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July 7, 1999

MEMORANDUM

TO: Nettie Myers, Dept. of Environment & Natural Resources
Joane Lineburg, Dept. of Environment & Natural Resources
John Cooper, Dept. of Game, Fish, & Parks
John Kirk, Dept. of Game, Fish, & Parks

FROM: Roxanne Giedd, Assistant Attorney General *RG*

RE: Memorandum of Agreement Among the SD DENR, and SD GF&P,
and US Dept. of the Interior

Enclosed is a copy of the Memorandum of Agreement Among the South Dakota Department of Environment and Natural Resources, South Dakota Department of Game, Fish and Parks, and United States Department of the Interior. A copy of the Consent Decree will follow at a later date.

RG: *(SK)*
Enc.

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Final MOA

MEMORANDUM OF AGREEMENT
AMONG THE
SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,
SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS,
AND
UNITED STATES DEPARTMENT OF THE INTERIOR

I. INTRODUCTION

1. This Memorandum of Agreement ("Agreement") is undertaken in accordance with the authorities cited below by and among the South Dakota Department of Environment and Natural Resources and the South Dakota Department of Game, Fish and Parks (collectively "State"); and the United States Department of the Interior ("DOI") (all three collectively "Parties"). The Parties enter into this agreement in accordance with the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, the Federal Water Pollution Control Act (also known as the Clean Water Act ("CWA")), 33 U.S.C. §§ 1251 *et seq.*; and other applicable Federal and State authorities.

II. DEFINITIONS

2. The following definitions shall apply to these terms as used in this Agreement:

A. "Approving Officials" means the individuals authorized to approve the expenditure of the funds in the HMC Natural Resources Restoration Fund. The Approving Official for the State is the Secretary of the Department of Game, Fish and Parks. The Approving Official for DOI is the Regional Director, Region 6, of the United States Fish and Wildlife Service, or his or her designee.

B. "Consent Decree" means the agreement, including attached exhibits and appendices, among the Plaintiffs and Homestake Mining Company of California, that represents the settlement of the Consolidated Actions.

C. "Consolidated Actions" means South Dakota v. Homestake Mining Company of California, Civ. No. 97-5078, and United States and Cheyenne River Sioux Tribe v. Homestake Mining Company of California, Civ. No. 97-5100, both in the United States District Court for the District of South Dakota..

D. "Covered Matters" mean all claims and counterclaims brought in the Consolidated Actions.

E. "Homestake Mining Company Natural Resources Restoration Fund"

("HMC NRRF") means the account in the State of South Dakota Game, Fish and Parks Fund that is to receive payments from Homestake under the Consent Decree.

F. "Natural Resource" and "Natural Resources" 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 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. "Party" means the South Dakota Department of Environment and Natural Resources; the South Dakota Department of Game, Fish and Parks (collectively "State"); and the United States Department of the Interior ("DOI").

H. "Restoration" means the restoration, rehabilitation, or acquisition of the equivalent of lost, injured, or destroyed Natural Resources and services that the Parties allege have been lost, injured, or destroyed as a result of Homestake's mining activity.

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

III. PURPOSE AND AUTHORITIES

3. The State and the United States have asserted in the Consolidated Actions that they are Trustees for Natural Resources and have authority to act on behalf of the public to recover damages from responsible parties for injury to Natural Resources resulting from releases of hazardous substances and to take appropriate actions necessary to restore injured Natural Resources.

4. By signing this Agreement, no Party is acknowledging or denying the Trusteeship for or other authority over any Natural Resources of any other Party. Nothing in this Agreement is intended to or does abrogate, cede, or otherwise waive any Party's responsibility for or authority over Natural Resources.

5. The Parties recognize that their collective and cooperative work towards common Natural Resource restoration goals provides the most effective and efficient approach to protect and restore the Natural Resources for which the Parties are responsible.

6. The Parties enter into this Agreement to establish a procedure for coordination and cooperation in developing and implementing plans for the restoration of Natural Resources that have been affected by the release of hazardous substances from the Homestake Mining Company of California ("Homestake") mining operations in and near Lead, South Dakota ("mining operations"). Such intergovernmental cooperation is encouraged by Federal and State law and regulations, including but not limited to the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 *et seq.*; the Migratory Bird Conservation Act, 16 U.S.C. §§ 701 *et seq.*; the Fish and Wildlife Act of 1956, 16 U.S.C. § 742a-j; and SDCL § 41-3-4.

7. The Parties recognize that each Party acts under its own separate authorities for restoration activities covered by the Agreement, and that each Party's responsibilities under the Agreement reflect those authorities. Nothing in this Agreement is intended to alter, amend, or interfere with the restoration authorities under which each Party acts, nor does participation in this Agreement constitute a waiver, admission, or agreement to the jurisdiction, authority, or power of any other Party to conduct the restoration activities involved herein.

