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CHAFFEE COUNTY, CO, JOYCE M RENO - CLERK & RECORDER RECE#: 322102 \*\*

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

This Declaration is made on (DATE) by Duane D. Zabka, Inc. dba E & R Trucking Company (hereinafter E & R Trucking). The purpose and intention of this Declaration is to protect the health and welfare of users of the subject property, and to protect public health, welfare and the environment, by conditioning and restricting uses and development activities on the subject property in order to prevent exposure to hazardous substances now present on the subject property.

Whereas, E & R Trucking, is the owner of a 10-acre tract in the SE ¼ of the SE ¼ of Sec. 25, T 50 N, R 8 E (specific legal description is attached); and

Whereas the United States Environmental Protection Agency (EPA) has identified, characterized and responded to a "release of hazardous substances" within the meaning of § 104 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9604, at the subject property, and has incurred "response costs" within the meaning of CERCLA § 107, 42 U.S.C. §9607; and

Whereas EPA and Cyprus Amax Minerals Company (Cyprus Amax) will have eliminated or substantially reduced the risk posed to human health and the environment by hazardous substances at the subject property by excavating and consolidating contaminated soils, and constructing a cap (hereinafter "the removal action") to prevent migration and re-exposure of the hazardous substances; and

Whereas the removal action will be located on a portion of the described 10-acre tract (hereinafter the "affected area"); and

Whereas the exact location of the "affected area" will be determined as part of the removal action; and

Whereas the functional and structural integrity of the removal action must be maintained to ensure the continued protection of human health and the environment from hazardous substances at the subject property; and

Whereas E & R Trucking is a potentially responsible party within the meaning of CERCLA §107, 42 U.S.C. §9607, liable for "response costs" incurred by EPA in remediating the risk to human health and the environment at the subject property; and

Whereas EPA and E & R Trucking have reached a legal settlement of E & R Trucking's potential liability for response costs incurred by EPA at the subject property through a Consent Decree entered by the United States District Court for the District of Colorado (CONSENT DECREE DOCKET NUMBER), which settlement includes a requirement that E & R Trucking, its heirs, successors and assigns prohibit residential uses of the subject property and perform certain activities to maintain the structural and functional

integrity of the removal action to ensure continued protection of human health and the environment.

**Now, therefore,** in consideration of EPA's and Cyprus Amax's construction of the removal action at the subject property, in consideration of the covenants exchanged by the parties in (CONSENT DECREE DOCKET NUMBER), and to ensure continued protection of human health and the environment, E & R Trucking hereby declares:

- (1) No portion of the 10 acre tract described in this restrictive covenant may be used, leased, sold, or disposed of for residential purposes.
- (2) The "affected area" will be surveyed by Cyprus Amax as part of the removal action. Within thirty (30) days after certification of completion of the removal action as defined in the Consent Decree, Cyprus Amax shall file with the Chaffee County Clerk and Recorder a legal description of the affected area. This legal description shall be considered an addendum incorporated by reference into this declaration of covenants, restrictions and conditions.
- (3) The following uses and activities will be prohibited within the "affected area:"
  - (a) The subject property may not be used, leased, sold, or disposed of for residential uses, or for any use inconsistent with the operation or proper functioning of the removal action.
  - (b) No drilling, excavation, or recontouring of the cap may be undertaken which may damage or interfere with its integrity, create erosion or sliding problems, or which may otherwise interfere with the flow of water through drainage channels.

**E & R Trucking further declares** that its heirs, successors and assigns have the affirmative duty to undertake the following activities to ensure the continued structural and functional integrity of the removal action:

- (1) Allow an irrevocable, permanent and continuing right of access to EPA, Cyprus Amax, and the Colorado Department of Public Health and Environment at all reasonable times to the property for purposes of:
  - a) Implementing the response actions in the Engineering Evaluation/Cost Analysis (EE/CA) for Operable Unit 1 of the Smelertown Superfund site.
  - b) Verifying any data or information submitted to EPA.
  - c) Verifying that no action is being taken on the property in violation of the terms of this instrument or of any federal or state environmental laws or regulations.
  - d) Monitoring response actions on the affected area and conducting investigations relating to contamination on or near the affected area, including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples.
  - e) Conducting periodic reviews of the removal action, including but not limited

f) Implementing additional or new removal actions if EPA, in its sole discretion, determines: i) that such actions are necessary to protect the environment because either the original removal action has proven to be ineffective or because new technology has been developed which will accomplish the purposes of the removal action in a significantly more efficient or cost effective manner; and, ii) that the additional or new removal actions will not impose any significantly greater burden on the property or unduly interfere with the then existing uses of the property.

