

BEER SCANNED

DOCUMENT NUMBER: 08-EUC-0033
PROJECT NUMBER: C3-063-00026
PROPERTY CATEGORY: 2



STATE OF KANSAS MONTGOMERY COUNTY
FILED FOR RECORD
MARILYN CALHOUN, REGISTER OF DEEDS
11:16:50 AM, 5/10/2011 Receipt No.: 45038
AGREEMENT \$6.00
ADDITIONAL PAGES \$42.00
TECHNOLOGY FUND \$44.00

BOOK: 596 PAGE: 121

CERTIFIED COPY

ENVIRONMENTAL USE CONTROL AGREEMENT

The City of Cherryvale, a Kansas municipality, having a mailing address of 123 West Main, Cherryvale, Kansas 67335, hereinafter referred to as "the Owner", is the owner of real property known as the east portion of the National Zinc Company Site, in the County of Montgomery, Kansas, as shown on the map attached hereto as Exhibit A, hereinafter referred to as "the Property", and more particularly described by the following legal description:

RECEIVED
MAY 13 2011
ENVIRONMENTAL REMEDIATION

All that portion of the Northeast Quarter of Section 8, Township 32 South, Range 17 East lying North and East of the right of way of the SKO Railroad (formerly the St. Louis and San Francisco Railroad):

Except:

A tract of land condemned for state highway purposes in the District Court, Montgomery County, Kansas, Case No. 42623, described as beginning at the intersection of the northeasterly right of way line of the St. Louis & San Francisco Railroad and the East line of the quarter section: then Northwesterly along said railroad right of way line 147.1 feet; thence Northerly to a point on the East line 1155 feet North of the place of beginning; thence South along the East line to the place of beginning, containing 0.84 acres, more or less.

And which shall likewise include any and all parcels contained therein.

WHEREAS the Owner has requested, by application to the Kansas Department of Health and Environment, hereinafter referred to as "KDHE", to restrict, prohibit and/or limit certain uses of the Property in accordance with Kansas Statutes Annotated (K.S.A.) 2009 Supp. 65-1,221 *et seq.*

KDHE has approved the Owner's application to restrict, prohibit, and/or limit certain uses of the Property since residual contamination, which exceeds department standards for unrestricted residential use, remains on the Property.

The conditions at the Property as of the date of KDHE's approval of the application are as follows:

The largest zinc smelter in the world until World War 1 operated at the Property from 1898 to 1976, with most active operations ceasing in the 1930s. Zinc smelting operations impacted soil, sediment, surface water and groundwater at the Property with heavy metals. The primary contaminants of concern (COCs) include arsenic, cadmium, lead and zinc. Remedial activities, completed at the end of 2007, removed all sediments and

Cherryvale, KS. 67335 Attn: Greg McDanel

DOCUMENT
NUMBER: 08-EUC-0033

PROJECT
NUMBER: C3-063-00026

PROPERTY
CATEGORY: 2

soils impacted with the COCs at concentrations exceeding the corresponding KDHE Tier 2 RSK non-residential soil pathway values established in the *Risk-Based Standards for Kansas RSK Manual – 5th Version* (October 2010).

COCs, specifically lead and cadmium, were identified in groundwater at concentrations exceeding the corresponding primary maximum contaminant levels established by the Environmental Protection Agency. The impacted groundwater was found to be of poor quality, occurring in localized areas and yielding little to no water.

KDHE has determined, based on conditions at the Property, the application and other information pertaining to the Property, that environmental use controls are appropriate to ensure future protection of public health and the environment, subject to the conditions herein. Therefore, in accordance with K.S.A. 2009 Supp. 65-1,226 and the rules and regulations promulgated thereunder, the Property is hereby designated by KDHE as a Category 2 property.

The Owner acknowledges that this Agreement runs with the land and is binding on all successors in interest in the Property pursuant to K.S.A. 2009 Supp. 65-1,227(b); and is enforceable by KDHE pursuant to K.S.A. 2009 Supp. 65-1,229, unless and/or until such requirements are mutually terminated in writing by KDHE and Owner or Owner's successor in interest. For purposes of the obligations set forth in this document, "Owner" shall be deemed to include the current Owner and any and all successors in interest.

This Agreement shall be recorded, by the Owner, with the Montgomery County Register of Deeds for the purposes of providing notice of the environmental use controls, protecting public health and the environment, and to prevent interference with the operation, performance, and/or maintenance of any remedial actions on the Property.

RESTRICTIONS, PROHIBITIONS AND LIMITATIONS:

Due to the environmental conditions described above, it is the desire and intention of the Owner to restrict, prohibit, and/or limit the following uses of the Property:

- A. The Property shall not be used for residential purposes of any type including, but not limited to, a residence or dwelling, including a house, apartment, mobile home, nursing home, or condominium; or public use area, including a school, educational center, day care center, playground or similar structure, unrestricted outdoor recreational area, or park.
- B. The Property shall not be used for agricultural purposes including, but not limited to, growing dry-land crops or irrigated crops, operating a feedlot, ranching, or any other activities which may disturb residual contamination remaining on the Property; however, haying shall be permitted provided that such use does not disturb residual contamination remaining on the Property.