8. The Parties recognize and agree that their restoration activities implement paragraph 18 of the Consent Decree.

IV. RESTORATION PLANNING AND PROJECT MANAGEMENT

9. Restoration Project Management Team

A. The State and DOI agree to jointly create a Restoration Project Management Team ("Team") which will be responsible for developing and implementing restoration plans that include the development, planning, implementation, and monitoring of restoration activities undertaken by the State and DOI. The Team will consist of representatives appointed by the State and by DOI. The Team may appoint or employ a Project Manager who will be responsible for the administration and oversight of activities. The Team will develop a job description for the Project Manager.

B. All restoration activities will be undertaken to restore, replace, or acquire the equivalent of Natural Resources or related services that allegedly have been injured, lost, or destroyed by releases of hazardous or deleterious substances from Homestake's mining operations. Restoration activities are not restricted to the Site, but to the extent possible will be conducted within the Whitewood Creek, Belle Fourche, and Cheyenne River basin watersheds in South Dakota. To the extent possible, given the nature of the planned restoration activities, the Team will request and utilize matching funds from other funding sources to support restoration activities.

C. The Team will coordinate and consult with representatives of the EPA as appropriate and necessary in order to facilitate coordination of restoration activities with response activities.

10. Decision-Making

A. The State and DOI are each entitled to one vote in decision making and must both agree to any decisions regarding restoration planning or expenditures. The State and DOI will each determine how to reach their respective internal positions on decisions. If either the State or DOI elects to abstain from voting on a decision, the position of the other Party will prevail. Abstention from voting on approval of expenditures must be made in writing.

B. Disputes that cannot be resolved to the satisfaction of both the State and DOI will be elevated in accordance with dispute resolution procedures described in Section VI of this Agreement.

11. Meetings

A. The Team will hold formal meetings at least twice a year. Formal Team meetings will be scheduled at least 15 business days in advance of each meeting except when exigent circumstances, such as a deadline for a matching fund proposal, occur that require a meeting to be scheduled with less notice. Attendance at meetings may be in person or by telephone conference call. The Parties recognize that much of the restoration planning process may occur during informal meetings or telephone calls.

B. At least one member from the State agencies and one member from the DOI shall participate in each formal Team meeting. Absent members are responsible for contacting those in attendance to learn what was discussed at the meeting.

V. FUNDING AND EXPENDITURES

12. All of the funds received from Homestake under the Consent Decree will be managed according to the provisions in the Consent Decree and this Agreement. Funds received from Homestake will be placed; pursuant to SDCL §§ 41-1-5.2, 41-13-1, and 41-2-31; in the South Dakota Department of Game, Fish, and Parks Game, Fish and Parks Fund established by SDCL § 41-2-34 and continuously appropriated pursuant to SDCL § 41-2-35.

13. The Secretary of the Interior is authorized to coordinate with states in efforts to protect all species of wildlife and their habitat and to accept donations of land and contribution of funds to further these purposes. 16 U.S.C. §§ 661 *et seq.*

14. In accordance with paragraph 18 of the Consent Decree, Homestake has agreed to pay to the Parties to this Agreement and to the Cheyenne River Sioux Tribe the sum of \$4.0 million, in four equal annual installments. The portions of these payments that are not due to the Cheyenne River Sioux Tribe, including any interest accumulating under paragraphs 22 and 23 of the Consent Decree and stipulated damages as specified in paragraph 41 of the Consent Decree, shall be paid into the State of South Dakota Department of Game, Fish and Park's "Game, Fish and Parks Fund" and denoted and maintained as the "HMC Natural Resources Restoration Fund" ("HMC NRRF").

15. The HMC NRRF will be administered as a separate fund within the Game, Fish and Parks Fund. Interest will accrue on funds paid into the HMC NRRF at the same rate and in the same manner as on all State general funds (defined at SDCL § 4-4-4(1) and invested in accordance with SDCL ch. 4-5), and all interest accruing on the principal of the HMC NRRF will be credited to the HMC NRRF.

16. The State and DOI will jointly administer the HMC NRRF, including any interest and stipulated damages, for the purposes of restoration planning and implementation].

17. Funds from the HMC NRRF may only be used by the State or by DOI upon the presentation of a written request for withdrawal of funds for a specific restoration project or related activity approved by joint signatures of the Approving Officials.

18. The Team will attempt to identify potential sources for public and private matching funds for restoration activities and apply for such funds as appropriate. Such applications must be approved by the Approving Officials. If funds held in the HMC NRRF are used to obtain additional contributions of funds, the additional funds shall be administered in accordance with the provisions of this Section, as well as according to any requirements placed on use of the matching funds by the granting entity.

