

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

**FILED**

JUL 13 1999

  
CLERK

STATE OF SOUTH DAKOTA, by and  
Through Nettie H. Myers, Secretary,  
Department of Environment and Natural  
Resources, designated trustee of State  
natural resources,

Plaintiff,

v.

HOMESTAKE MINING COMPANY  
OF CALIFORNIA

Defendant.

Civil Action No. 97-5078

UNITED STATES OF AMERICA,

and

CHEYENNE RIVER SIOUX TRIBE

Plaintiffs,

v.

HOMESTAKE MINING COMPANY  
OF CALIFORNIA

Defendant.

Civil Action No. 97-5100

**CONSENT DECREE**

**I. Introduction**

1. This Consent Decree ("Decree") is entered into by the State of South Dakota ("the State"), as trustee for natural resources, on behalf of the Department of Environment and Natural Resources ("DENR") and the Department of Game, Fish and Parks ("DGFP") and as a counterclaim defendant; by the United States of America ("the United States"), on behalf of the Department of

the Interior ("DOI") and the Department of Defense ("DOD") as trustees for Natural Resources, and on behalf of the Environmental Protection Agency ("EPA") and as a counterclaim defendant; and by the Cheyenne River Sioux Tribe as trustee for Natural Resources and as a counterclaim defendant (hereinafter collectively "Plaintiffs"), and by the Homestake Mining Company of California ("Homestake"), defendant and counterclaim plaintiff.

2. Subject to the Reservation of Rights in Sections IX and X, and to the Reopeners in Section XII, this Decree is in settlement of all claims and counterclaims brought in the Consolidated Actions.

3. By entering into this Decree, no Party hereto makes any admission of any liability to any other Party arising out of the transactions or occurrences alleged in the complaints or counterclaims that serve as the bases for this Decree.

4. The Parties hereto recognize, and the Court, by approving and entering this Decree finds, that this Decree has been negotiated by the Parties in good faith and under the supervision of the Magistrate for this Court to avoid the costs and risks of prolonged and complicated litigation, and that this Decree is fair, reasonable, consistent with the purposes of the statutes pursuant to which these actions were brought, and in the public interest.

## II. Definitions

5. Unless otherwise expressly provided for herein, the terms used in this Decree shall have the meaning provided for them in CERCLA and the CWA and in regulations promulgated under CERCLA and the CWA. Wherever terms listed below are used in this Decree, the following definitions shall apply:

A) "Consent Decree" or "Decree" shall mean this Decree and all exhibits or appendices attached hereto. In the event of conflict between the terms of this Decree and any appendix or exhibit, this Decree shall control.

B) "Covered Matters" shall mean all claims and counterclaims brought in the Consolidated Actions.

C) "Date of Lodging" or "Lodging" shall be the date on which the Plaintiffs lodge this Consent Decree with the clerk of the District Court, pending a motion for entry by Plaintiffs to be filed, if appropriate, after the thirty day public comment period provided under Section XXII of this Decree.

D) "Date of Entry" or "Entry" shall be the date on which the District Court enters this Consent Decree.

E) "Final Date of Approval" shall mean the later of: (1) the date on which the District Court has entered this Decree as a judgment and all applicable appeal periods have expired without an appeal being filed; or (2) if an appeal is taken, the date on which the District Court's final judgment is affirmed and there is no further right of appeal.

F) "Natural Resource" and "Natural Resources" shall mean those natural resources that belong to, are managed by, are held in trust by, appertain to, or are otherwise controlled by the United States, and/or the Cheyenne River Sioux Tribe, and/or the State of South Dakota. Such resources include, but are not limited to, surface and ground water, drinking water, fisheries resources, sediment resources, habitat, vegetation, biota, wildlife, and State or federally listed threatened or endangered species and migratory birds.

G) "Natural Resource Damages" for purposes of this Decree shall mean any relief or remedy recoverable by Plaintiffs for injury to, destruction of, or loss of any or all Natural Resources or services provided to humans and the environment by these resources, including compensation to the public for the loss of such Natural Resources and services, damage assessment costs, Trustee response costs and litigation costs.

H) "Site" shall be as described in the pleadings in the Consolidated Actions.

I) "NPL Site", or "Whitewood Creek NPL Site", shall mean that area encompassing approximately 2018 acres along 18 miles of the Whitewood Creek flood plain from the Crook City Bridge to the confluence of the Belle Fourche River, as described in the EPA Record of Decision for the Whitewood Creek NPL Site promulgated March 30, 1990.

J) "Trustees" shall mean the United States of America through the Department of the Interior, and through the Department of Defense acting through the U.S. Army Corps of Engineers; the State of South Dakota and the Department of Environment and Natural Resources, working in conjunction with the Department of Game, Fish and Parks; and the Cheyenne River Sioux Tribe.

K) "State of South Dakota" or "State" shall mean the State of South Dakota, its departments, agencies and other subdivisions, including but not limited to the Department of Environment and Natural Resources, and Department of Game, Fish and Parks.

L) "Cheyenne River Sioux Tribe" shall mean the Cheyenne River Sioux Tribe, its departments, agencies and other subdivisions.

