

489660

DECLARATION OF RESTRICTIVE COVENANTS AND RESTRICTIONS

AGAINST THE USE OF REAL PROPERTY

THIS DECLARATION OF RESTRICTIVE COVENANTS AND RESTRICTIONS AGAINST THE USE OF REAL PROPERTY (this "Declaration") is made this 29th day of June, 2000, by BUTALA CONSTRUCTION COMPANY, a Colorado corporation (hereinafter "Butala") for the benefit of Butala, the Butala Property and the Third Party Beneficiaries (as defined below).

WITNESSETH:

WHEREAS, Butala is the owner of certain property, located in Salida, Colorado, more particularly described in Attachment A, attached hereto and incorporated herein by reference as though fully set forth (hereinafter referred to as the "Butala Property"), and

WHEREAS, pursuant to a Consent Decree entered into by Butala, Beazer East, Inc. ("Beazer"), the U.S. Environmental Protection Agency ("USEPA") and the Colorado Department of Public Health and the Environment ("CoDPHE"), portions of the Butala Property are the subject of a remedial action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.* ("CERCLA"); and

WHEREAS, pursuant to the Consent Decree, Butala is required and has agreed to subject the Property to certain covenants and restrictions, which covenants and restrictions shall burden the Butala Property and bind Butala, its heirs, successors, assigns, and any grantees of the Butala Property, their heirs, successors, assigns and grantees for the benefit of the Third Party Beneficiaries; and

WHEREAS, Butala has entered into an Agreement with Beazer, resolving certain matters between them and agreeing to impose upon the Butala Property the covenants and restrictions more particularly described herein in order to best effectuate the implementation of the Record of Decision regarding Operable Unit 2 of the Smelertown Superfund Site "(ROD)".

NOW, THEREFORE, Butala hereby declares that the Butala Property described in Attachment A shall hereinafter be bound by, held, sold, and conveyed subject to the following covenants and restrictions which shall run with the Butala Property and be binding on all parties having any right, title or interest in the described Butala Property, or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of Butala, the Butala Property and the Third Party Beneficiaries.

STATE OF COLORADO }
COUNTY OF CHAFFEE } ss.
Certified to be full, true and correct
copy of the original in my records.
WITNESS my hand and the Seal of said
County this 30th day of June 2000
JOYCE M RENO
COUNTY CLERK & RECORDER
Rebecca K. Carris, Dep.
BY DEPUTY

I. USE COVENANTS AND RESTRICTIONS

1.1 The Covenants. The following Covenants shall burden the Butala Property and are intended to be and shall be construed as covenants of Butala and its successors, assigns and transferees which run with the Butala Property:

A. No residential development of the Butala Property described in Attachment A shall be permitted or allowed, without the express prior written consent of the USEPA, the CoDPHE, and Beazer ("the Third Party Beneficiaries") which consent may be granted or withheld with or without cause or made subject to any conditions whatsoever, whether reasonable or not.

B. No mining or excavation shall be permitted in the area of the Butala Property known as the Mining Restricted Area ("MRA") and no mining or excavation shall be permitted below twenty (20) feet beneath the surface in the area known as the Buffer Area ("BA") (collectively referred to as the "MRA/BA"), without the express written consent of the Third Party Beneficiaries, which consent may be granted or withheld with or without cause or made subject to any conditions whatsoever, whether reasonable or not. This Covenant shall not prohibit any excavation necessary for or incidental to any non-residential development which occurs on the MRA/BA, provided no excavation below twenty (20) feet below the surface of the MRA/BA shall occur. The MRA is identified on Attachment B attached hereto and incorporated by reference as though fully set forth, and the BA is identified on Attachment C, attached hereto and incorporated by reference as though fully set forth.

C. No wells or drilling whatsoever shall be permitted or allowed in any groundwater or aquifer within the MRA/BA, with the exception of monitoring or remedial wells to be installed by USEPA and/or Beazer, without the express written consent of USEPA, the CoDPHE and Beazer which consent may be granted or withheld with or without cause or made subject to any conditions whatsoever, whether reasonable or not.