19. The State and DOI shall adopt mutually acceptable accounting standards and procedures to track expenditures made for any restoration activities undertaken pursuant to this Agreement.

20. In no case will any Party receive reimbursement from the funds in the HMC NRRF, or credit against those funds, for staff time spent on restoration activities, except that such funds may be used to pay the salary of the Project Manager. Funds in the HMC NRRF also may be used to cover other expenses relating to the restoration plan, such as Federal Register notices, mailing and shipping, public meetings, duplicating, and NEPA compliance, but such funds may not otherwise be used for project management. The HMC NRRF funds may, however, be applied to contracts with third parties for services such as sampling and laboratory or restoration work.

21. Each Party may have its own additional sources of funding for activities relating to this Agreement. Each Party maintains its independent authority to administer these funds to further the purposes of the Agreement.

VI. DISPUTE RESOLUTION

22. The Parties agree that their joint and individual decision-making will focus upon their mutual goal of restoration of Natural Resources allegedly injured by releases of hazardous substances from Homestake's mining operations at the Site.

23. The Parties intend to resolve disputes at the Team level whenever and as expeditiously as possible. Disputes that cannot be resolved at the Team level will be handled as follows:

A. Each Party will be responsible for the resolution of any disputes within that Party's organization.

B. Disputes over restoration planning and implementation among the Parties will be elevated for resolution by a State and a DOI Dispute Resolution Official or their designees. The Dispute Resolution Official for the State of South Dakota is the Secretary of the Department of Game, Fish and Parks; and the Dispute Resolution Official for DOI is the Regional Director, Region 6, of the U.S. Fish and Wildlife Service. These officials may, at their discretion, delegate their dispute resolution authority in total or for particular disputes. If these officials cannot resolve the dispute, they may choose to raise it to a higher level within their respective organizations.

24. The Parties may establish other mechanisms for dispute resolution, including Alternative Dispute Resolution, by mutual consent of the Parties involved in the dispute.

VII. PUBLIC INFORMATION

25. The Parties intend to keep the public informed about the activities undertaken to further the purposes of this Agreement to the extent consistent with Federal and State law. The Parties will make periodic joint statements to the public or will conduct public meetings.

26. The Parties will not release any pre-final data or reports, and will not release any final data or reports without advanced written notice to the other Parties, except as otherwise required by Federal or State law.

27. If one Party receives a request for information concerning matters covered by this Agreement or the Consent Decree, copies of the request and response will be provided by the receiving Party to the other Parties at the same time the response is provided to the requestor.

28. Where the Parties, together or individually, employ consultants and/or contractors in order to carry out activities authorized under this Agreement, the Parties agree to require their consultants, contractors, and any subcontractors hired by the consultants or contractors, to sign separate confidentiality agreements that prohibit them from releasing any pre-final or final data or reports, unless otherwise authorized by the Parties.

29. The Parties recognize that CERCLA 111(i) requires them to develop plans for the use of recovered funds and that such plans must be submitted for adequate public notice and an opportunity for hearing and consideration of all public comments.

VIII. NOTIFICATION OF COMMUNICATIONS WITH HOMESTAKE

30. The Parties agree that they will not initiate communications with Homestake or its agents regarding any matters relating to the Natural Resource Restoration activities being conducted by the Parties under the Consent Decree or this Agreement without first notifying the other Parties. This restriction does not apply to land transfers to the Bureau of Land Management, water rights transfers to the State, or requests for access to Homestake's lands for restoration or research activities. This agreement does not restrict, limit, or otherwise interfere with communications with Homestake occurring in the course of a Party's usual business, and is

not intended to limit the jurisdiction, authority, or responsibilities of a Party as established by law.

IX. COVENANTS NOT TO SUE

31. To facilitate and in consideration for the mutual coordination and cooperation in restoration planning described in the foregoing Memorandum of Agreement, the United States and the State of South Dakota covenant as follows:

Except as provided in Plaintiffs' Reservation of Rights in Section IX of the Consent Decree Reservation of Rights, the United States and the State of South Dakota mutually covenant not to sue or to take any other civil or administrative action against each other for claims filed in the Consolidated Actions. This covenant shall take effect upon the Effective Date of the Consent Decree. This covenant does not extend to any other person or entity.

32. This covenant not to sue shall survive termination of the attached Memorandum of Agreement and is enforceable in the United States District Court for the State of South Dakota.

X. GENERAL PROVISIONS

33. Reservation of Rights

A. Nothing in this Agreement is intended or shall be construed to be an admission by the Parties in any dispute or action between the Parties or between the Parties and a third party. Nothing in this Agreement is intended or shall be construed as a waiver by the Parties of any claim or defense or of any other right or remedy in any legal action, except as provided in the Covenants Not to Sue in Section IX.

