

FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

FEB 14 2008

D. MARK JONES, CLERK

DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
KENNECOTT UTAH COPPER CORPORATION,)
)
Defendant.)

Civil Action No.

Case: 2:08cv00122
Assigned To : Campbell, Tena
Assign. Date : 2/14/2008
Description: USA v. Kennecott Utah Copper Corporation

NATURAL RESOURCE DAMAGE CONSENT DECREE

I. INTRODUCTION

1. The United States of America (the "United States"), on behalf of the Secretary of the United States Department of the Interior, Fish and Wildlife Service ("FWS"), has filed a Complaint in this action alleging that Kennecott Utah Copper Corporation ("KUCC") is liable under the natural resource damage provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, as a result of releases of hazardous substances from KUCC's facility located near Magna, Utah.

2. KUCC operates a smelter, refinery and mill tailings impoundment at the north end of its property located near Magna, Utah, on the south shore of Great Salt Lake, west of Salt Lake City, Utah. The facility has been used to process copper, gold and silver-bearing ores.

3. Releases of hazardous substances from KUCC's facilities include, but are not

limited to, selenium, copper, arsenic, lead, zinc, and cadmium. In its complaint, the United States alleges that the releases of these hazardous substances have resulted in injury to Natural Resources, including migratory birds, freshwater wildlife habitats, wetlands, marshes, mudflats, playas, riparian areas, sediments, and freshwater ponds, as well as adjacent upland areas. Contaminated groundwater has been released from the facility through artesian springs into these fish and wildlife habitats and, ultimately, to the Great Salt Lake.

4. In the early 1990's the Environmental Protection Agency ("EPA") began a phased process for addressing environmental cleanup at the more extensive KUCC mining and mineral processing operations, which were divided into North and South Zones, each containing several operable units. There have been four Records of Decision (RODs) completed by EPA for the Kennecott North and South Zone sites. The fourth and final ROD, issued by EPA on September 26, 2002, covers the entire North Zone and all remaining operable units in the South Zone including Pine Canyon, Tooele County mine drainage, and the Precipitation Plant. The final ROD addresses, inter alia, the smelter and refinery area, the area of the old waste water treatment plant sludge ponds, and the tailings ponds located at the north end of the KUCC property. KUCC is implementing the remedy for the North Zone as set forth in the final ROD.

5. The subject of this Consent Decree is recovery of Natural Resource Damages (defined below) and compensation to the public for losses resulting from injury to Natural Resources (defined below) located within the NRD Area (defined below), which is depicted on the map attached hereto as Exhibit C.

6. The United States and KUCC have agreed that it is appropriate for KUCC to resolve its liability for Natural Resource Damages associated with the NRD Area by conveying

approximately 331 acres of land, as more specifically defined below, and certain water rights, as more specifically described below, to The Nature Conservancy (“TNC”), to be permanently preserved and managed as wetlands and associated upland habitat. The approximately 331 acres will be transferred pursuant to the terms of a Transfer Agreement between KUCC and TNC, which will include, in addition to the approximately 331 acres, transfer of an additional approximately 286 acres as a donation, for a total of approximately 617 acres, collectively called the “Lake Point Wetlands Property.”

7. As part of the settlement and as compensation for Natural Resource Damages, KUCC also will perform certain enhancements to the Lake Point Wetlands Property pursuant to the Restoration Plan; fund an endowment to be used by TNC for the purpose of preserving and managing such land; pay to the United States certain damage assessment costs; and pay to the United States certain restoration planning and management oversight costs, all as more specifically set forth in this Consent Decree. FWS has entered into a Memorandum of Agreement (MOA) with TNC regarding the use of the endowment fund and the preservation and management of the subject land, in accordance with the Restoration Plan.