D. No wells or drilling whatsoever shall be permitted or allowed in the area identified on Attachment D attached hereto and incorporated herein by this reference as though fully set forth and referred to as the Groundwater Buffer Area ("GBA"), with the exception of monitoring or remedial wells to be installed by USEPA and/or Beazer, without the express written consent of USEPA, the CoDPHE and Beazer which consent may be granted or withheld with or without cause or made subject to any conditions whatsoever, whether reasonable or not.

E. Use of the groundwater within the Upper Terrace Aquifer and the Lower Terrace Aquifer as a drinking water supply shall be prohibited, without the express written consent of USEPA.

1.2 Covenants/Equitable Servitudes. All of the Covenants contained herein are made for the direct, mutual, and reciprocal benefit of each and every portion of the Butala Property and create an equitable servitude thereon. Each of these Covenants shall operate as a covenant running with the land for the benefit of each lot or parcel of the Butala Property, and shall inure to the benefit of Butala, the Butala Property and the Third Party Beneficiaries, and any successors, assigns or transferees thereof. No partial invalidity of any Covenant or other restriction in this Declaration shall affect the validity or enforceability of the remaining provisions hereof.

1.3 Third Party Beneficiaries. Beazer, the CoDPHE and the EPA shall be third party beneficiaries of this Declaration to the extent provided in this Declaration.

1.4 Benefits. Butala and the Third Party Beneficiaries acknowledge that the benefits to Butala, the Butala Property and the Third Party Beneficiaries by reason of the Covenants include without limitation the following:

(a) The reduction or minimization of potential risk to human health and the environment from the release of Hazardous Materials from the Property on, or in the vicinity of, the Butala Properties; and

(b) The maintenance, use and potential development of the Butala Property in such a manner as to allow economic benefits to accrue to adjacent property owners and other property owners located in the general vicinity of the Property while protecting human health and the environment.

1.5 Modification of Covenants. The Covenants may be modified as follows:

(a) Required Approvals. Any proposed modification must be approved in writing executed by (i) USEPA, the CoDPHE and Beazer, and (ii) the owner of the parcel burdened by the Covenant to be modified. Such written approval may be evidenced by execution of a written instrument created to amend the Covenants.

(b) Recordation of Modification. In order to be effective, any modification of the Covenants must be (i) in writing, (ii) dated after the date of this Declaration, (iii) executed by each of the persons described in Section 1.5 above, with each signature duly notarized (to the extent required by Colorado law), and (iv) duly recorded in the real property records of the county in which the Butala Property is located (the "County").

Any modification which complies with the foregoing requirements shall be deemed duly created and enforceable from and after the effective date thereof. For purposes of these provisions, a modification of the Covenants may include (i) the imposition of new covenants, or (ii) the termination of all or part of the existing Covenants.

II. PERMITTED USES

2.1 Permitted Uses. All uses not prohibited by the Covenants or applicable law shall be permitted on the Butala Property.

III. ENFORCEMENT RIGHTS

3.1 Enforcement of Covenants. The Third Party Beneficiaries shall have the right, but not the obligation, to enforce the Covenants. Each Covenant shall be enforceable, in perpetuity, to the fullest extent permitted by Colorado law.

3.2 Specific Performance. Butala hereby specifically agrees that in addition to all other remedies available under the Declaration, at law or in equity, the remedy of "specific performance" shall be available to any party (the "Enforcing Party") entitled to enforce the Covenants. Butala hereby waives, to the fullest extent permitted by Colorado law, any rights it may have to argue that specific performance is an inappropriate remedy.

3.3 No Waiver. A delay or failure to enforce in any specific instance any Covenant or any violation of any Covenant, shall not preclude or waive the right of any Enforcing Party to enforce such Covenant, or the violation thereof in that or in any other instance.

