

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA;
CHEROKEE NATION;
DELAWARE TRIBE OF INDIANS;
and OSAGE NATION,

Plaintiffs,

v.

CYPRUS AMAX MINERALS
COMPANY,
Defendant.

CIVIL ACTION NO. 4:19-cv-697-GKF-JFJ

CONSENT DECREE AND JUDMENT FOR NATURAL RESOURCE DAMAGES

This Consent Decree is made and entered into by and among Plaintiffs, the United States of America (“United States”), on behalf of the United States Department of the Interior, acting through the United States Fish and Wildlife Service (“DOI/FWS”), the Cherokee Nation (“Cherokee”), the Delaware Tribe of Indians (“Delaware”), and the Osage Nation (“Osage”) (hereafter the three tribal entities are collectively referred to as the “Tribes,” and the DOI/FWS and Tribes are collectively referred to as “Trustees”) and Defendant Cyprus Amax Minerals Company (“Cyprus Amax”).

I. BACKGROUND

1. Contemporaneously with the lodging of this Consent Decree, the United States and the Tribes have filed a Complaint in this matter against Cyprus Amax pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act

(“CERCLA”), 42 U.S.C. § 9607(a).

2. In the Complaint, the United States and Tribes seek compensation for Natural Resource Damages pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), for the injury to, destruction of or loss of Natural Resources, including ecological service losses, under the trusteeship of the Trustees.

3. In the Complaint, the Trustees assert, *inter alia*, that Cyprus Amax, or its legal predecessors in interest, owned or operated one or more smelters at its facility located at or near West 11th and Virginia Streets, on the west side of Bartlesville, Washington County, Oklahoma (“Facility”) within the area now known as the National Zinc Corporation Site (“Site”). The Complaint further alleges that, during smelter operations, there were disposals of hazardous substances at the Site that caused releases of hazardous substances at and from the Facility into the environment causing injury to, destruction of, or loss of Natural Resources, including ecological service losses, within Washington County, as well as in nearby Osage county.

4. Each of the Trustees has been designated a natural resource trustee pursuant to Section 107(f) of CERCLA, 42 U.S.C. § 9607(f); Section 311 of the Clean Water Act (“CWA”), 33 U.S.C. § 1321; Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 C.F.R. §§ 300.600 - 300.615; and Executive Order 12580 (1987) and, under these authorities, acts on behalf of the public to seek damages for the injury to, destruction of, or loss of Natural Resources resulting from releases of Waste Material into the environment.

5. Zinc smelter operations began at the Facility in 1907, and up to three different smelters were operated at the Facility over time. Two of the smelters ceased operating in the 1920s, and one smelter continued operations through the 1970s. Operations at the Facility also

included operations to recover zinc, cadmium, and lead from industrial materials, using smelting and chemical processing to recover the metals.

6. The United States Environmental Protection Agency (“EPA”) implemented a removal action and cleanup of soil near the Facility in 1992. EPA proposed adding the Site to the National Priorities List, and later designated it as a Superfund Accelerated Cleanup Model pilot project in 1993. EPA and Oklahoma Department of Environmental Quality (“ODEQ”) signed a Memorandum of Understanding on March 31, 1994, that allowed the Potentially Responsible Parties pilot project to proceed, with the purpose of ensuring a prompt CERCLA-Quality Cleanup. By September 2001, all remediation work was substantially completed under the oversight of the ODEQ. The ODEQ approved the Remedial Action Completion final report for Operable Unit 1 in February 2011 and the Remedial Action Completion final report for Operable Unit 2 in December 2001.

7. The Trustees implemented a Natural Resources Damage Assessment (“NRDA”) using, in part, the data provided by the removal and remedial actions described in Paragraph 6 and the additional investigations conducted by the Trustees to evaluate the injury, loss or destruction of Natural Resources and resource services within the Bartlesville area due to releases of Waste Material at or from the Facility. In accordance with 43 C.F.R. Part 11, the Trustees completed a Preassessment Screen prior to conducting formal injury assessment activities to review information on Waste Material releases from the Facility and the potential impacts to natural resources. The Preassessment Screen concluded that further assessment efforts were warranted, pursuant to 43 C.F.R. § 11.23.