8. The Parties believe, and the Court finds, that this Consent Decree has been negotiated by the Parties in good faith; is fair, reasonable, and in the public interest; will expedite restoration, replacement, or acquisition of the equivalent of the Natural Resources and services that the United States asserts have been injured, destroyed, or lost; and will avoid prolonged, difficult, expensive and complicated litigation. By entry into this Consent Decree, neither KUCC nor its officers, directors or employees admit any fact or liability arising out of the transactions or occurrences alleged above or in the Complaint.

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

II. JURISDICTION

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 2201 and 42 U.S.C. § 9613(b). This Court also has personal jurisdiction over KUCC. KUCC shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

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

IV. DEFINITIONS

11. Unless otherwise defined herein, terms used in this Consent Decree which are defined in CERCLA, or in regulations promulgated pursuant to CERCLA, shall have the meaning assigned to them therein.

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

b. "CWA" shall mean the Federal Clean Water Act and shall specifically refer to the natural resource damage provisions found at 33 U.S.C. § 1321(f)(4).

c. "Complaint" shall mean the complaint filed in this action.

d. "Consent Decree" shall mean this Consent Decree and all exhibits attached hereto, which are incorporated by reference.

e. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or State or Federal holiday, the period shall run until the close of business of the next working day.

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

g. "Endowment" shall mean the \$175,000 fund to be provided by KUCC to TNC, to be used by TNC for the sole purpose of management and restoration of the Lake Point Wetlands Property, pursuant to the terms of the MOA and the Restoration Plan.

h. "FWS" shall mean the United States Department of the Interior, Fish and Wildlife Service.

i. "KUCC" shall mean Kennecott Utah Copper Corporation, a Delaware corporation.

j. "Lake Point Wetlands Property" shall mean the approximately 617 acre property located in Tooele County, Utah, currently owned by KUCC, which shall be transferred to TNC pursuant to the terms of the Transfer Agreement and which is further described in Exhibit B.

k. "Lake Point Water Rights" shall mean the water rights currently owned by KUCC which will be transferred to TNC pursuant to the Transfer Agreement and which is further described in Exhibit A.

l. "Natural Resources" shall mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States.

m. "Natural Resource Damages" means civil compensatory relief, including the reasonable costs of assessing damages, recoverable pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Section 311(f)(4) of the CWA, 33 U.S.C §1321(f)(4) by the United States as Trustee on behalf of the public for injury to, destruction of, loss of, or loss of uses of the Natural Resources or the services they provide at the NRD Area.

n. "Natural Resource Damage Area" or "NRD Area" shall mean the area depicted on the map attached hereto as Exhibit C.

o. "Party" and "Parties" shall mean individually the United States or KUCC and shall mean collectively the United States and KUCC.

p. "Restoration Plan" shall mean the FWS Restoration Plan attached to this Consent decree at Exhibit E, which sets forth the initial restoration activities that will be undertaken by KUCC on the Lake Point Wetlands Property to assure that the public is compensated in perpetuity for Natural Resource injuries and losses incurred at the NRD Area, and which also includes obligations to be taken thereafter by TNC with respect to long-term property management and use of the Endowment.

q. "TNC" shall mean The Nature Conservancy, a non-profit organization dedicated to acquiring and managing wetlands and other unique or ecologically valuable lands, and its successors and assigns.

r. "Transfer Agreement" shall mean the agreement dated June 1, 2007 between KUCC and TNC attached as Exhibit B to this Consent Decree, which contains the terms of the transfer of the Lake Point Wetlands Property and the Lake Point Water Rights to TNC, and which requires KUCC to complete certain portions of the Restoration Plan and pay the

Endowment to TNC.

s. "Trustee" shall mean the Secretary of the United States Department of the Interior, acting through the Fish and Wildlife Service.

**V. CONVEYANCE OF PROPERTY AND WATER RIGHTS AND
IMPLEMENTATION OF RESTORATION PLAN**

Conveyance of Lake Point Wetlands Property and Water Rights

12. As provided by the terms of the Transfer Agreement (Exhibit B), and to further the objectives of this Consent Decree, KUCC shall, at its sole expense, cause fee title to the Lake Point Wetlands Property and the Lake Point Water Rights to be conveyed to TNC pursuant to the Transfer Agreement. KUCC shall not amend the Transfer Agreement or waive the performance of any obligation thereunder without the express written consent of FWS. KUCC shall deliver to FWS copies of all reports and other documents delivered to TNC pursuant to Section 2.1 of the Transfer Agreement and all documents recorded in connection with the closing thereunder.