M) "United States" shall mean the United States of America, its departments, agencies, and other subdivisions, including but not limited to the Environmental Protection Agency, Department of the Interior and Department of Defense.

N) "Department of the Interior" or "DOI" shall mean the U.S. Department of the Interior and its constituent agencies, bureaus and other subdivisions, including but not limited to the Fish and Wildlife Service, U.S. Geological Survey, Bureau of Land Management (BLM), Bureau of Reclamation, and Bureau of Indian Affairs.

O) "Department of Defense" or "DOD" shall mean the U.S. Department of Defense acting through the Army Corps of Engineers.

P) "Parties" shall mean the United States, Homestake, the Cheyenne River Sioux Tribe, and the State of South Dakota.

Q) "Homestake" shall mean Homestake Mining Company of California.

### III. Background

6. Plaintiffs have alleged in their complaints that during the period from 1876 to 1977 tailings and other mining materials were disposed of in Whitewood Creek from mining activity engaged in by Homestake, and that those tailings have moved and continue to move along Whitewood Creek into its downstream receiving waters, and that hazardous and/or deleterious substances and pollutants have been released and continue to be released from the tailings into the environment throughout the area in and along Whitewood Creek and its downstream receiving waters.

7. Homestake ceased disposal of mine tailings into Whitewood Creek in 1977. In settlement of litigation brought by the United States and the State under the CWA, CIV 78-5094, Homestake implemented wastewater treatment for wastewater flows from the Homestake Mine operations.

8. Commencing in 1981, EPA, the State, and Homestake conducted a remedial investigation under CERCLA along that portion of Whitewood Creek and its floodplain between the Crook City Bridge and the Belle Fourche River. On September 8, 1983, EPA listed an 18-mile segment of Whitewood Creek on the National Priorities List ("NPL") as the "Whitewood Creek NPL Site," defined herein at paragraph 5 (I). In 1987 EPA placed the remaining portions of Whitewood Creek and its downstream waters in the area between Lead, South Dakota, and Lake Oahe on its CERCLIS list as the "Cheyenne River Basin Site" for further investigation.

9. EPA completed its Remedial Investigation and Feasibility Study for the Whitewood Creek NPL Site in 1989. Pursuant to a consent decree between the United States and Homestake (*United States v. Homestake Mining Company of California, Inc.* CIV 90-5101) (hereinafter "1991 Consent



Decree”), Homestake implemented the EPA-selected remedy for identified risks to human health and the environment for the Whitewood Creek NPL Site. In 1996, EPA deleted the Whitewood Creek Site from the NPL.

10. The State filed the instant suit against Homestake on September 25, 1997, alleging claims for Natural Resource Damages with respect to the Site under CERCLA, Section 107, 42 U.S.C. § 9607, and for public nuisance under State statutory provisions. The United States and the Cheyenne River Sioux Tribe filed the instant suit against Homestake on November 26, 1997, under CERCLA Section 107, 42 U.S.C. § 9607, for recovery of Natural Resource Damages and past response costs, and for declaratory judgment for future response costs, with respect to alleged releases and threatened releases of hazardous substances within the Site, excluding relief relating to response actions by EPA within the Whitewood Creek NPL Site, which is governed by the 1991 Consent Decree. The United States also sought Natural Resource Damages under CWA Section 311(f)(4), 33 U.S.C. § 1321(f)(4). Homestake filed answers in both cases denying liability and asserted counterclaims against the United States, the State, and the Cheyenne River Sioux Tribe. The United States, the State and the Cheyenne River Sioux Tribe filed answers to Homestake’s counterclaims denying liability.

11. Plaintiffs allege that the releases of hazardous substances to the environment have occurred and continue to occur throughout the Site. The hazardous substances alleged to have been released include, but are not limited to, arsenic, cadmium, chromium, copper, iron, lead, manganese, mercury, nickel, selenium, silver, zinc, cyanide and compounds of each of the aforementioned substances.

12. Plaintiffs allege that the releases of hazardous substances have resulted in injury to Natural Resources including, but not limited to, ground and surface water resources, including drinking water, soil, sediment, terrestrial vegetation, aquatic invertebrates, birds, fish and mammals

throughout the Site, and to the services provided to humans and to the environment by those resources. The alleged injuries include the diminution in value of federal, Tribal and State lands from the presence of tailings. The State also asserts that the alleged releases of hazardous and/or deleterious substances have resulted in a continuing public nuisance, as defined under state law.

13. The United States and the Cheyenne River Sioux Tribe also assert claims for past and future response costs under CERCLA, for response activities undertaken or to be undertaken with respect to releases of hazardous substances from tailings located within the Site, with the exception of claims on behalf of EPA within the NPL Site, which claims are covered by the 1991 Consent Decree.

NOW, THEREFORE, before the taking of any testimony and any adjudication of the merits of these cases, and without admission of law, fact, liability or responsibility by the Parties, it is ORDERED, ADJUDGED and DECREED as follows:

#### IV. Jurisdiction and Venue

14. For the purpose of Entry and enforcement of this Consent Decree only, the Parties agree that this Court has jurisdiction over the subject matter of these consolidated cases pursuant to 28 U.S.C. §§ 1331, 1345, 1362 and 2201, 33 U.S.C. § 1321(e)(2) and (n) and 42 U.S.C. §§ 9606, 9607 and 9613(b) and personal jurisdiction over Homestake, and that venue is proper in this District.