DOCUMENT
NUMBER: 08-EUC-0033

PROJECT
NUMBER: C3-063-00026

PROPERTY
CATEGORY: 2

- C. The Owner shall not allow water wells to be drilled, constructed, or used on the Property for domestic purposes, lawn and gardening, or other means, which use involves or may involve human consumption and/or other possible human contact uses. This restriction does not prohibit drilling, construction or use of water wells for the purpose of containing product or contamination, or for contaminated ground water recovery, monitoring, or other remediation activities as approved in writing by KDHE.
- D. The Owner shall not file or petition to initiate re-zoning of the Property without fifteen (15) days prior notification to KDHE.
- E. The Owner shall not allow any excavation activities, soil disturbances, or construction activities on the Property unless conducted in accordance with the *Soil Management Plan* attached hereto as Exhibit B. KDHE shall be provided with notification fifteen (15) calendar days prior to such activities.
- F. The Owner shall obtain prior written approval from KDHE before undertaking any of the following:
1. Undertaking any excavation or construction of drainage ditches on the Property;
 2. Changing the surface contour of the Property or performing dirt work thereon;
 3. Altering the vegetation grown on the Property in a manner inconsistent with routine management practices; or
- G. If structural impediments (i.e. natural gas building, concrete foundations, utility lines) on this Property are removed or modified in such a manner as to provide for potential exposure to any remaining contamination, the Owner shall notify KDHE no less than fifteen (15) calendar days prior to removal of such structural impediments. KDHE may require soils underlying the structural impediments be tested to determine any additional hazards to human health and the environment from the exposed soil. Based on the potential hazards associated with the exposed soil as determined by KDHE, KDHE may require specific protective or remedial actions to prevent future impacts to human health and the environment.

LOCAL ORDINANCES AND ZONING:

The Owner and KDHE acknowledge that the following local ordinances and zoning requirements were in place at the time of recording this Agreement.

This Property is “Un-zoned” by the Planning and Zoning Commission of the City of Cherryvale, Kansas.

DOCUMENT NUMBER: 08-EUC-0033	PROJECT NUMBER: C3-063-00026	PROPERTY CATEGORY: 2
---	---	---------------------------------------

ACCESS:

The Owner hereby agrees and conveys to KDHE, its agents, contractors, and employees, access to the Property for the term of this Agreement to enter or come upon the Property to inspect the Property and perform any required action (i.e., monitoring, sampling, etc.) KDHE deems necessary for any one or more of the following purposes:

1. Ensuring that use, occupancy, and activities of and at the Property are consistent with this Agreement;
2. Inspecting protective structures and any other remedial systems to ensure their designed operation, performance and structural integrity;
3. Documenting environmental conditions of and at the Property;
4. Ensuring implementation and enforcement of the requirements, restrictions, prohibitions, and other limitations described in this Agreement; and/or
5. Performing any additional investigations or remediation deemed necessary by KDHE to protect public health and the environment.

FUNDING:

On behalf of the Owner, the United States Steel Corporation and Citigroup Global Market Holdings, Inc. have agreed to submit to KDHE a one-time payment of \$10,000 to compensate KDHE for costs incurred to perform inspections, monitoring, and tracking of the terms and requirements of this Agreement. The funding requirement for this Agreement is based on the size of the Property, physical properties of residual contamination, types of protective structures at the Property, and frequency of KDHE's anticipated inspections, and anticipated inspection costs.

DURATION:

The Owner hereby agrees that this Agreement extends in perpetuity unless and/or until removal following approval by KDHE pursuant to K.S.A. 2009 Supp. 65-1,227.

INSPECTION REQUIREMENTS:

The Owner shall visually inspect the Property according to the *Interim Operation and Maintenance Plan* dated May 2009 pending approval of the *Final Operation and Maintenance Plan* by KDHE, both of which are incorporated herein by reference. The Owner shall document the condition and current uses of the Property including inspection findings, photo documentation and any other information required to verify if the terms of this Agreement are being fulfilled. The documentation shall be submitted to KDHE within thirty (30) days after the inspection. The Owner may submit and

**DOCUMENT
NUMBER: 08-EUC-0033**

**PROJECT
NUMBER: C3-063-00026**

**PROPERTY
CATEGORY: 2**

KDHE shall consider modifications of the frequency of inspection and reporting if warranted by technical data. Written approval from KDHE must be obtained for modification of frequency of inspection or reporting requirements throughout the term of this Agreement.

MAINTENANCE REQUIREMENTS:

The Owner hereby agrees to provide maintenance of the Property and correct deficiencies according to the *Interim Operation and Maintenance Plan* dated May 2009 pending approval of the *Final Operation and Maintenance Plan* by KDHE, both of which are incorporated herein by reference.

OTHER TERMS AND CONDITIONS:

The Owner hereby agrees to provide KDHE written notification no less than fifteen (15) calendar days prior to any sale, lease, conveyance or other transfer of the Property. The notice shall include the name and business address (if applicable) of the transferee and the expected date of transfer.