3.4 Waiver. An Enforcing Party may waive, in a writing executed by the Enforcing Party, one or more violation of the Covenants. Such waiver shall relate only to the specific Covenants, described in the waiver and shall not be effective to waive any other Covenants or any prior or subsequent violation, whether of the same or different nature. A waiver by one Enforcing Party shall not be effective against or constitute a waiver by any other Enforcing Party.

IV. CONVEYANCE/SUBSEQUENT OWNERS

4.1 General. The Covenants, releases, covenants not to sue and indemnities set forth in this Declaration are intended to be covenants which run with the land and shall be binding upon all subsequent owners of all or any part of the Butala Property as covenants or agreements made for the benefit of Butala.

4.2 Provisions of Subsequent Conveyance Instruments. Butala hereby agrees that in any subsequent conveyance of all or any part of the Butala Property, or any interest in the Butala Property (including without limitation grant of an easement burdening the Property or grant of a lease of all or any part of the Butala Property), Butala shall include the following provisions in the deed or other conveyance instrument (completed appropriately to refer to this Declaration and modified only so as to fit appropriately in the context of the conveyance instrument):

Grantee hereby agrees to: (i) accept the Property subject to the covenants set forth in that certain Declaration dated _____, and recorded on _____ in Book _____, at Page _____ of the _____ County real property records (the "Covenant"), (ii) abide by and enforce the covenants as owner of the Property, and (iii) be bound by the release, covenant not to sue and indemnity provisions of the Covenant as if the Grantee hereunder were the grantee under the Covenant.

Grantee hereby also agrees that in any subsequent deed or other conveyance instrument, it shall require the grantee in such deed or conveyance instrument to either (a) execute the deed or conveyance instrument which contains the agreements set forth in the immediately preceding paragraph, or (b) execute a separate acknowledgment attached to the deed or conveyance instrument which contains the agreements set forth in the immediately preceding paragraph.

4.3 Notice of Conveyance. At least thirty (30) days prior to any grant, transfer or conveyance of any interest in all or any part of the Butala Property, the owner of the Butala Property intending to make the grant, transfer or conveyance shall notify USEPA, the CoDPHE and Beazer or each of their designees in writing by certified mail or personal delivery of such intent, and of provisions to be made to ensure the subsequent owner of the Butala Property will abide by the covenants.

4.4 Binding Effect. Notwithstanding the foregoing, any person or entity who acquires any right, title or interest in all or any part of the Butala Property shall be conclusively deemed to have consented and agreed to the provisions of Section 4.2, whether or not any reference to this Declaration or these provisions is contained in the deed or other conveyance instruments by which such person or entity acquires an interest in the Butala Property.

V. MISCELLANEOUS

5.1 No Admission of Liability. Neither this Declaration nor any of the terms, recitals, provisions or statements contained herein shall be construed as an admission of liability by Butala in any proceeding, action or dispute under CERCLA or any other federal, state or local law or regulation or under any common law theory.

5.2 No Merger. The Covenants granted and imposed on the Butala Property by this Declaration shall not merge with any other interest of Butala in or to the Butala Property, but shall at all times be and remain a separate and distinct interest and shall remain as Covenants running with the land, enforceable against the Butala Property unless modified in accordance with the terms hereof.

A tract of land located within the Northwest 1/4 of the Southwest 1/4 of Section 30 of Township 50 North, Range 9 East and within Section 25 of Township 50 North, Range 8 East of the NMPM, Chaffee County, Colorado, described as follows:

Beginning at a point on the southwesterly boundary of Chaffee County Road No. 150 from whence the East 1/4 corner (Government brass capped pipe) of said Section 25 bears South 87°20'27" East 2153.93 feet;

thence proceeding around the tract herein described, first North 81°47'00" West 636.14 feet;

thence North 45°16'21" West 255.1 feet;

thence North 34°52'00" West 364.30 feet;

thence North 20°34'00" West 729.30 feet to the North boundary of the Southeast 1/4 of the Northwest 1/4 of said Section 25 as fenced;

thence North 87°58'00" West 543.10 feet to the Northwest corner of the said Southeast 1/4 of the Northwest 1/4;