Implementation of Restoration Plan

13. The Parties acknowledge that the Restoration Plan will be implemented pursuant to KUCC's obligations as set forth in this Consent Decree, and the Transfer Agreement. KUCC agrees that it shall perform each and every obligation required of it as set forth in the Transfer Agreement with respect to implementation of the Restoration Plan.

14. Within 90 days after KUCC determines that all of its obligations regarding implementation of the Restoration Plan ("KUCC Restoration Activities") have been fully performed, KUCC shall schedule and conduct a pre-certification inspection to be attended by KUCC and FWS. Within 30 days of the pre-certification inspection, KUCC may submit a written

report requesting certification from FWS that the KUCC restoration activities have been fully performed. In the report, KUCC's project coordinator shall state that the KUCC Restoration Activities have been completed in full satisfaction of the requirements of the Transfer Agreement, Restoration Plan, and this Consent Decree. The written report shall include as-built drawings.

15. If FWS concludes, based on the initial or any subsequent report requesting certification, that the KUCC Restoration Activities have been performed in accordance with the Transfer Agreement and this Consent Decree, FWS will, within a reasonable time, so certify in writing to KUCC. This certification shall constitute evidence of satisfactory performance and completion by KUCC of its obligations under the Transfer Agreement and this Consent Decree regarding implementation of the Restoration Plan.

16. After KUCC's obligations regarding implementation of the Restoration Plan are concluded, the property which is the subject of the Restoration Plan will be managed pursuant to the terms of the "Memorandum of Agreement between The Nature Conservancy and The Fish and Wildlife Service" attached hereto as Exhibit D.

VI. CASH PAYMENTS

17. Within 45 (forty-five) days after the closing of the transfer of the Lake Point Wetlands Property and Lake Point Water Rights to TNC, KUCC shall pay to the United States Department of the Interior \$113,800 in reimbursement of DOI damage assessment costs, and \$52,000 for management oversight of the Lake Point Wetlands Property and restoration planning. Payments to DOI shall be made by Electronic Funds Transfer (EFT) to the U.S. Department of Justice lockbox, referencing DOJ No. 90-11-3-06999 and the United States Attorney's Office in

accordance with the EFT instructions that shall be provided by the United States Attorney's office after lodging of this Decree. Any EFT received at the United States Department of Justice lockbox after 4:00 p.m. (Eastern Time) will be credited on the next business day. KUCC shall simultaneously send copies of the EFT transmittal notice to the Chief, Environmental Enforcement Section, U.S. Department of Justice, P.O. Box 7611, Washington D.C. 20044, Attn: DOJ No. 90-11-3-06999. Notice of the EFT also shall be sent to:

U.S. Department of the Interior
Natural Resource Damage Assessment and Restoration Program
Attention: Restoration Fund Manager
1849 C Street, NW
Mail Stop 4449
Washington, DC 20240

18. KUCC shall pay the Endowment amount of \$175,000 to TNC pursuant to the terms of the Transfer Agreement.

**VII. COVENANTS NOT TO SUE AND RESERVATION OF RIGHTS BY
THE UNITED STATES**

19. In consideration of the actions that will be performed and payments made by KUCC under the terms of this Consent Decree, and except as provided for in this Consent Decree, the United States covenants not to sue or to take administrative action against KUCC pursuant to CERCLA or the CWA for Natural Resource Damages. These covenants not to sue are conditioned upon the satisfactory performance and completion by KUCC of its obligations under this Consent Decree and completion of the obligations under the Transfer Agreement. This covenant not to sue extends only to KUCC and its directors, employees, agents, predecessors, subsidiaries, affiliates, parents, successors, and assigns and does not extend to any other person.