8. The Trustees’ NRDA investigations found a variety of chemicals of potential

concern (“COPCs”) released from the Facility, including arsenic, cadmium, copper, lead, mercury, selenium, silver, and zinc. These COPCs are hazardous substances as listed in 40 C.F.R. § 116.4 and toxic pollutants pursuant to 40 C.F.R. § 401.15. The Facility also discharged sulfur dioxide into the ambient air in July 1977. Sulphur dioxide converts to sulfuric acid, a hazardous substance pursuant to 40 C.F.R. § 116.4. Multiple lines of evidence demonstrate that Natural Resources in the area have been injured as a result of exposure to these Waste Materials. The Trustees’ investigations also identified ecological service losses resulting from injuries to Natural Resources. These findings are presented in the *Amended Preassessment Screen and Determination: National Zinc NRDA Site, Osage and Washington Counties, Oklahoma*, Natural Resource Trustees for the National Zinc NRDA Site, July 2012.

9. Each Trustee has incurred costs in connection with carrying out this NRDA process.

10. This Consent Decree provides the terms under which Cyprus Amax shall compensate the Trustees for Natural Resource Damages and provides for payments by Cyprus Amax to the Trustees in the total amount of one million six hundred ninety-five thousand five hundred dollars (\$1,695,500.00) that will be utilized to: 1) reimburse the Trustees for Past Assessment Costs as defined in paragraph 15; 2) fund restoration planning; and 3) fund compensatory Natural Resource Restoration Actions to address the injured Natural Resources.

11. Following execution of this Consent Decree, the Trustees will conduct restoration planning in accordance with 43 C.F.R. § 11.81, 42 U.S.C. §§ 9607(f) and 9611(i), and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*

12. The United States, the Tribes and Cyprus Amax recognize, and this Court finds,

that the Parties have negotiated this Consent Decree in good faith, that implementation of this Consent Decree will expedite the restoration of Natural Resources and avoid lengthy and protracted litigation, and that this Consent Decree is fair, reasonable, and in the public interest.

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

II. JURISDICTION AND VENUE

13. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and Sections 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over Cyprus Amax. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). Solely for the purpose of this Consent Decree and the underlying Complaint, Cyprus Amax waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Cyprus Amax shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

14. This Consent Decree applies to and is binding upon the United States, the Cherokee, the Delaware, the Osage, and upon Cyprus Amax. Cyprus Amax shall provide a copy of this Consent Decree to any successor-in-interest. Any change in ownership or corporate status of Cyprus Amax, including any transfer of assets or real or personal property, shall in no way alter Cyprus Amax's responsibilities under this Consent Decree.

IV. DEFINITIONS

15. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in the CERCLA and the CWA, and in regulations promulgated under CERCLA

and the CWA, including 43 C.F.R. § 11.14, shall have the meanings assigned to them in such statutes and 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.*

“CWA” shall mean the Clean Water Act or Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.*

“Consent Decree” means this Consent Decree and all appendices attached hereto. In the event of a conflict between this Decree and any appendix, this Decree shall control.

“Cyprus Amax” means Cyprus Amax Minerals Company and its respective successors and assigns.

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

“Date of Lodging” means the date this Consent Decree is lodged with the Clerk of Court.

“Effective Date” means the effective date of this Consent Decree as provided by Section XV of this Consent Decree (Effective Date and Retention of Jurisdiction).

“Federal Trustee” means the DOI/FWS.

“Interest,” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

“Natural Resource Damages” means compensatory relief or damages, including the reasonable costs of assessing such damages, that are recoverable pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), or Section 311(f) of the CWA, 33 U.S.C. § 1321(f), or 43 C.F.R. § 11.15, and state, tribal or federal common law, by the Trustees on behalf of the public for injury to, destruction of, loss of, or loss of use of the Natural Resources or resource services belonging to, managed by, controlled by or appertaining to the United States or the Tribes resulting from past disposals or discharges of Waste Material or releases of Waste Material at or from the Site.

“Natural Resources” shall have the meaning provided in Section 101(16) of CERCLA, 42 U.S.C. § 9601(16).

