to
Paramount Communications Inc.)**

Date: January 23, 1995


Elisa M. Rivlin
Vice President and
Associate General Counsel
1515 Broadway, 27th Floor
New York, NY 10036

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Name: Elisa M. Rivlin
Title: Vice President & Associate General Counsel
Address: 1515 Broadway, 27th Floor
New York, NY 10036
Telephone: 212-258-6674

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States, and New Mexico Office of Natural Resources Trustee, plaintiffs, v. Bayard Mining Corp., Mining Remedial Recovery Company, and Paramount Communications Inc., defendants, relating to the Cleveland Mill Superfund Site.

FOR Mining Remedial Recovery Company

Date: August 29, 1994



Michael W. Baum
President & CEO
Mining Remedial Recovery Company
P.O. Box 866
Price, Utah 84501
(801) 637-5900

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Robert N. Steinwurtzel
Counsel for Mining Remedial Recovery Company
Andrews & Kurth, L.L.P.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700