

**SOUTHWESTERN JORDAN VALLEY GROUNDWATER CLEANUP PROJECT
STATE OF UTAH NATURAL RESOURCE DAMAGE TRUSTEE**

**COMMENT RESPONSE SUMMARY
AUGUST 31, 2004**

***Response to Common Comment No. 12 – Kennecott Liability for Natural Resource
Damage and Use of Trust Fund for the Joint Proposal***

A number of comments emphasized that Kennecott should bear all financial responsibility for the cleanup. Similarly, some commenters questioned the manner in which the Trust Fund is to be used under the Joint Proposal or disagreed with providing such funds to Kennecott. As described below, Kennecott assumed the financial obligation for Natural Resource Damages, as set by the Consent Decree, and funded the Trust Fund. The Consent Decree provides that the Trust Fund is available to Kennecott and others for projects that will restore, replace or acquire the equivalent of the damaged resource, provided various requirements are satisfied. The Joint Proposal is such a project and the Trustee has determined that use of the Trust Fund, as outlined in the Joint Proposal, is consistent with the requirements of the Consent Decree.

Responsibility Under the Consent Decree

In 1995, the Court approved a Consent Decree regarding the State's Natural Resource Damage claim against Kennecott for injury to water resources. The Consent Decree sets forth, among other things, Kennecott's obligation to extract contaminants from the low pH/heavy metals plume, complete source control measures, and establish an Irrevocable Letter of Credit and cash payment in a Trust Fund. Kennecott is extracting contaminants from the low pH/heavy metals plume, source control measures are operational, and the Trust Fund was established.

As required by Section V.D.2 of the Consent Decree, in 1995 Kennecott provided the Trustee with a \$28 million Irrevocable Letter of Credit (ILC) representing the amount needed to restore, replace or acquire the equivalent of the natural (groundwater) resource. Section V.D.2.a of the Consent Decree requires that the amount of the ILC be increased annually at 7 percent. Kennecott also provided the Trustee with \$9 million in cash that was placed in the Trust Fund, in consideration of the lost use of a portion of the water through the treatment process.

Under the Consent Decree, the ILC may be reduced if Kennecott provides municipal quality water through treatment of contaminated water, to a purveyor of municipal and industrial water and if other requirements of the Consent Decree, as set forth in Section V.D.2.b, are met. The Consent Decree authorizes a partial reduction to the ILC when the treatment facilities are complete and operational. This reduction represents capital expenditures; further reductions to the ILC representing operation and maintenance costs also are contemplated in the Consent Decree. The ILC portion of the Trust Fund not allocated for a Kennecott project may, at the Trustee's option, be converted to cash and used by the Trustee to restore, replace or acquire the equivalent of the natural resource for the benefit of the public in the Affected Area. The Consent Decree also provides that Kennecott has the right to convert the ILC to cash, which shall be used by the Trustee to restore, replace or acquire the equivalent resource (groundwater) for the benefit of the public in the Affected Area.

Proposed Groundwater Cleanup Project

The project outlined in the Joint Proposal seeks to utilize one half of the ILC for the Kennecott project, the Zone A Plant, pursuant to Section V.D.2 .b of the Consent Decree, and one half of the ILC for the JWCD project, the Zone B Facilities, pursuant to Section V.D.4 of the Consent Decree. Each project will generally be constructed over the next six years, although different construction periods are contemplated for the two plants. The conversion from the 7 percent interest rate to the PTIF rate reflects the Trustee's approval of the project outlined in the Joint Proposal and Kennecott's commitment to expend considerable additional sums of money to construct the two projects.

The ILC portion of the Trust Fund allocated for the Kennecott project is designated the Zone A ILC. Consistent with the Consent Decree, the Zone A ILC will be reduced in capital and operation and maintenance phases. The 3-Party Agreement provides for a 60 percent reduction of the Zone A ILC for capital expenditures upon reaching "Complete and Operational" status. At that time, Kennecott contractually commits to deliver 3500 acre-feet per year of treated water for the forty year Operational Period. The remaining 40 percent of the Zone A ILC, representing the operation and maintenance component, is released in 15 percent increments annually over the next four years with the remainder released in the fifth year.