“Natural Resource Restoration Actions” shall mean projects selected by the Trustees to restore, rehabilitate, replace and/or acquire the equivalent of the Natural Resources alleged to be injured as a result of releases or the threat of releases at or from the Site, in accordance with Section VII.

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

“Parties” means the United States, on behalf of the Federal Trustees, the Tribes, and Cyprus Amax; and each shall be a “Party.”

“Past Assessment Costs” means the reasonable costs of the NRDA for the Site incurred by DOI/FWS and the Tribes prior to June 30, 2016, that are recoverable pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C) and 43 C.F.R. § 11.15(a)(3).

“Plaintiffs” means the United States, on behalf DOI/FWS, and the Tribes.

“Releases of hazardous substances at or from the Site that are the subject of this Consent Decree” shall mean all releases described in Chapter 2 of the Amended Preassessment Screen and Determination: National Zinc NRDA Site, Osage and Washington Counties, Oklahoma, completed by the Trustees in July 2012 (“Amended Preassessment Screen”).

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Site” shall mean the National Zinc Company Facility/Zinc Corporation of America Facility (“Facility”), located in Washington and Osage Counties, Oklahoma, and any area where Waste Material released from the Facility has come to be located within and near Bartlesville, Oklahoma. The Facility is shown on the Amended Preassessment Screen (See Appendix A-Figures: Location Map for National Zinc site.)

“Tribes” means the Cherokee Nation (“Cherokee”), and the Delaware Tribe of Indians (“Delaware”), and the Osage Nation (“Osage”).

“Trustees” means the Federal Trustee and the Tribes collectively.

“United States” means the United States of America.

“Waste Material” includes COPCs and shall mean (a) any “hazardous substance”

under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (b) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (c) any “solid waste” under Section 1004(27) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6903(27).

V. GENERAL PROVISIONS

16. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are: (i) to provide funding by Cyprus Amax to the Trustees to restore Natural Resources and resource services to compensate the public for Natural Resource Damages attributable to past releases of Waste Material at or from the Site; (ii) to provide for payments to each Trustee of Past Assessment Costs by Cyprus Amax; and (iii) to resolve the Plaintiffs’ claims for Natural Resource Damages against Cyprus Amax.

17. Liability. By entry into this Decree, Cyprus Amax does not admit the allegations in the Complaint and does not admit any liability to Plaintiffs arising out of the matters alleged in the Complaint. Nothing in this Consent Decree shall be construed as an admission of liability by Cyprus Amax for any claims or allegations made in the Complaint or in this Consent Decree. This Consent Decree shall not be used as evidence of Cyprus Amax's alleged liability in any action or proceeding other than an action or proceeding to enforce the terms of this Consent Decree.

18. Responsibility for Compliance. Cyprus Amax is and shall be solely responsible for compliance with this Consent Decree.

VI. PAYMENTS BY CYPRUS AMAX

19. Within thirty (30) days of the Effective Date of this Decree, Cyprus Amax shall pay a total of one million six hundred ninety-five thousand five hundred dollars (\$1,695,500), to reimburse the Federal and Tribal Trustees for their Past Assessment Costs, and restoration

planning, and to fund Natural Resource Restoration Actions to be selected and conducted by the Trustees in accordance with Section VII (Natural Resource Restoration Actions), in the manner and amounts set forth in Paragraphs 20-22 below.

20. Past Assessment Costs Incurred

a. Past Assessment Costs Incurred by Cherokee Nation. Within thirty (30) days of the Effective Date of this Consent Decree, Cyprus Amax shall pay four thousand two hundred and forty dollars (\$4,240) to the Cherokee Nation to reimburse Past Assessment Costs incurred for the Site. Payment to the Cherokee Nation shall be made by certified check payable to the “Cherokee Nation” and sent to Attn: Cherokee Nation office of the Attorney General, P.O. Box 948, Tahlequah, OK 74465. Cyprus Amax shall provide written notice of this payment to the Cherokee Nation in accordance with Section XII (Notice).