20. Notwithstanding any other provision of this Consent Decree, the United States reserves the right to institute proceedings against KUCC in this action or in a new action seeking recovery of Natural Resource Damages based on (1) conditions unknown to the United States as of the date of lodging of this Consent Decree that contribute to the injury to, destruction of, or loss of Natural Resources; or (2) new information received by the United States after the date of lodging of this Consent Decree which indicates there is injury to, destruction of, or loss of Natural Resources of a type unknown to the United States as of the date of execution by KUCC of this Consent Decree.

21. Furthermore, this Consent Decree is without prejudice to the rights of the United States against KUCC with respect to all matters other than those expressly specified in paragraph 8 above, including, but not limited to, the following:

- a. claims based on a failure of KUCC to meet a requirement of this Consent Decree;
- b. any and all criminal liability;
- c. liability arising from the past, present, or future disposal, release, or threat of release of hazardous substances anywhere other than at the NRD Area;
- d. liability arising from any future release of hazardous substances at the NRD Area after entry of this Consent Decree;

VII. COVENANTS BY KUCC

22. KUCC hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States for any claims arising from or relating to the Consent Decree pursuant to any Federal, State, or common law, including, but not limited to the following: any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established

pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through Sections 107, 111, 112, and 113 of CERCLA, 42 U.S.C. §§ 9607, 9611, 9612, and 9613, or any other provision of State or Federal law.

23. Except as provided in Paragraph 35, KUCC hereby covenants not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States notifies KUCC in writing that it no longer supports entry of the Consent Decree.

24. 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).

IX. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

25. Nothing in this Consent Decree shall be construed to create any right in, or grant any cause of action to, any person not a Party to this Consent Decree. Each Party expressly reserves any and all rights, defenses, claims, demands, and causes of action which each Party may have with respect to this release of hazardous substances against any person not a Party hereto. In the event KUCC applies for or seeks to modify permits under the CWA or CERCLA requirements with respect to the NRD Area, the FWS specifically reserves the right to participate in the permitting or modification process to the extent authorized by law, including, but not limited to, any proposed actions under the CWA's Section 404 wetland mitigation program.

26. In any subsequent administrative or judicial proceeding initiated by the United States under paragraphs 20 and 21 above, KUCC 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, statute of limitations, or any other defenses based upon the contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, provided, however, that nothing in this paragraph affects the enforceability of the covenant not to sue set forth in Paragraph 19.

27. The Parties agree, and by entering into this Consent Decree this Court finds, that KUCC is entitled, as of the date of entry 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), for Natural Resource Damages.

X. CERTIFICATION

28. Each undersigned representative of a Party 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 this document.

XI. VOIDABILITY

29. If for any reason the Court should decline to approve entry of this Consent Decree in the form presented, or if the United States withdraws its consent pursuant to Paragraph 33 this Consent Decree and the settlement embodied herein shall be voidable by written notice to KUCC and the terms hereof may not be used as evidence in any litigation.

30. In the event the closing of the transfer of the Lake Point Wetlands Property and the Lake Point Water Rights does not occur within 18 (eighteen) months after the entry of this Consent Decree because of the failure of one or more conditions precedent to the closing set forth in the Transfer Agreement and such failure is not the result of any act or omission on the

part of KUCC, the Parties agree to negotiate in good faith toward a Consent Decree amendment satisfactory to both Parties, which amendment will be presented to the Court for approval.

XII. COMPLIANCE WITH OTHER LAWS

31. This Consent Decree shall not be construed in any way to relieve KUCC or any other person or entity from the obligation to comply with any Federal, State, or local law.

XIII. RETENTION OF JURISDICTION

32. This Court retains 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 enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or material modification of this Consent Decree, or to effectuate or enforce compliance with its terms.