B. Neither execution of this Agreement nor performance of any activity pursuant to this Agreement shall constitute an admission or denial by any Party of, nor be construed as precedent for or limitation on, any other Party's or non-party's legal authority or responsibility under Federal or State law or regulation.

C. Neither execution of this Agreement nor performance of any activities pursuant to this Agreement shall constitute an admission by any Party of, nor be construed as precedent for, any Party's liability under any theory of law.

D. This Agreement is not intended to and does not affect in any manner the jurisdiction, power and authority of any Party to independently execute the statutory and regulatory duties, responsibilities, and obligations each Party is charged to execute, or to manage the resources each Party is charged to manage. If a proposed restoration activity may affect such execution or management activities, and dispute resolution of these restoration activities in accordance with section VI of this Agreement is unsuccessful, each Party maintains its right to

act in accordance with its execution and management authorities, and may either challenge the proposed restoration activity or another Party's authority to proceed with a restoration activity.

E. This Agreement does not create any further legal rights or obligations among the Parties, their agents, or any third parties, except as expressly provided in this Agreement and the Covenants Not to Sue in Section IX..

34. Nothing in this Agreement authorizes any Party to enter into a settlement or contract on behalf of any other Party, and a Party does not represent any other Party in litigation. This Agreement has no effect on any other settlement or event not related to the settlement embodied in the Consent Decree.

35. Nothing in this Agreement shall be construed as obligating any Party to expend any funds in excess of appropriations or other amounts authorized by applicable law.

36. This Agreement is not intended, and shall not, vest any right in any person other than the Parties to this Agreement.

37. No elected or appointed officials of the governments of the Parties shall be allowed to receive any personal benefit arising from this Agreement other than those benefits to the general public which this Agreement is intended to generate.

38. Any modification of this Agreement must be in writing and approved by all Party signatories to this Agreement or their delegated officials.

X. TERMINATION AND WITHDRAWAL

39. This Agreement shall be in effect from the date of execution until termination by written agreement of the Party signatories to the Agreement or their delegated officials. Any Party may withdraw from this Agreement by providing written notice to the other Parties at least thirty (30) days in advance of the withdrawal date.

40. In the event the State or DOI elects to terminate and withdraw from this Agreement, any of the funds paid by Homestake remaining in the HMC NRRF at the time of termination, including any applicable interest and stipulated damages and matching funds, shall be deposited in a court registry account with the United States District Court for the District of South Dakota, pursuant to Rule 67 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2041 and 2042. Funds placed in the court registry, and interest accrued thereon, shall be expended only for the purposes set forth in paragraph 18 of the Consent Decree and may be withdrawn by order of the Court upon a joint request by the United States and the State, or by other Court order in accordance with law.

41. The following provisions shall survive termination of this Agreement by any Party:

- A. The covenants not to sue in Section IX.
- B. The court registry account provisions of paragraph 40.

XI. EFFECTIVE DATE.

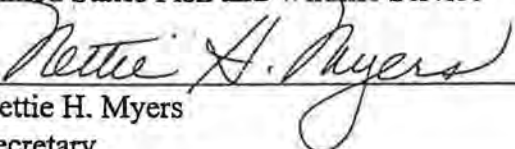
40. This Agreement shall be effective on the date when last executed by the authorized representatives of all the Parties.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates attested to below.

The following signatures apply to the entire Agreement except for Section IX, Covenants Not to Sue.

Ralph O. Morgenweck
Regional Director, Region 6
United States Fish and Wildlife Service

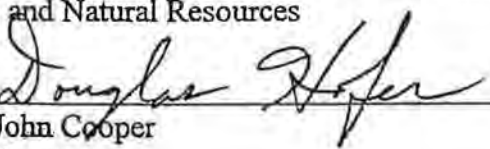
Date



Nettie H. Myers
Secretary
South Dakota Department of Environment
and Natural Resources

7-6-99

Date

for 

John Cooper
Secretary
South Dakota Department of Game, Fish and Parks

7-6-99

Date

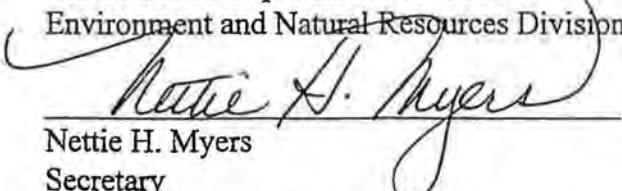
The following signatures apply specifically to Section IX, Covenants Not to Sue.

Lois J. Schiffer

Assistant Attorney General

United States Department of Justice

Environment and Natural Resources Division

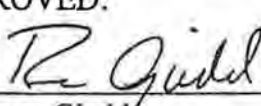


Nettie H. Myers

Secretary

South Dakota Department of Environment
and Natural Resources

APPROVED:



Roxanne Giedd

Assistant Attorney General

State of South Dakota