b. Past Assessment Costs Incurred by Osage Nation. Within thirty (30) days of the Effective Date of this Consent Decree, Cyprus Amax shall pay three thousand seven hundred and forty nine dollars (\$3,749) to the Osage Nation to reimburse Past Assessment Costs incurred for the Site. Payment to the Osage Nation shall be made by certified check payable to the “Osage Nation” and sent to Attn: Osage Nation Treasury at 627 Grandview Avenue, Pawhuska, OK 74056. Cyprus Amax shall provide written notice of this payment to the Osage Nation in accordance with Section XII (Notice).

c. United States’ Past Assessment Costs. Within thirty (30) days of the Effective Date of this Consent Decree, Cyprus Amax shall pay a total of three hundred forty three thousand seven hundred fifty three dollars (\$343,753) to reimburse Past Assessment Costs incurred by the DOI/FWS. Cyprus Amax shall make this payment by Fedwire Electronic Funds

Transfer at <https://www.pay.gov> to the U.S. Department of Justice account in accordance with instructions provided to Cyprus Amax by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of Oklahoma following entry of this Consent Decree. The instructions must include a Consolidated Debt Collection System ("CDCS") number to identify payments made under this Consent Decree. Cyprus Amax shall provide notice of payment, referencing the Natural Resource Damage Assessment and Restoration ("NRDAR") Account Number 0503 and the National Zinc Facility Damage Assessment, DOJ Case Number 90-11-2-10689, and this civil action case name and number to DOJ, DOI/FWS, at the addresses set forth in Section XII (Notice).

21. Funding of Trustees' Natural Resource Restoration Actions. Within thirty (30) days of the Effective Date of this Consent Decree, Cyprus Amax shall pay the sum of one million three hundred forty-three thousand seven hundred fifty eight dollars (\$1,343,758) into the National Zinc Facility (OK) Restoration Account (the "Restoration Account"), a subaccount to be established within the United States Department of the Interior ("DOI") NRDAR Fund. DOI will assign these funds a special project number to allow the funds to be maintained as a segregated account within the DOI NRDAR Fund. Cyprus Amax shall make this payment by electronic funds transfer to the United States in accordance with current electronic funds transfer procedures and instructions for same to be provided to Cyprus Amax by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of Oklahoma following entry of this Consent Decree. Cyprus Amax shall provide notice of payment, referencing the National Zinc Facility (OK) NRDA, DOJ Case Number 90-11-2-10689, and this civil action case name and number to DOJ, DOI/FWS, at the addresses set forth in Section XII (Notice). Such funds shall be held in the

Restoration Account solely for use as agreed by the Trustees to plan for, implement, conduct, finance and oversee one or more restoration actions or projects that are appropriate to restore, replace or acquire the equivalent of Natural Resources or services like those injured or lost due to releases of Waste Material at or from the Site. Such actions or projects shall be identified in a written restoration plan to be developed in the future by the Trustees, with opportunity for public review and comment.

22. Interest on Late Payments. In the event any payment required by this Section is not made when due, Interest on the unpaid balance shall be paid commencing on the thirty-first (31st) day after the Effective Date of the Decree for Past Assessment Costs Incurred (Paragraph 20) and on the thirty-first (31st) day after the due date(s) for payment of Funding of Trustees' Natural Resource Restoration Actions (Paragraph 21) accruing through the date of full payment. Interest payments shall be paid in the same manner as the overdue principal amount, and shall be directed to the same fund or account as the overdue principal amount. Interest is in addition to such other remedies or sanctions available to Plaintiffs by virtue of the Defendant's failure to make timely payments under this Section, including, but not limited to, payment of any Stipulated Penalties accruing for late payments under Section VIII (Stipulated Penalties).