thence South 00°32'00" East along the West boundary of the said Southeast 1/4 of the Northwest 1/4 as fenced 572 feet more or less to the centerline of the Arkansas River;

thence southeasterly along the said River centerline for a distance of 2297 feet more or less to the southerly boundary of that Parcel of land described in Book 460 at Page 343 of the Chaffee County Records;

thence South 79°10'00" East along said southerly Parcel boundary 1826.03 feet to an existing aluminum capped rebar corner monument;

thence North 87°10'00" East 859.23 feet to the East line of said Section 25;

thence North 00°07' East along said East Section line 60.04 feet;

thence North 87°06' East 320.50 feet;

thence on a curve to the left an arc distance of 234.63 feet, said curve having a radius of 5680.38 feet and a chord which bears North 85°55'00" East 234.62 feet;

thence North 84°44'00" East 456.9 feet;

thence on a curve to the left an arc distance of 219.10 feet to the East line of the said Northwest 1/4 of the Southwest 1/4 of Section 30 as fenced, said curve having a radius of 1859.80 feet, and a chord which bears North 81°21'30" East 218.98 feet;

thence along said East line as fenced North 01°11'42" East 142.65 feet to the southwesterly boundary of Chaffee County road No. 150;

thence along said road boundary, first North 58°42'08" West for a distance of 929.11 feet;

thence North 81°47'00" West 2282.16 feet;

thence North 46°09'52" West 456.83 feet to the point of beginning.

ATTACHMENT A

EXHIBIT
MINING RESTRICTED AREA - STATE PLANE

A parcel of land located in the Southeast Quarter of Section 25, Township 50 North, Range 8 East of the New Mexico Principal Meridian, Chaffee County, Colorado, more particularly described in relation to the Colorado Coordinate System of 1983, Central Zone, as follows:

Commencing at the Southeast corner of said Southeast Quarter of Section 25 and considering the East line of said Southeast Quarter to bear North 00°26'26" East with all grid bearings contained herein relative thereto (the East line of said Southeast Quarter is evidenced by USGLO monuments placed in 1939);

Thence North 33°29'49" West, a distance of 2585.00 grid feet to the Point of Beginning;
Thence South 07°39'10" West, a distance of 204.94 grid feet;
Thence North 83°17'47" West, a distance of 184.33 grid feet;
Thence South 12°36'22" West, a distance of 198.80 grid feet;
Thence South 62°05'19" East, a distance of 184.08 grid feet;
Thence South 03°41'56" East, a distance of 75.86 grid feet;
Thence South 28°34'50" West, a distance of 154.19 grid feet;
Thence South 69°38'39" West, a distance of 85.31 grid feet;
Thence North 70°57'29" West, a distance of 244.47 grid feet;
Thence North 15°32'06" East, a distance of 180.29 grid feet;
Thence North 69°58'46" West, a distance of 327.86 grid feet;
Thence South 48°33'50" West, a distance of 50.22 grid feet;
Thence North 40°21'00" West, a distance of 268.48 grid feet;
Thence North 47°37'27" East, a distance of 202.53 grid feet;
Thence South 42°35'09" East, a distance of 198.03 grid feet;
Thence South 79°57'04" East, a distance of 304.40 grid feet;
Thence North 06°36'15" East, a distance of 263.27 grid feet;
Thence South 84°09'16" East, a distance of 330.35 grid feet to the Point of Beginning,
containing 6.9188 acres, more or less.

Prepared June 19, 2000 by LJ Ludeman, PLS
4100 E. Mississippi Ave. Glendale, CO 80246