#### V. Parties Bound

15. This Decree shall be binding on all Parties and their successors and assigns. Any change in ownership or corporate status of Homestake, including but not limited to transfer of assets or real or personal property, insolvency, or dissolution, shall in no way alter Homestake's responsibilities under this Decree.

#### VI. Payments and Transfers

16. In consideration of the covenants and releases for the Covered Matters and other provisions

contained in this Decree, Homestake agrees to make the payments and undertake the actions described in this Decree. The Trustees have determined that the payments and transfers by Homestake as set forth in this Decree are appropriate actions sufficient to protect and restore the Natural Resources alleged to be damaged by releases or threatened releases of hazardous substances resulting from Homestake's activities at the Site as alleged in the Consolidated Actions.

17. Homestake agrees to submit an application to, and make a good faith effort to, amend its South Dakota Water Right No. 43A-1 to provide that for three (3) months of each calendar year, Homestake will not divert water at the Little Spearfish Creek intake (authorized by its South Dakota Water Right No. 137-1) to the extent that such diversion would reduce the instream flow in Little Spearfish Creek below 20 c.f.s. of water, as measured at the Little Spearfish Creek point of diversion authorized by Water Right No. 137-1. Prior to such amendment, Homestake and the State of South Dakota shall agree upon the specific three (3) months to be covered by the amendment. Nothing in this section shall constitute a representation or warranty by Homestake that the flows of natural water in Little Spearfish Creek absent diversion will reach 20 c.f.s. during the three (3) month period. Homestake shall file the application to amend Water Right No. 43A-1 within ten (10) days of the Final Date of Approval of this Decree. Homestake further agrees that within thirty (30) days of the final and complete closure of operations at the Homestake Mine in Lead, South Dakota, including completion of reclamation required by regulatory agencies, Homestake will submit an application to, and make a good faith effort to, transfer to DGFP its then existing rights under Water Right No. 43A-1, amended as described herein, for instream flow in Little Spearfish Creek to the intake for Hydropower Plant No. 1. At the time of such transfer, Homestake will agree to the deletion of the three (3) month limitation and will permanently abandon the diversion point on Little Spearfish Creek authorized by its Water Right No. 137-1. The DGFP shall be responsible for and shall pay all costs of removing the diversion structure and



any appurtenant facilities at the diversion point on Little Spearfish Creek authorized by Water Right No. 137-1. The State of South Dakota shall defend against claims or suits and indemnify and hold Homestake harmless from any liability of any kind or character arising out of the three (3) month period of 20 c.f.s. flow covered by the amendment of South Dakota Water Right No. 43A-1, and arising out of the abandonment and removal of the diversion point on Little Spearfish Creek authorized by Water Right No. 137-1 and the increased flows resulting therefrom, including, but not limited to, flooding and erosion. In the event claims or suits are filed against Homestake, Homestake shall promptly forward such claims or suits to the State for defense. Water Right No. 43-1 will continue to appropriate Spearfish Creek water to the extent the diversion works are capable up to the approximate limit of 120 c.f.s. with a priority date of January 4, 1909 for power generation at Hydropower Plant No. 1. Water Right No. 137-1 will continue to appropriate Spearfish Creek water to the extent the diversion works are capable up to the approximate limit of 75 c.f.s. with a priority date of June 9, 1917 for power generation at Hydropower Plant No. 2. The Tribe reserves the right to object to the transfer of the water to the State.

18. Homestake agrees to pay to the Trustees the sum of \$4 million, in four equal annual installments. All payments made pursuant to this paragraph 18 are to be used by the Trustees in a manner consistent with the requirements of CERCLA and the CWA and related regulations in connection with activities intended to restore, replace, and/or acquire the equivalent of Natural Resources and services that Plaintiffs allege have been lost, injured, or destroyed as a result of Homestake's mining activities. The Trustees will coordinate and consult with each other and with EPA in carrying out activities under this Decree, as appropriate.

19. The Trustees have determined that these payments will be made as follows: One third of each annual installment will be paid to the Cheyenne River Sioux Tribe, in accordance with the payment procedures described at paragraph 27. The remaining two thirds of each annual

installment is to be used jointly by the United States and the State of South Dakota and shall be paid into the South Dakota Game, Fish and Parks Fund, as established by SDCL 41-2-34, in accordance with the payment procedures described at paragraph 29. The first payment of \$1 million is due within sixty (60) days after the Date of Entry of this Decree, with each succeeding annual payment to be due on the appropriate anniversary of the initial payment.

20. Homestake agrees to pay within sixty (60) days of the Date of Entry of this Decree the sum of \$500,000 for reimbursement of Natural Resource Damage assessment costs incurred by the United States with respect to the Site. Payment of the \$500,000 shall be made to the United States in accordance with the payment procedures described at paragraph 26. The State and the Cheyenne River Sioux Tribe agree not to further assert their claims for Natural Resource Damage assessment costs set forth in the Complaints in these Consolidated Actions.