VII. NATURAL RESOURCE RESTORATION ACTIONS

23. All funds in the Restoration Account shall be managed by DOI for the joint use of the Trustees for Natural Resource Restoration Actions in accordance with this Consent Decree. All such funds shall be applied toward the costs of: (a) planning Trustee-selected Natural Resource Restoration Actions; (b) administrative expenses necessary for, and incidental to, Trustee-selected Natural Resource Restoration Actions; (c) implementation of Trustee-selected Natural Resource

Restoration Actions, and (d) monitoring of Natural Resource Restoration Actions in accordance with 43 C.F.R. § 11.81, 42 U.S.C. §§ 9607(f) and 9611(I), and NEPA, 42 U.S.C. § 4321 *et seq.*

24. Restoration Planning. In accordance with CERCLA, the Trustees will prepare a Restoration Plan describing how the funds dedicated for Trustee-selected Natural Resource Restoration Actions under this Section will be used. As provided by 43 C.F.R. §11.93, the Plan will identify how funds will be used for restoration, rehabilitation, replacement, or acquisition of the equivalent of the Natural Resources and services that were alleged to be injured or lost due to the release or threatened release of Waste Material at or from the Site. The plan will also include public notice and comment requirements.

25. Decisions regarding any use or expenditure of funds under this Section shall be made by the agreement of the Trustees, acting through the Trustee Council established by the Trustees.

VIII. STIPULATED PENALTIES

26. Cyprus Amax shall be liable for the stipulated penalties set forth below, which shall accrue per violation per day, for the failure to make the payments to the United States or to the Tribes required by Paragraphs 19-22:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1st through 14th day
\$ 2,500	15th through 30th day
\$ 5,000	31st day and beyond

27. All penalties shall begin to accrue on the day after 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.

28. Following the determination by any Plaintiff that Cyprus Amax has failed to comply with one of the requirements of this Consent Decree listed above, that Plaintiff, acting either individually or in coordination with other Plaintiffs, may give Cyprus Amax written notice of same and describe the noncompliance. The Plaintiff(s) may send Cyprus Amax a written demand for the payment of the penalties. However, penalties shall accrue as provided in this Section regardless of whether Plaintiff(s) have notified Cyprus Amax of a violation.

29. All penalties accruing under this Section shall be due and payable to the relevant Plaintiff within thirty (30) days of Cyprus Amax's receipt of a demand for payment of the penalties.

30. Penalties for violations of Paragraph 20(a) (Past Assessment Costs Incurred by the Cherokee Nation) shall be paid to the Cherokee Nation in accordance with procedures set forth in Paragraph 20(a) and shall reference "Stipulated Penalties", and "National Zinc Facility Natural Resource Damages Settlement, Oklahoma." Penalties for violations of Paragraph 20(b) (Past Assessment Costs Incurred by the Osage Nation) shall be paid to the Osage Nation in accordance with procedures set forth in Paragraph 20(b) and shall reference "Stipulated Penalties", and "National Zinc Facility Natural Resource Damages Settlement, Oklahoma." Penalties for violations of Paragraphs 20(c) and 21 shall be paid to the United States in accordance with Paragraph 20(c) and shall reference "Stipulated Penalties".

31. If Cyprus Amax fails to pay stipulated penalties when due, Cyprus Amax shall pay Interest on the unpaid stipulated penalties. Interest shall accrue from the date stipulated penalties

are due until the date of payment. Additionally, in the event Cyprus Amax fails to pay stipulated penalties when due, any Plaintiff may institute a legal proceeding to collect such penalties, as well as Interest accruing on any unpaid balance, as provided by law.

32. If Cyprus Amax fails to comply with the Decree, each Plaintiff shall be entitled to collect the costs (including attorney's fees) incurred by it in any judicial action to enforce the terms of this Decree.

33. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the Tribes to seek any other remedies or sanctions available by virtue of a violation of this Consent Decree by Cyprus Amax.

34. Notwithstanding any other provision of this Section, each Plaintiff may, in its unreviewable discretion, waive any portion of stipulated penalties owed to it pursuant to this Consent Decree.

IX. COVENANTS NOT TO SUE BY PLAINTIFFS

35. In consideration of the payments to be made by Cyprus Amax under Section VI in accordance with the terms of this Consent Decree, and except as specifically provided in Paragraph 36 (Reservations of Rights by Plaintiffs) the United States and the Tribes hereby covenant not to sue or take any civil, judicial, or administrative action against Cyprus Amax to recover Natural Resource Damages. This covenant not to sue shall take effect upon the Effective Date of this Consent Decree. This covenant is conditioned upon the satisfactory performance by Cyprus Amax of all of its obligations under this Consent Decree. This covenant not to sue extends only to Cyprus Amax and does not extend to any other person.