The ILC portion of the Trust Fund allocated to the JWCD project is designated the Zone B ILC and will be used by the Trustee to restore, replace or acquire the equivalent of the resource. Under the 3-Party Agreement, the Zone B ILC will be reduced by 50 percent when Kennecott has reimbursed JWCD for Zone B construction costs equal to one-half of the Zone B ILC. At that time, JWCD contractually commits to deliver to the Affected Municipalities 1750 acre-feet per year of water for forty years. Further reductions to the Zone B ILC will occur consistent with increases in reimbursements made by Kennecott and increases in JWCD's commitments for water delivery. The Zone B ILC will be reduced to zero when Kennecott has reimbursed JWCD for construction costs equal to the full amount of the Zone B ILC. At that time, JWCD's contractual commitment to deliver water to the Affected Municipalities will be 3500 acre feet per year for forty years, whether or not the Zone B Facilities reach Complete and Operational status.

Funding by JWCD

Kennecott is reimbursing JWCD for the costs to construct the Zone B Facilities in exchange for the reduction to the Zone B ILC as discussed above. The Zone B Facilities will be owned and operated by JWCD. JWCD also is requesting that the Trustee allow JWCD to use the cash portion of the Consent Decree Trust Fund to fund treatment of shallow groundwater or other groundwater at the Zone B plant. Except for certain capital costs Kennecott is advancing, Kennecott is not responsible for treatment and related costs for this shallow groundwater contamination. The majority of the funds JWCD is contributing to the project are for activities undertaken to produce water with a lower TDS than required by the Consent Decree and attributable to costs it would otherwise incur to obtain the water absent contamination. For example, as established in Section V.D.2.b (i) of the Consent Decree, JWCD is obligated to pay Kennecott \$49 (1995 dollars based on the ENR Index) for each acre foot of treated water produced and delivered to JWCD for avoided water supply operating, maintenance and replacement costs. The funds JWCD is providing are discussed in Section 9 of the Project Agreement.

Under Section V.D.2.b (i) of the Consent Decree, if Kennecott desires to receive a reduction to the ILC for any project it proposes, Kennecott must provide the treated water to a purveyor of municipal and industrial water. Thus, the use of JWCD facilities in the Joint Proposal is

required. Such use also is appropriate, since the facilities were constructed for the purpose of conveying and delivering public water supplies to JWCD's member agencies and customers.

Ongoing Operations

As explained above, the Consent Decree outlines the manner in which the Trust Fund may be used. Consistent with the Consent Decree, the Zone A ILC will be reduced in phases to assure that the Zone A Plant is complete and operational. The Zone B ILC will be reduced only as JWCD commits to water deliveries, whether or not the Zone B Facilities are completed (if not completed, JWCD will be required to satisfy its commitment from other available sources).

Kennecott will own the Zone A Plant, and the Zone B Facilities will be owned by JWCD. The plants will be assets for which financial incentives will exist to operate and maintain them. In addition, Kennecott will be contractually obligated under the terms of the Project Agreement and 3-Party Agreement to provide 3500 acre feet of treated water per year from Zone A for the Operational Period of 40 years. JWCD will be contractually obligated under the terms of the Project Agreement and the 3-Party Agreement to deliver 3500 acre feet of treated water per year from Zone B Facilities or from other sources available to JWCD for 40 years. Project Agreement, Sections 4 and 5; 3-Party Agreement, Section I.C. This is consistent with the terms of the Consent Decree, Section V.D.2.b (iii) and d (iii). If either Kennecott or JWCD fails to satisfy its contractual commitments, under Section VII.B of the 3-Party Agreement the Trustee has all remedies available at law and in equity, including the right to recover damages and to seek specific performance.