21. Homestake agrees to pay to the Cheyenne River Sioux Tribe within sixty (60) days of the Date of Entry of this Decree the sum of \$500,000 to be used by the Cheyenne River Sioux Tribe for future environmental monitoring or other environmental purposes, in accordance with the procedures in paragraph 27.

22. All payments due within 60 days after entry of this Consent Decree shall be subject to an interest rate of 6% per annum, which interest shall begin to accrue from the Date of Entry until the date of payment to the Trustees or to the escrow established under paragraph 23 below.

23. A) In the event an appeal is taken from the District Court's judgment of entry of this Consent Decree, within 30 days of such appeal Homestake shall establish an escrow account bearing interest at commercially reasonable terms in a bank selected by Plaintiffs, for deposit of all payments required under paragraphs 18, 19, 20 and 21, plus interest accrued under paragraph 22. The escrow account will remain in effect until completion of the appellate process, and the money plus interest in the escrow account shall be transferred pro rata to the Trustees within ten (10) days

of the Final Date of Approval of the Decree, in accordance with paragraphs 19, 20 and 21 above. If the District Court's judgment of entry of this Consent Decree is reversed and if this Consent Decree becomes null and void, the money plus interest in the escrow account shall be returned to Homestake. Homestake will retain responsibility for administrative fees and taxes associated with the escrow account.

B) Regardless of the Final Date of Approval, the times for compliance provided in Paragraph 24(F) shall be adjusted to ensure that Homestake will have six (6) months from its receipt of the Cheyenne River Sioux Tribe's selection of lands and sixty (60) days from the Final Date of Approval to complete its obligations under Paragraph 24(F).

24. A) Homestake agrees it shall transfer by gift deed pursuant to 26 U.S.C. § 7871, four hundred (400) acres of land from its holdings within the area of the Black Hills to the Cheyenne River Sioux Tribe with ultimate selection of these lands to be made at the sole discretion of Homestake. The transfer of lands to the Cheyenne River Sioux Tribe pursuant to this paragraph shall not affect any claims of the Great Sioux Nation to the Black Hills under the 1868 Treaty of Fort Laramie. II Kappler, Indian Affairs (Treaties) page 998 *et. seq.* (15 Stat. 635).

B) Homestake understands that the Cheyenne River Sioux Tribe seeks lands in the Black Hills that are culturally significant to the Cheyenne River Sioux Tribe. The preceding sentence in this sub-paragraph does not impose an affirmative obligation upon Homestake.

C) Homestake has in good faith identified and presented to the Cheyenne River Sioux Tribe a reasonable list of land parcels from which the Cheyenne River Sioux Tribe will make its selection of the four hundred (400) acres.

D) Prior to the Date of Entry of the Decree, Homestake will provide information in its possession or which Homestake can easily obtain for each parcel, regarding, but not limited to, the location of the parcels of land, topographic maps, legal descriptions of the parcels, archaeological

reports, survey reports and notes, environmental studies, and aerial photographs.

E) The Cheyenne River Sioux Tribe and its designees (including but not limited to its spiritual leaders, environmental assessors, archaeologists, and/or anthropologists) shall have reasonable opportunities to visit each of the identified parcels of land and shall within eighteen (18) months of the Date of Entry of the Consent Decree, identify to Homestake which of the parcel(s) of land in sub-paragraph 24(C) the Cheyenne River Sioux Tribe has selected for transfer, not exceeding four hundred (400) acres.

F) Within six (6) months of notification by the Cheyenne River Sioux Tribe of the selected parcel(s) of land, Homestake shall provide to the Cheyenne River Sioux Tribe all documentation required to transfer title to the selected land(s) to the Cheyenne River Sioux Tribe including, but not limited to the deeds, title reports, and where possible, title insurance commitments listing the Cheyenne River Sioux Tribe as the named insured. No consideration shall be stated in the deeds, however, an agreed upon value(s) may be stated in the title insurance commitments.

G) All deeds conveying land by gift deed to the Cheyenne River Sioux Tribe pursuant to this provision shall provide that the lands shall be used in perpetuity by the Cheyenne River Sioux Tribe solely for non-commercial purposes. In the event that any Party to this Consent Decree believes that the Cheyenne River Sioux Tribe is using the land in a manner inconsistent with this Decree, it shall notify the Cheyenne River Sioux Tribe and the United States in writing, and the Cheyenne River Sioux Tribe shall have thirty (30) days to respond in writing. Any dispute between the other Parties to this Consent Decree and the Cheyenne River Sioux Tribe over the Cheyenne River Sioux Tribe's use of the property conveyed pursuant to this provision shall be decided by the District Court pursuant to the terms of this Consent Decree.



H) The non-commercial purposes restriction upon the lands shall be enforceable against the Cheyenne River Sioux Tribe by the United States District Court under the terms of this Consent Decree by any Party hereto. All lands transferred from Homestake to the Cheyenne River Sioux Tribe under this Consent Decree shall be subject to paragraph 28 of this Consent Decree.