36. Reservation of Rights by Plaintiffs.

a. Notwithstanding any other provision of this Consent Decree, the United States and the Tribes reserve the right to institute civil, judicial, or administrative proceedings as applicable against Cyprus Amax in this action or in a new action, seeking recovery of Natural Resource Damages, if:

(i) conditions, including release of Waste Material, at or from the Site that previously were unknown to the Trustees are discovered and these conditions are believed to cause or contribute to new or additional injuries to, loss of, or destruction of Natural Resources, or resource service losses; or

(ii) information about the release of Waste Material at or from the Site that previously was unknown to the Trustees is received, in whole or in part, and the Trustees determine that this previously unknown information, together with any other relevant information, indicates that there is new or additional injury to, loss of, or destruction of Natural Resources, or resource service losses, of a magnitude greater than was known at the time of entry of this Consent Decree.

b. For purposes of subparagraph a, the information and the conditions known to the Trustees includes only that information and those conditions known to the Trustees as of the Date of Lodging.

c. Nothing in the Consent Decree is intended to be, nor shall be construed as, release from liability or a covenant not to sue for any claim or cause of action of the United States or the State, administrative or judicial for:

- (i) Cyprus Amax's failure to comply with any obligation or requirement of this Consent Decree;
- (ii) claims brought on behalf of the United States or the Cherokee, Delaware or Osage Tribes, including Tribal and Federal agencies, for any relief other than for Natural Resource Damages that are the subject of this Consent Decree;
- (iii) liability arising from any past, present, or future releases of Waste Material other than the releases of hazardous substances at or from the Site that are the subject of this Consent Decree;
- (iv) liability arising from any releases of Waste Material from any site or location that is not the subject of this Consent Decree, including but not limited to, any Waste Material taken from the Site and disposed of at another site or location;
- (v) liability based upon the ownership or operation of the Site by Cyprus Amax when such ownership or operation commences after signature of this Consent Decree by Cyprus Amax;
- (vi) liability based upon the Cyprus Amax's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, after signature of this Consent Decree by Cyprus Amax;
- (vii) criminal liability; and

(viii) liability to reimburse response costs or to implement response actions under CERCLA with respect to the Site.

X. COVENANTS NOT TO SUE BY CYPRUS AMAX

37. Subject to the reservations in Paragraphs 35 and 36, Cyprus Amax covenants not to sue and agrees not to assert any claims or causes of action against the United States or the Tribes with respect to Natural Resource Restoration Actions or Natural Resource Damages, and this Consent Decree, pursuant to any federal, state, tribal, or common law, including but not limited to:

- a. any direct or indirect claim for reimbursement of Natural Resource Damages from the EPA Hazardous Substance Superfund through CERCLA Sections 106(b)(2), 107, 111, 112 or 113, or any other provision of law;
- b. any claims against the United States or the Tribes under CERCLA Sections 107 or 113, tribal or state law regarding Natural Resource Damages and this Consent Decree; or
- c. any claims against the United States or the Tribes arising out of Natural Resource Restoration Actions or Natural Resource Damages, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

38. Except as provided in Paragraph 45 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States or any of the Tribes brings a cause of action or issues an order pursuant to any of the reservations in Section IX (Covenants Not to Sue by Plaintiffs), but only to the extent that Cyprus Amax's claims arise from the same response

action, response costs, or damages that the United States or the Tribe is seeking pursuant to the applicable reservation.

39. 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).

XI. EFFECT OF SETTLEMENT AND CONTRIBUTION PROTECTION

40. 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. Each of the Parties expressly reserves any and all rights (including but not limited to any right of contribution pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to Natural Resource Damages against any person not a Party hereto.

41. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially-approved settlement pursuant to which Cyprus Amax has, as of the Effective Date, resolved its liability to the United States and to each of the Tribes within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), or as may be otherwise provided by law, for the “matters addressed.” The “matters addressed” in this Consent Decree are Natural Resource Damages. Provided, however, that if the United States or any of the Tribes exercises rights under the reservations in Section IX (Covenants Not to Sue by Plaintiffs), other than in paragraph 36(c)(vii) (criminal liability), the “matters addressed” in this Consent Decree

will no longer include those Natural Resource Damages that are within the scope of the exercised reservation.