- (2) Operation and maintenance of the pile and cap and monitoring of groundwater wells.
- (3) The removal action shall be maintained continuously.

**These Restrictions and Covenants** are hereby declared to be covenants running with the land and shall be fully binding upon all persons acquiring an interest in the subject property, whether in fee or in usufruct, including heirs, successors, purchasers and assigns. E & R Trucking agrees to include a notice in any instrument conveying any interest in any portion of the property that the property is subject to this Declaration. At least 30 days prior to the conveyance of any interest in property located within the subject property including, but not limited to, fee interests, leasehold interests, and mortgage interests, E&R shall give the grantee written notice of (i) the Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the subject property pursuant to the Access and Institutional Controls of Section IX of the Consent Decree, and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of subject property pursuant to the Access and Institutional Controls of Section IX of the Consent Decree. At least 30 days prior to the conveyance of any interest in property located within the subject property, E&R shall give written notice to EPA, the State and Cyprus Amax of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access provisions, and/or restrictive covenants was given to the grantee. EPA and Cyprus Amax retain the right to enforce these Restrictions and Covenants, and to assign rights of enforcement of this Declaration to appropriate state and local authorities and respective successors, against any person who violates these Restrictions and Covenants. E&R Trucking hereby reserves unto itself, its successors, and assigns, all rights and privileges in and to the use of the property which are not incompatible with the restrictions, rights and access granted herein. Nothing in this document shall limit or otherwise affect EPA's rights of entry and access or EPA's authority to take response actions under CERCLA, the NCP, or other federal law. No right of access or use by the general public to any portion of the property is conveyed by this instrument.

**These Restrictions and Covenants** incorporate the following provisions:

- (1) The federal agency having administrative jurisdiction over the interests acquired by

(2) EPA, the State or Cyprus Amax shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA. Enforcement of the terms of this instrument shall be at the discretion of EPA, the State or Cyprus Amax, and any forbearance, delay or omission to exercise its rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver of such term or of any subsequent breach of the same or any other term, or of any of the rights under this instrument.

(3) EPA or Cyprus Amax shall be entitled to recover damages for violations of the terms of this instrument, or for any injury to the removal action, to the public or to the environment protected by this instrument.

(4) E&R Trucking hereby waives any defense of laches, estoppel, or prescription.

(5) E&R Trucking hereby covenants to and with the United States and Cyprus Amax and its assigns, that it is lawfully seized in fee simple of the property, that it has a good and lawful right and power to sell and convey it or any interest therein, that the property is free and clear of encumbrances, except those attached hereto, and that E&R Trucking will forever warrant and defend the title thereto and the quiet possession thereof.

**These Restrictions and Covenants** may be modified or terminated under the following circumstances:

- (A) The contaminated soils are removed from the affected area or the cap is reconfigured in a manner to preclude some or all of the requirements detailed in this covenant.
- (B) Predicated on information not available at the time of these Restrictions and Covenants, a future determination is made by the EPA that the 10-acre tract and/or the affected area is protective of existing and proposed uses and does not pose an unacceptable risk to human health or the environment.
- (C) Any change to these Restrictions and Covenants must be approved by EPA and Cyprus Amax and their successors or assigns.

IN WITNESS WHEREOF, E&R Trucking has caused this Declaration to be signed in its name.

Executed this 16 day of November, 2000.

DUANE D. ZABKA  
By: Duane D Zabka



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Colorado Department of Public Health and Environment

By: \_\_\_\_\_  
Its: \_\_\_\_\_