I) Nothing in this paragraph limits or expands the rights or responsibilities set out in the Department of Interior regulations governing land acquisitions, 25 C.F.R. Part 151.

25. A) The U.S., on behalf of the Department of Interior, and Homestake, agree to develop a land exchange agreement for the BLM lands alleged to be contaminated by tailings and which have been mutually identified by the Parties. Homestake agrees to pay up to \$300,000.00, for the lands which have been mutually identified by the Parties and transaction costs. The Parties may modify by mutual consent the lands to be exchanged, and the allocation of transaction costs.

B) Nothing in this paragraph shall alter, amend, or otherwise modify provisions applicable to the liability of the United States or Homestake under CERCLA or any other statutory or common law with respect to the lands conveyed pursuant to this paragraph.

#### VII. Payment Procedures

26. Payment to the United States of \$500,000 for reimbursement of Natural Resource Damage assessment costs shall be completed by electronic commerce referencing Civil Action #97-5100, the remitters name "Homestake Mining Company," the Site name "Whitewood Creek and Downstream Waters," and the location "South Dakota." Payment shall be made in accordance with instructions attached as Exhibit A to this Consent Decree. Any payment received by the Department of Interior after 5:00 PM (Eastern Time) will be credited on the next business day. Homestake shall send immediate notice of such payment by letter via facsimile to the DOI in accordance with instructions in Exhibit A.



27. Payments to the Cheyenne River Sioux Tribe shall be made by certified check, payable to the Treasurer of the Cheyenne River Sioux Tribe, PO Box 590, Eagle Butte, SD 57625. Homestake may elect to make payments to the Cheyenne River Sioux Tribe pursuant to 26 U.S.C. § 7871 (Indian Tax Status Act).

28. Lands transferred from Homestake to the Cheyenne River Sioux Tribe hereunder shall be made pursuant to 25 U.S.C. § 7871 as follows: Homestake will gift deed the designated lands to the Cheyenne River Sioux Tribe. The Cheyenne River Sioux Tribe may apply to the Secretary of the Interior to have the lands taken into trust subject to the Department of Interior regulations governing land acquisitions, 25 C.F.R. Part 151. The State in its own right, and any of its subdivisions, reserves the right to object to the transfer of lands into trust status.

29. That portion of payments made pursuant to paragraph 18, to be used jointly by the federal trustees and the State, shall be made by certified check, payable to the South Dakota Game, Fish and Park Fund, designated as "HMC Natural Resources Restoration Fund" and sent to Secretary, Game, Fish and Parks, Foss Building, 523 E. Capitol, Pierre, SD 57501. A copy of each transmittal letter and certified check shall be sent at the same time to the Department of the Interior Authorized Official at the following address: Regional Director, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver, Colorado 80225.

#### VIII. Dismissals, Releases and Covenants Not To Sue

30. The claims asserted in CIV 97-5100 by the United States for response costs on behalf of EPA, including claims for declaratory relief, are dismissed without prejudice pursuant to Fed.R.Civ.P. 41(a)(1). Subject to Plaintiffs' Reservation of Rights in Section IX, paragraph 34, all other claims alleged by Plaintiffs in the Consolidated Actions shall be dismissed with prejudice within thirty days of the Date of Entry of this Decree, pursuant to Fed.R.Civ.P. 41(a)(1).

31. Subject to Homestake's Reservation of Rights in Section X, paragraph 35, all counterclaims alleged in the Consolidated Actions shall be dismissed with prejudice within thirty days of the Date of Entry of this Decree, pursuant to Fed.R.Civ.P. 41(a)(1).

32. Except as provided in Plaintiffs' Reservation of Rights, Section IX, paragraph 34, and the Reopeners, Section XII, paragraphs 37-39, Plaintiffs release and covenant not to sue or take any other civil or administrative actions against Homestake for all Covered Matters.

33. Except as provided in Homestake's Reservation of Rights, Section X, Homestake releases and covenants not to sue or to take any other civil or administrative action against Plaintiffs for all Covered Matters.

#### IX. Plaintiffs' Reservation of Rights

34. Nothing in this Decree shall in any way limit or restrict the authority of Plaintiffs to initiate appropriate action against Homestake, either judicial or administrative, separately or together, with respect to:

A) claims based on any matters related to the Site other than those that are defined as Covered Matters;

B) claims based upon a failure of Homestake to fulfill its obligations under this Decree;

C) claims based on liability for past, present or future disposal, release(s) or threat(s) of release(s) of hazardous substance(s) unrelated to the Site;

D) claims based on criminal liability;

E) claims of the United States, on behalf of EPA, regarding obligations under the 1991 Consent Decree;

F) claims by the United States, on behalf of EPA, as alleged in the Consolidated Actions that are not resolved by the 1991 Consent Decree or otherwise;

G) claims arising from releases of hazardous substances at the Site other than the continuing releases alleged by Plaintiffs in the Consolidated Actions, that occur after the Date of Lodging of the Decree.