ATTACHMENT B

EXHIBIT
MINING RESTRICTED AREA
SECTION 25, T. 50 N., R. 8 E.
N. M. P. M., CHAFFEE COUNTY, CO

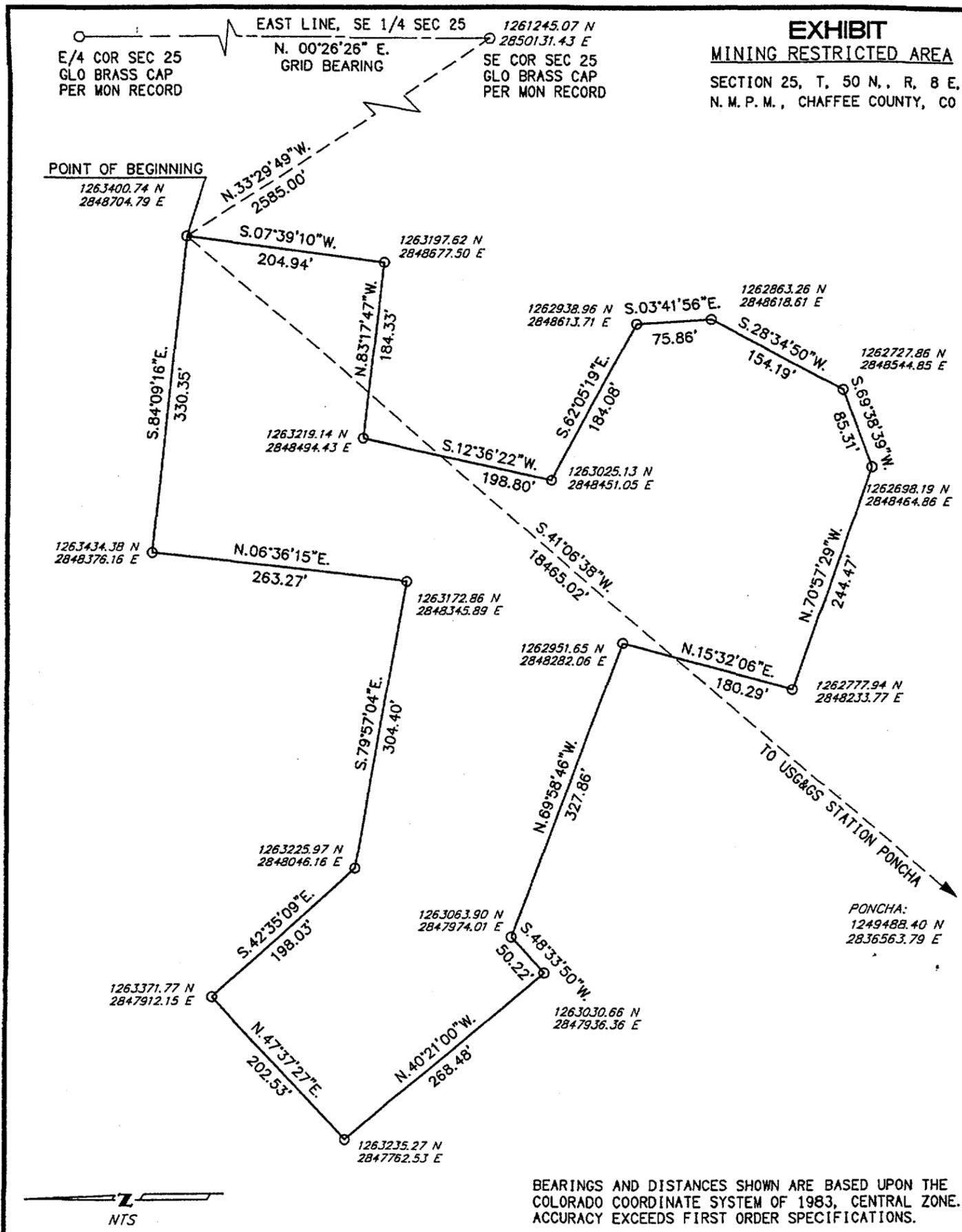


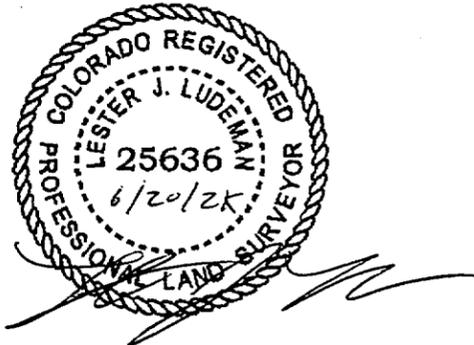
EXHIBIT
MINING BUFFER ZONE - STATE PLANE