IX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

33. The Parties agree and acknowledge that final approval by the United States and entry of this Consent Decree is subject to a thirty-day (30) period for public notice and comment in accordance with U.S. Department of Justice policy. As provided in paragraph 34, the Restoration Plan will be subject to a simultaneous thirty (30)-day public comment period. The United States reserves the right to withdraw or withhold its consent if comments regarding the Consent Decree disclose facts or considerations that indicate that the Consent Decree is inappropriate, improper, or inadequate.

34. The Parties further agree that the thirty-day period for notice and comment on the Restoration Plan shall run simultaneously with the period for notice and comment on this

Consent Decree as provided in Paragraph 33. FWS reserves the right to modify the Restoration Plan pursuant to its terms and conditions prior to entry of this Consent Decree. FWS shall provide notice to KUCC if it intends to modify the Restoration Plan, and KUCC shall have a reasonable opportunity to discuss the proposed modifications with FWS.

35. KUCC consents to the entry of this Consent Decree without further notice so long as FWS has not modified KUCC's obligations with respect to the Restoration Plan as a result of comments thereon.

XV. MODIFICATIONS

36. This Consent Decree may not be modified without the written consent of the Parties and approval of the Court, except that minor modifications or technical corrections (e.g., minor modifications or technical corrections to the Transfer Agreement) may be made with the written consent of the Parties.

XVI. TERMINATION

37. Any Party may apply to the Court to terminate this Consent Decree after KUCC has fulfilled its obligations under this Consent Decree.

XVII. EFFECTIVE DATE

38. This Consent Decree shall be effective upon the date of its entry by the Court.

XVIII. SIGNATORIES/SERVICE

39. KUCC 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 their behalf with respect to all matters arising under or relating to this Consent Decree. KUCC 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 rules of this Court, including, but not limited to, service of a summons.

40. This Consent Decree may be executed in 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.

XIX. ATTACHMENTS

41. The following Exhibits are attached to and incorporated into this Consent Decree:

Exhibit A: Legal Description of Lake Point Property and Lake Point Water Rights

Exhibit B: Transfer Agreement between KUCC and The Nature Conservancy

Exhibit C: Map of NRD Area

Exhibit D: Memorandum of Agreement between The Nature Conservancy and The Fish and Wildlife Service

Exhibit E: Restoration Plan

XX. NOTICES

42. Whenever notice under this Consent Decree is sent to a Party, such notice shall be sent as follows, except that a Party may change its contact information by written notice to the other Party:

For the United States:

Regional Director, USFWS Region 6 (Authorized Official)
U. S. Fish and Wildlife Service
134 Union Boulevard
Lakewood, Colorado 80228

With a copy to:

Field Supervisor, USFWS Utah Field Office

2369 West Orton Circle, Suite 50
Salt Lake City, Utah 84119

For KUCC:

CERCLA Project Coordinator
Attn: Environmental Department
Kennecott Utah Copper Corporation
P.O. Box 6001
Magna, Utah 84044-6001

With a copy to:

Vice President, Legal
Kennecott Utah Copper Corporation
P.O. Box 6001
Magna, Utah 84004-6001

XXI. FINAL JUDGMENT

43. This Consent Decree and its Attachments constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to 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.

44. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and KUCC.

SO ORDERED THIS _____ DAY OF _____, 2008.

UNITED STATES DISTRICT JUDGE

FOR THE PLAINTIFF UNITED STATES

Date: 12 Feb. 2008

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Date: 2-12-08

RACHEL JACOBSON
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources
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U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20530
(202) 514-5474

United States Attorney for the District of Utah

Date: 2/14/08

By:

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185 South State Street
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Salt Lake City, Utah 84111
Telephone: (801) 524-5682

Of Counsel:
Dana Jacobsen, United States Department of the Interior

FOR THE DEFENDANT KUCC:

Date: 1.17.08

ANDREW HARDING
President and Chief Executive Officer

Date: 1-17-08

KENNETH R. BARRETT
Corporate Counsel

Authorized agent to accept service for KUCC:

Corporation Services Company
2180 South 1300 East
Salt Lake City, Utah 84106