H) claims by the Cheyenne River Sioux Tribe, on behalf of its tribal members and/or those eligible for membership, not based on CERCLA or the CWA, for alleged injury to human health;

I) claims by the United States, on behalf of DOI, relating to the Bureau of Reclamation siphon structure crossing Whitewood Creek, other than (i) claims for Natural Resource Damages under CERCLA or the CWA, or (ii) claims under CERCLA for response costs that are not asserted pursuant to paragraph 34 (J).

J) claims in contribution, by counterclaim or otherwise, against any Party for any response costs incurred or response actions ordered by EPA or a third party in connection with the Site.

#### X. Homestake's Reservation of Rights

35. A) In the event that Plaintiffs, or any of them, initiate any action against Homestake included within the provisions of Sections IX, Plaintiffs' Reservations of Rights or XII, Reopeners, Homestake retains the right to assert in connection with such action all claims (however asserted) and defenses against any of the Plaintiffs, provided that Homestake may not reassert counterclaims asserted in the Consolidated Actions except as provided below.

B) Homestake may only assert its counterclaims dismissed herein (however asserted) in an action concerning the Site, brought by one or more Plaintiffs and/or by one or more third parties involving one or more of the following:

- (i) claims based on any matters related to the Site other than those that are defined as Covered Matters;
- (ii) claims based upon a failure of a Plaintiff to fulfill its obligations under this Decree;

- (iii) claims of the United States, on behalf of EPA, regarding the obligations of Homestake under the 1991 Decree;
  - (iv) claims of the United States, on behalf of EPA, relating to the Site that are not resolved by the 1991 Consent Decree or otherwise;
  - (v) claims relating to the Bureau of Reclamation siphon structure crossing Whitewood Creek asserted pursuant to paragraph 34 (I);
  - (vi) claims in contribution, by counterclaim or otherwise, brought against Homestake based on response actions ordered by EPA or a third party in connection with the Site;
  - (vii) any claim asserted by a Plaintiff pursuant to Section XII.
- C) Homestake specifically reserves, notwithstanding any other provision of the Decree, its right to assert all non-CERCLA and non-CWA claims (however asserted) and any defenses in any action brought under the provisions of Sections IX, X or XII herein.

#### XI. Effect of Settlement

36. In no event shall any Party assert any defense based on any contention that claims (however asserted) or defenses raised in a subsequent proceeding authorized under Sections IX, X, or XII, were or should have been raised in these Consolidated Actions, including, but not limited to, any defense based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion and claim-splitting.

#### XII. Reopeners (of Plaintiffs' Claims against Homestake)

37. Notwithstanding any other provision of this Decree, Plaintiffs reserve the right to assert claims against Homestake jointly or separately where (i) conditions that were unknown to the Plaintiffs on or before the Date of Entry of this Consent Decree are discovered that result in releases of hazardous substances that contribute to material injury to, destruction of, or loss of Natural Resources other than those past and continuing releases alleged by Plaintiffs in the Consolidated

Actions, or (ii) new information is received by Plaintiffs after the Date of Entry of this Decree demonstrating material injury to, destruction of, or loss of Natural Resources resulting from releases of hazardous substances by Homestake, which injury is of a type unknown or of a magnitude significantly greater than was known by Plaintiffs on or before the Date of Entry of this Decree.

38. For purposes of paragraph 37, “unknown conditions” or “new information” shall not include: (i) an increase in Plaintiffs’ assessment of Natural Resource Damages arising out of the past and continuing releases of hazardous substances alleged by Plaintiffs in the Consolidated Actions; (ii) identification of a risk of injury or harm, as opposed to actual injury or harm, resulting from past or continuing releases of hazardous substances alleged in these Consolidated Actions, or (iii) releases of hazardous substances resulting from activities undertaken by or at the direction of Plaintiffs.

39. Notwithstanding the foregoing, no condition shall be deemed “unknown” and no information shall be deemed “new” if the condition is identified in or the information is contained in, or the condition could be reasonably determined from, the facts, documents, evidence, and data in the possession, on or before the Date of Entry of this Decree, of any of the following: the DENR and DGFP, the Cheyenne River Sioux Tribe, the DOI, the DOD, and the EPA, and the in-house and outside experts of each of them.

### XIII. Contribution Protection

40. Plaintiffs acknowledge that the payments and other actions required under this Consent Decree represent a fair, reasonable and equitable discharge for the matters addressed in this Decree. By entering into this Decree, all Parties are entitled to such protection from contribution as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613 (f)(2), for all Covered Matters as defined in this Decree. The contribution protection shall commence with the Date of Lodging of



this Decree and for each Party shall continue subject only to performance by that Party of its obligations under this Decree. Any rights the Parties may have to obtain contribution or otherwise recover costs or damages from persons not party to this Decree are preserved.