A parcel of land located in the Southeast Quarter of Section 25, Township 50 North, Range 8 East of the New Mexico Principal Meridian, Chaffee County, Colorado, more particularly described in relation to the Colorado Coordinate System of 1983, Central Zone, as follows:

Commencing at the Southeast corner of said Southeast Quarter of Section 25 and considering the East line of said Southeast Quarter to bear North 00°26'26" East with all grid bearings contained herein relative thereto (the East line of said Southeast Quarter is evidenced by USGLO monuments placed in 1939);

Thence North 29°41'41" West, a distance of 2605.34 grid feet to the Point of Beginning;
Thence South 07°22'40" West, a distance of 587.94 grid feet;
Thence South 67°06'42" West, a distance of 159.24 grid feet;
Thence South 28°34'50" West, a distance of 154.19 grid feet;
Thence South 69°38'39" West, a distance of 85.31 grid feet;
Thence North 70°57'29" West, a distance of 244.47 grid feet;
Thence North 49°38'43" West, a distance of 390.28 grid feet;
Thence North 40°21'00" West, a distance of 347.26 grid feet;
Thence North 47°46'50" East, a distance of 201.16 grid feet;
Thence South 41°20'30" East, a distance of 78.19 grid feet;
Thence South 84°40'49" East, a distance of 333.85 grid feet;
Thence North 06°21'24" East, a distance of 226.47 grid feet;
Thence South 84°14'17" East, a distance of 574.08 grid feet to the Point of Beginning,
containing 13.7945 acres, more or less.

Prepared June 20, 2000 by LJ Ludeman, PLS
4100 E. Mississippi Ave. Glendale, CO 80246