Within fifteen (15) days of real property conveyance, the Owner hereby agrees to provide KDHE a copy of the recorded deed with legal description and corresponding survey map for which this Agreement applies.

The Owner, with prior notification to KDHE, hereby agrees to obtain and record with this Agreement an updated, accurate legal description or legal survey of the Property should the adjacent SKO Railroad (formerly the St. Louis and San Francisco Railroad) right-of-way be removed or abandoned.

The Owner hereby agrees to provide KDHE written notification no less than fifteen (15) calendar days prior to any land use changes at the Property.

The Owner acknowledges that the requirements in this Agreement may not be extinguished, limited or impaired through adverse possession, abandonment, waiver, lack of enforcement, or other common law principles, pursuant to K.S.A. 2009 Supp. 65-1,227(e).

The Owner shall cause any lease, grant, or other transfer of any interest in the Property to include a provision expressly requiring the lessee or transferee to comply with the terms of this Agreement. The failure to include such a provision shall not affect the validity or applicability to the Property of this Agreement.

This Agreement may be modified by mutual written agreement by the Owner and KDHE. Within thirty (30) calendar days of executing an amendment, modification, or termination of this Agreement, the Owner shall record such amendment, modification, or termination with the Montgomery County Register of Deeds, and within thirty (30) calendar days thereafter, the Owner shall provide a copy of the recorded amendment, modification, or termination to KDHE that bears the seal and/or notarized signature of the Register of Deeds.

DOCUMENT NUMBER: 08-EUC-0033	PROJECT NUMBER: C3-063-00026	PROPERTY CATEGORY: 2
---	---	---------------------------------

ENFORCEABILITY:

If the terms of this Agreement are not being implemented by the Owner or contamination at the Property presents a hazard to public health or the environment, KDHE may take such action as authorized by K.S.A. 2009 Supp. 65-1,229, including:

- A. Issue an order directing the Owner to correct any deficiencies and fully implement the terms of this Agreement.
- B. Issue an order retracting this Agreement and any remedial action at the Property and requiring the Owner to implement a remedial action at the Property to attain a cleanup standard that will allow for unrestricted use of the Property.

EFFECTIVE DATE OF AGREEMENT:

The Owner shall provide to KDHE a copy of this Agreement bearing the seal or notarization of the Register of Deeds in **Montgomery** within ninety (90) days from **certified receipt** of this fully executed Agreement from KDHE.

On behalf of the Owner, the United States Steel Corporation and Citigroup Global Market Holdings, Inc. shall provide KDHE with funding as determined by KDHE in accordance with K.S.A. 2009 Supp. 65-1,226 within ninety (90) days from **certified receipt** of this fully executed Agreement from KDHE.

Proper recording of all necessary documents and submission of required funding shall be conditions precedent to the effectiveness of this Agreement.

FURTHERMORE, the Owner and KDHE declare that, upon the filing of this Agreement, the Restrictive Covenant, filed for record on the 15th day of November, 1983, with the Montgomery County, Kansas, Register of Deeds, and duly recorded in Book 61 of Misc. on Page 218, is thereby extinguished and replaced by this Agreement insofar as it applies to the east portion of the National Zinc Company Site.

DOCUMENT
NUMBER: 08-EUC-0033

PROJECT
NUMBER: C3-063-00026

PROPERTY
CATEGORY: 2

IN WITNESS WHEREOF, KDHE and the Owner have entered into and executed this Environmental Use Control Agreement through their duly authorized representatives as of this 19th day of April, 2011.

Kansas Department of Health and Environment

By: Robert Moser
Robert Moser, MD, Secretary

ACKNOWLEDGMENT:

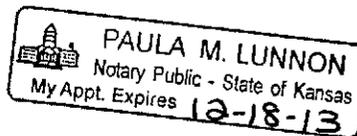
STATE OF KANSAS)
)ss:
COUNTY OF SHAWNEE)

BE IT REMEMBERED, on this 19th day of April, 2011, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came Robert Moser, MD, Secretary and authorized representative of KDHE, who is personally known to be such person who executed the above document on behalf of said Agency, and such person duly acknowledges the execution of the same to be his/her act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Shawnee County, Kansas, the day and year last written above.

Paula M. Lunnon, Shawnee, Kansas
Notary Public in and for said County and State

My Term Expires: 12-18-13



DOCUMENT	PROJECT	PROPERTY
NUMBER: 08-EUC-0033	NUMBER: C3-063-00026	CATEGORY: 2

Kansas Municipality: **City of Cherryvale**

By: John M Wright

Date: 5/6/2011

Print Name: JOHN M. WRIGHT

Title: MAYOR

ACKNOWLEDGMENT:

STATE OF Kansas)
)ss:
 COUNTY OF Montgomery

BE IT REMEMBERED, on this 6th day of May, 2011, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came John M. Wright authorized representative of the City of Cherryvale, who is personally known to be such person who executed the above document on behalf of said municipality, and such person duly acknowledges the execution of the same to be his/her act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Montgomery County, Kansas, the day and year last written above.

Becky Swain
 Notary Public in and for said County and State

My Term Expires: 1/31/2015