#### XIV. Stipulated Damages

41. If Homestake fails to make timely payment of any \$1 million annual installment as set forth in paragraph 18, Homestake shall pay stipulated damages of \$5,000 per day for every day that such payment is late until such time as the payment is made. One third of each \$5,000 stipulated damage payment shall be paid to the Cheyenne River Sioux Tribe. The remaining two thirds of each stipulated damages payment is to be paid jointly to the United States and the State of South Dakota and shall be paid into the South Dakota Game, Fish and Parks Fund. Stipulated damages shall begin to accrue as of 5:00 PM Pacific Standard Time on the day after payment is due and shall continue through and including the final day that payment is made. Stipulated damages are due and payable within 30 days of Homestake's receipt of a demand for payment from any Plaintiff. Payments shall be made in the same manner as set forth for payments in Section VII. Stipulated damages shall accrue as provided above regardless of whether demand is made, but need only be paid upon demand.

42. If Homestake fails to pay \$500,000 for reimbursement of Natural Resource Damage assessment costs incurred by the United States as set forth in paragraph 20, Homestake shall pay stipulated damages of \$2,500 per day for every day that such payment is late until such time as the payment is made. Stipulated damages shall begin to accrue as of 5:00 PM Pacific Standard Time on the day after payment is due and shall continue through and including the final day that payment is made. Stipulated damages are due and payable within 30 days of Homestake's receipt of a demand for payment from the United States. Payments shall be made in the same manner as set forth for

payments in Section VII. Stipulated damages shall accrue as provided above regardless of whether demand is made, but need only be paid upon demand.

43. If Homestake fails to pay to the Cheyenne River Sioux Tribe the sum of \$500,000 to be used by the Cheyenne River Sioux Tribe for environmental monitoring or other environmental purposes as set forth in paragraph 21, Homestake shall pay stipulated damages of \$2,500 per day for every day that such payment is late until such time as the payment is made. Stipulated damages shall begin to accrue as of 5:00 PM Pacific Standard Time on the day after payment is due and shall continue through and including the final day that payment is made. Stipulated damages are due and payable within 30 days of Homestake's receipt of a demand for payment from the Cheyenne River Sioux Tribe. Payments shall be made in the same manner as set forth for payments in Section VII. Stipulated damages shall accrue as provided above regardless of whether demand is made, but need only be paid upon demand.

44. If Homestake fails to fulfill its obligations to the Cheyenne River Sioux Tribe as set forth in subparagraphs (D) and (F) of Paragraph 24 of this Consent Decree, Homestake shall pay stipulated damages to the Cheyenne River Sioux Tribe in the amount of five thousand dollars (\$5,000.00) per day for each day that any such obligation remains unfulfilled. Stipulated damages shall begin to accrue as of 5:00 PM Pacific Standard Time on the day after performance is due and shall continue through and including the final day that performance is completed. Stipulated damages are due and payable within 30 days of Homestake's receipt of a demand for payment from the Cheyenne River Sioux Tribe. Payments shall be made in the same manner as set forth for payments in Section VII. Stipulated damages shall accrue as provided above regardless of whether demand is made, but need only be paid upon demand.

45. Payments made pursuant to paragraphs 41 - 44 shall be in addition to any other remedies or sanctions available to Plaintiffs by virtue of Homestake's failure to meet the requirements of this Consent Decree.

#### XV. Access

46. Commencing with the Date of Entry of this Decree, Homestake agrees to provide, or to make efforts to obtain, reasonable access for the Trustees and their contractors for property within the Site owned or leased by Homestake, its subsidiaries or affiliates. Homestake's obligation is conditioned upon the Trustees providing to Homestake reasonable advance written notice of the request, indicating the time and duration of the access requested, the persons who will be entering the land and any equipment they will bring with them, and the purpose for which the access is sought. If Homestake does not provide access in accordance with the request, Homestake shall provide written explanation to the Trustees within fourteen (14) calendar days of the request.

47. The purposes for which access may be available under this Section are:

- A) conducting investigations relating to contamination at or near the Site;
- B) obtaining samples;
- C) assessing the need for, planning for or implementation of restoration activities in accordance with this Decree.

48. The Trustees agree to provide Homestake with the opportunity to obtain split samples for any sampling activity undertaken pursuant to paragraphs 46 and 47, and to provide Homestake with copies of all final sampling results and final analyses obtained or prepared relating to samples, data or other information collected or developed pursuant to paragraphs 46 and 47.

49. Nothing in this Section shall authorize the Trustees to conduct restoration activities of any nature on any property owned or leased by Homestake or any of its subsidiaries or affiliates, without the express advance written consent of Homestake.

50. Nothing in this Section shall affect the authority of the Trustees to obtain access under federal, State, or Tribal law.

#### XVI. Notice and Submittals

51. Except as otherwise provided herein, whenever written notice regarding or relating to this Decree is required to be given by one Party to another for any reason, it shall be directed to the individuals and addresses specified below, unless the individuals specified or their successors give notice, in writing, to the other Party that notice should be directed to a different individual or address. All notices shall reference the consolidated actions and civil action numbers.

Notice to State of South Dakota:

Secretary, DENR  
Joe Foss Building 523 E. Capitol  
Pierre, SD 57501

Notice to United States of America:

United States Attorney  
P.O. Box 5073  
Sioux Falls, SD 57117-5073

Notice to Cheyenne River Sioux Tribe:

Tribal Chairman  
Cheyenne River Sioux Tribe  
P.O. Box 590  
Eagle Butte, SD 57625

Legal Department  
Cheyenne River Sioux Tribe  
P.O. Box 590  
Eagle Butte, SD 57625

Notice to Homestake Mining Company of California:

Harold Barnes  
Director of EHS&Gov't Affairs  
Homestake Mining Company  
650 California Street  
San Francisco, CA 94108

## XVII. Modifications

52. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by each of the Parties signatory hereto, and approved by the Court as a modification to this Consent Decree.