42. The Parties further agree, and by entering this Consent Decree this Court finds, that the Complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which Cyprus Amax has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

43. Cyprus Amax shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify the United States and each of the Tribes in writing no later than sixty (60) days prior to the initiation of such suit or claim.

44. Cyprus Amax shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify in writing the United States and each of the Tribes within ten (10) days after service of the complaint on Cyprus Amax. In addition, Cyprus Amax shall notify the United States and each of the Tribes within ten (10) days after service or receipt of any Motion for Summary Judgment and within ten (10) days after receipt of any order from a court setting a case for trial.

45. Res Judicata and Other Defenses. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs with respect to the Site, Cyprus Amax shall not assert, and may not maintain any defense or claim based on the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or any other defenses based upon the contention that the claims raised by the Plaintiffs 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 IX (Covenants Not to Sue by Plaintiffs).

XII. NOTICE

46. Whenever, under the terms of this Consent Decree, a notice, report or other document is required to be sent by one Party to another, it shall be made electronically and by mailing, unless otherwise requested. It shall be directed to the individuals at the addresses set forth 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, the Federal Trustee and each of the Tribes, and Cyprus Amax, respectively.

As to the United States:

By email: eescdcopy.enrd@usdoj.gov
Re: DJ # 90-11-2-10689

AND

By Mail:
Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-11-2-10689
(and to DOI/FWS as provided below)

Department of the Interior, Office of the Solicitor
Attn: Frank Lupo
505 Marquette Ave, NW; Suite 1800

Albuquerque, NM 87102

U.S.Fish and Wildlife Service
Region 2, Regional Office
Attn: Sherry Kircher
P.O. Box 1306
Albuquerque, NM 87102

U.S. Fish and Wildlife Service
Oklahoma Ecological Services Office
Attn: Jonna Polk
9014 E 21st Street
Tulsa, OK 74129

As to Cherokee:

By Mail:
Cherokee Nation
Attn: Principal Chief
P.O. Box 948
Tahlequah, OK 74465

Cherokee Nation
Attn: Attorney General
P.O., Box 948
Tahlequah, OK 74465

As to Delaware:

By Mail:
Delaware Tribe of Indians
Attn: Chief
5100 Tuxedo Blvd
Bartlesville, OK 74006

Delaware Tribe of Indians
Attn: Environmental Director

170 NE Barbara
Bartlesville, OK 74006

As to Osage:

By Mail:
Osage Nation
Attn: Principal Chief
627 Grandview
Pawhuska, OK 74056

Osage Nation
Attn: Attorney General
1071 Grandview
Pawhuska, OK 74056

As to Cyprus Amax:

By Mail:
L. Richards McMillan, II.
Cyprus Amax Minerals Company
333 N. Central Avenue
Phoenix, AZ 85004

David L. Wallis
Gallagher & Kennedy, P.A.
2575 E. Camelback Rd.
Phoenix, AZ 85016

XIII. MODIFICATION

47. Modifications: Material modifications to this Consent Decree shall be in writing, signed by the Parties, and shall be effective upon approval by the Court. Non-material modifications to this Consent Decree shall be in writing and shall be effective when signed by the Parties.

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

XIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

49. The Parties agree and acknowledge that final approval by the United States and entry of this Consent Decree are subject to a thirty (30) day period 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. Each Plaintiff reserves the right to withdraw or withhold its consent to entry of this Decree if comments regarding the Consent Decree disclose facts or considerations that indicate that the Consent Decree is inappropriate, improper, or inadequate.

50. 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.

51. Cyprus Amax consents to the entry of this Consent Decree without further notice.

XV. EFFECTIVE DATE AND RETENTION OF JURISDICTION

52. This Consent Decree will be effective upon the approval and entry of the Consent Decree by the Court.

53. This Court shall retain jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of modifying or enforcing the terms and conditions of this Consent Decree, and to resolve disputes arising hereunder as may be necessary or appropriate for the construction, execution or enforcement of this Consent Decree.