ATTACHMENT C

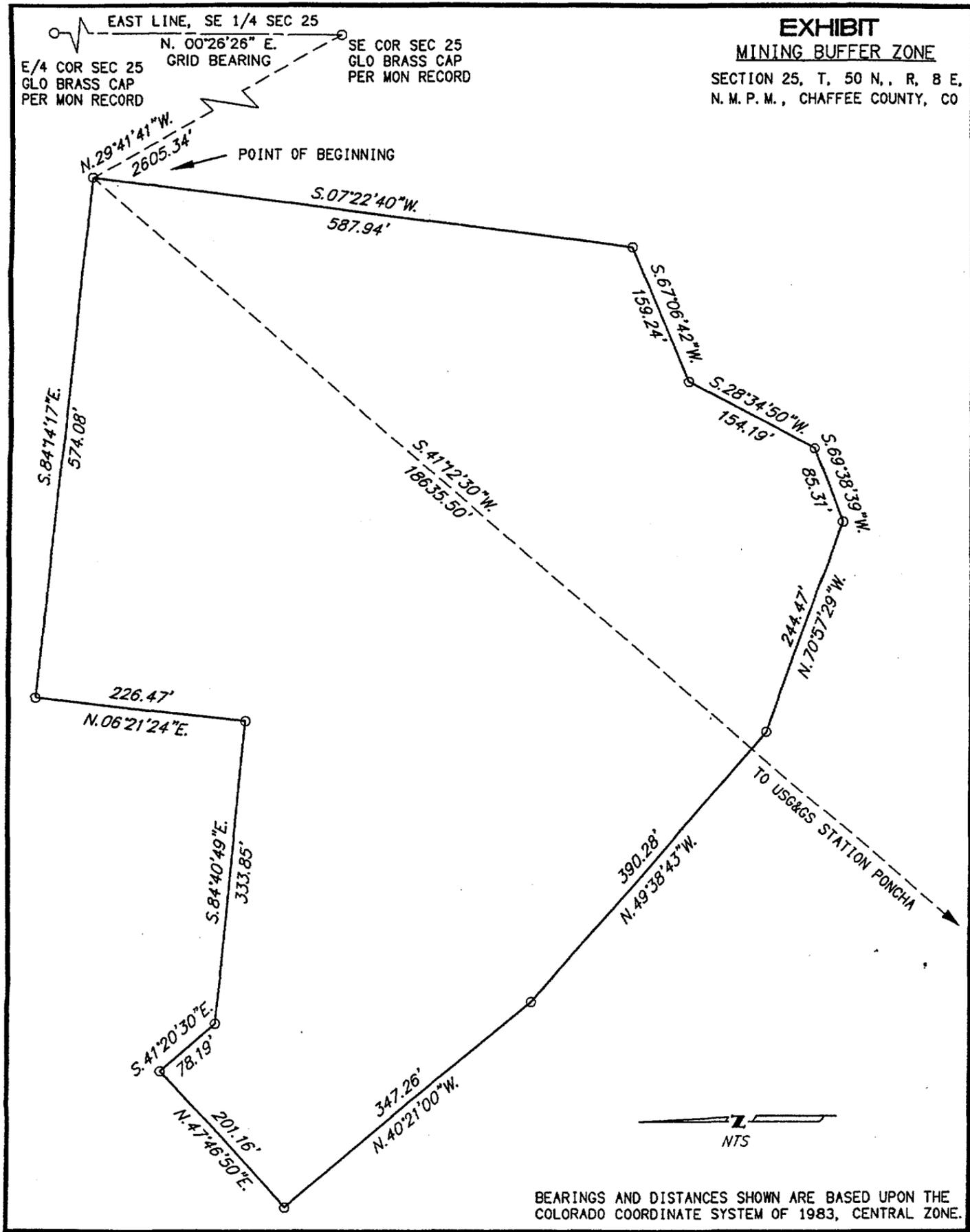


EXHIBIT
MINING BUFFER ZONE
SECTION 25, T. 50 N., R. 8 E,
N.M.P.M., CHAFFEE COUNTY, CO

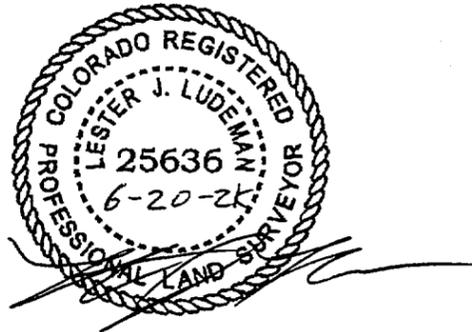
EXHIBIT
GROUND WATER BUFFER ZONE - STATE PLANE

A parcel of land located in the South Half of Section 25, Township 50 North, Range 8 East of the New Mexico Principal Meridian, Chaffee County, Colorado, more particularly described in relation to the Colorado Coordinate System of 1983, Central Zone, as follows:

Commencing at the Southeast corner of said South Half of Section 25 and considering the East line of said South Half to bear North 00°26'26" East with all grid bearings contained herein relative thereto (the East line of said Southeast Quarter is evidenced by USGLO monuments placed in 1939);

Thence North 00°25'56" West, a distance of 1824.32 grid feet to the Point of Beginning;
Thence South 00°39'32" West, a distance of 482.34 grid feet;
Thence South 87°21'16" West, a distance of 877.96 grid feet;
Thence North 78°51'37" West, a distance of 1762.05 grid feet;
Thence North 35°21'59" West, a distance of 202.39 grid feet;
Thence North 13°56'34" West, a distance of 405.57 grid feet;
Thence North 76°37'53" East, a distance of 1066.14 grid feet;
Thence South 81°33'16" East, a distance of 445.20 grid feet;
Thence South 52°37'08" East, a distance of 731.26 grid feet;
Thence South 81°35'37" East, a distance of 775.93 grid feet to the Point of Beginning;
containing 47.3439 acres, more or less.

Prepared June 20, 2000 by LJ Ludeman, PLS
4100 E. Mississippi Ave. Glendale, CO 80246



ATTACHMENT D