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

## XVIII. Effect of Settlement and Limitations

54. The provisions of this Decree, including specifically those provisions providing releases, covenants not to sue and contribution protection, shall inure to the benefit of all Parties, their predecessors, successors, affiliates, officers, directors, employees, agents, assigns, and designees.

55. Except as expressly provided in Section VIII of this Decree (Dismissals, Releases and Covenants Not to Sue), each Plaintiff retains all authorities it may have under federal, State, or Tribal law, including, but not limited to, emergency response authorities.

## XIX. Signatories and Service

56. Each undersigned representative of the Parties to this Consent Decree 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 the terms of this Decree.

57. Each Party 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.

## XX. Voidability

58. If for any reason the District Court should decline to approve entry of this Decree in the form presented, this Decree and the settlement embodied herein shall be void. If this Decree



becomes void pursuant to this paragraph, the terms hereof may not be used as evidence in any litigation or other proceeding.

#### XXI. Retention of Jurisdiction

59. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be necessary or appropriate for the construction, implementation, or enforcement of this Decree.

#### XXII. Public Comment

60. The Parties agree that this Decree will be subject to a 30-day public comment period. The Plaintiffs reserve the right to withdraw their consent to this Decree if comments received during the comment period disclose facts or considerations that show that this Decree is inappropriate, improper, inadequate or not in the public interest. Homestake consents to the entry of this Decree by the Court without further notice.

#### XXIII. Entire Agreement

61. This Decree constitutes the entire understanding of the Parties with respect to its subject matter.

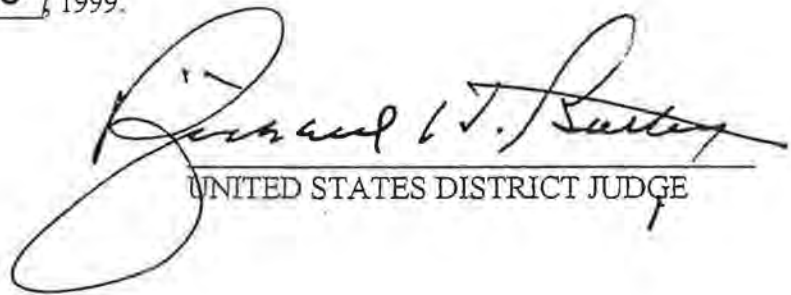
#### XXIV. Effective and Termination Date

62. This Decree shall be effective upon the date on which this Decree has been entered by the United States District Court.

63. The Court may terminate this Decree on a duly noticed motion and the Court shall grant such motion unless a Party opposing the motion establishes that Homestake has failed to fulfill its obligations under the Decree, except that the motion shall be granted if Homestake has fulfilled all obligations in Section VI and VII of this Decree other than the transfer of the 43A-1 water right to the State as contemplated in paragraph 17. Upon the date of termination, all obligations of the Parties under this Decree shall cease, except that termination of this Decree shall not affect the

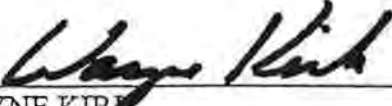
following provisions: (i) provisions herein for enforcement of the restriction on commercial use of the property transferred under paragraph 24; (ii) transfer of the 43A-1 water right to the State as contemplated in paragraph 17; (iii) Section VIII, paragraphs 30-33 (Dismissals, Releases and Covenants not to Sue); (iv) Section XIII, paragraph 40 (Contribution Protection); (v) Section IX, paragraph 34 (Plaintiffs' Reservation of Rights); (vi) paragraph 35 (Homestake's Reservation of Rights); (vii) Section XII, paragraphs 37-39 (Reopeners); (viii) Section XVIII, paragraphs 54-55 (Effect of Settlement and Limitations), which shall all remain in effect as an agreement among the Parties. Provided further, that Section XV, paragraphs 46-50 (Access), shall remain in effect for ten years from the Date of Entry of the Decree and then expire by its own terms.

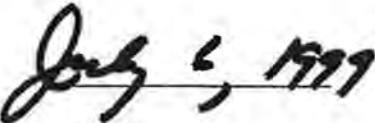
SO ORDERED THIS <sup>22</sup>3 DAY OF July, 1999.

  
UNITED STATES DISTRICT JUDGE

Consent Decree, State of South Dakota v. Homestake Mining Company of California, CIV97-5078; United States and Cheyenne River Sioux Tribe v. Homestake Mining Company of California, CIV97-5100

FOR HOMESTAKE MINING COMPANY OF CALIFORNIA:

  
\_\_\_\_\_  
WAYNE KIRK  
Vice-President and General Counsel  
Homestake Mining Company of California

  
\_\_\_\_\_  
July 6, 1997