XVI. TERMINATION

54. This Decree shall terminate upon written notice, made in accordance with Section XII, by Cyprus Amax to all Plaintiffs that all payments required under Section VI have been made, and subsequent written notice by the United States confirming the performance by Cyprus Amax of its payments and notification obligations under this Decree. Such notice by the United States shall be sent within sixty (60) calendar days of receipt by all Plaintiffs of the required payments and notice from Defendants. If the United States fails to send such notice, this Decree shall terminate automatically on the 61st day following receipt by all Plaintiffs of the required payments and notice from Defendants. The following provisions of this Decree shall survive termination: Section IX (Covenant Not to Sue By Plaintiffs); (“Reservation of Rights”); Section X (Covenants Not To Sue By Cyprus Amax); and Section XI (Effect of Settlement and Contribution Protection).

XVII. SIGNATORIES/SERVICE

55. Each undersigned representative of Cyprus Amax, the Cherokee, the Delaware, the Osage, and the Assistant Attorney General for the Environment and Natural Resources Division 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.

56. Cyprus Amax 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 or any of the Tribes have notified Cyprus Amax in writing that it no longer supports entry of the Consent Decree.

57. Cyprus Amax 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 the service of the Complaint, Consent Decree, and any related filings

with the Court. Cyprus Amax hereby agrees 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. The Parties agree that Cyprus Amax need not file an answer to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

58. This Consent Decree may be executed in any number of counterparts and, as executed, shall constitute one agreement, binding on all of the Parties hereto, even though all of the Parties do not sign the original or the same counterpart.

XVIII. FINAL JUDGMENT

59. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

60. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the Tribes, and Cyprus Amax. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 58.


SO ORDERED THIS 25TH DAY OF FEBRUARY, 2020.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

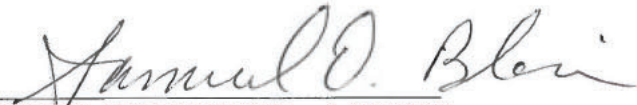
THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States; Cherokee Nation; Delaware Tribe; and Osage Nation v. Cyprus Amax Minerals Company* relating to National Zinc Site Natural Resource Damages.

FOR THE UNITED STATES OF AMERICA:

10.06.2019
Date


THOMAS A. MARIANI, JR.
Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice

12-16-19
Date


SAMUEL D. BLESI (DC Bar # 417818)
Trial Attorney
Environmental Enforcement Section
Environmental and Natural Resources Division
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R. TRENT SHORES
United States Attorney
Northern District of Oklahoma
United States Attorney

CATHERINE D. MCCLANAHAN, OBA No. 14853
Assistant United States Attorney
110 West 7th Street, Suite 300
Tulsa, Oklahoma 74119
Telephone: (918) 382-2700
Katherine.Vincent@usdoj.gov

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States; Cherokee Nation; Delaware Tribe; and Osage Nation v. Cyprus Amax Minerals Company* relating to National Zinc Site Natural Resource Damages.

FOR THE CHEROKEE NATION:

10/3/19
Date

Sara Hill
~~Principal Chief, Cherokee Nation~~
Attorney General

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States; Cherokee Nation; Delaware Tribe; and Osage Nation v. Cyprus Amax Minerals Company* relating to National Zinc Site Natural Resource Damages.

FOR THE DELAWARE TRIBE:

09/27/19
Date


Chief, Delaware Tribe of Indians

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States; Cherokee Nation; Delaware Tribe; and Osage Nation v. Cyprus Amax Minerals Company* relating to National Zinc Site Natural Resource Damages.

FOR THE OSAGE NATION:


10-7-19
Date


Principal Chief, Osage Nation

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States; Cherokee Nation; Delaware Tribe; and Osage Nation v. Cyprus Amax Minerals Company* relating to National Zinc Site Natural Resource Damages.

FOR THE CYPRUS AMAX MINERALS COMPANY:

3/29/19
Date



SWA SATHNAM
DEPUTY GENERAL COUNSEL

Date

APPENDIX A

Figure 1-1 Location Map for National Zinc Remediation Site

