

**SETTLEMENT AGREEMENT  
AND STIPULATED FINAL ORDER**

**INTRODUCTION**

The New Mexico Environment Department (“Department”); and Freeport-McMoRan Tyrone Inc. (“Tyrone”), formerly Phelps Dodge Tyrone, Inc., (jointly the “Parties”) hereby enter into this Settlement Agreement and Stipulated Final Order (“Tyrone Agreement”).

This Tyrone Agreement is entered into in response to the Decision and Order on Remand issued by the New Mexico Water Quality Control Commission (“Commission”) on February 4, 2009 (“Commission Decision”) and Tyrone’s appeal thereof to the Court of Appeals currently pending as No. 29,321. The Commission Decision addressed Tyrone’s appeal to the Commission of the Supplemental Discharge Permit for Closure for the Tyrone Mine (DP-1341) (“Supplemental Discharge Permit for Closure”) issued by the Department on April 8, 2003, pursuant to the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 to 74-6-17. The Supplemental Discharge Permit for Closure sets forth permit terms and conditions for the closure of the Tyrone copper mine in Grant County (“Tyrone Mine”). The permit includes conditions to accomplish the purposes of section 20.6.2.3101 NMAC.

This Agreement does not address, nor is it the result of, any enforcement or compliance action, or any alleged violation of the Water Quality Act, the Commission regulations, any of the discharge permits for the Tyrone Mine, or any other law, regulation, or permit.

**I. CASE HISTORY**

1. The Parties to this Tyrone Agreement have been engaged in nearly a decade of protracted administrative and judicial proceedings under the Water Quality Act centered on the terms and conditions of the Supplemental Discharge Permit for Closure for the Tyrone Mine.



2. After holding a public hearing from May 20, 2002, through June 1, 2002, the Department issued the final Supplemental Discharge Permit for Closure for the Tyrone Mine on April 8, 2003.

3. In April and July 2003, Tyrone and the Gila Resources Information Project (“GRIP”) filed with the Commission appeal petitions challenging various conditions of the Supplemental Discharge Permit for Closure.

4. On October 15, 2003, the Department Secretary approved a Settlement Agreement and Stipulated Order, executed by the Department, Tyrone, and GRIP, which resolved some of the issues in the appeals. As a result of the settlement, on October 20, 2003, GRIP withdrew its appeal and Tyrone withdrew portions of its appeal, leaving intact its challenges to Conditions 4 and 17.

5. Between October 27, 2003 and November 13, 2003, the Commission held a public hearing on the appeal.

6. On June 10, 2004, the Commission issued a Partial Final Decision and Order, and on August 26, 2004, it issued its Final Order, largely upholding the Supplemental Discharge Permit for Closure, including the challenged conditions.

7. On July 12, 2004, Tyrone appealed the Commission’s decision to the New Mexico Court of Appeals pursuant to section 74-6-7(A) of the Water Quality Act. Tyrone challenged both the authority of the Department to place the challenged permit conditions in the discharge permit, and the Commission’s finding that the Tyrone Mine in its entirety is a place of withdrawal of water for present or reasonably foreseeable future use under section 74-6-5(E)(3) of the Water Quality Act.

8. On July 19, 2006, the Court of Appeals issued its final decision on Tyrone's appeal. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502. The Court upheld the authority of the Department to issue discharge permits subject to conditions. The Court also reversed the Commission's decision to uphold Conditions 4 and 17 and remanded the case to the Commission to adopt and apply criteria to determine places of withdrawal where compliance is to be measured, and to evaluate the reasonableness of Conditions 4 and 17.

9. Between July 23, 2007 and December 16, 2007, the Commission held a public hearing on the remand.

10. On February 4, 2009, the Commission issued its Decision and Order on Remand. The Commission adopted certain criteria and rejected other criteria offered by the parties for determining places of withdrawal. The Commission ordered the Department to identify places of withdrawal using the Commission's criteria, to negotiate appropriate modeling and, in consultation with Tyrone, to determine the effectiveness of Conditions 4 and 17 to prevent and reduce ground water contamination at the places of withdrawal identified under the Commission's criteria.

11. On March 5, 2009, Tyrone filed a notice of appeal of the Commission's decision with the Court of Appeals pursuant to section 74-6-7(A) of the Water Quality Act (No. 29,321). Tyrone challenged, among other things, (a) the Commission's rejection of certain criteria offered by Tyrone, (b) the Commission's conclusion that "at least 100 years" is the timeframe to use in evaluating the reasonable foreseeability of future uses of ground water, and (c) the Commission's conclusion that Tyrone's own withdrawals for mining and remediation purposes constitute places of withdrawal where standards must be met.

12. On March 23, 2009, the Court granted the Department's motion to intervene as an appellee in the proceeding. On April 17, 2009, the Court granted GRIP's motion to intervene as an appellee in the proceeding.

13. As a result of the foregoing, Tyrone, the Department and GRIP entered into extensive good faith negotiations sixteen months ago. This Tyrone Agreement is the result of those negotiations. GRIP notified Tyrone and the Department of its decision not to join Tyrone and the Department as a party to the Tyrone Agreement on December 7, 2010.

## **II. CONDITIONS PRECEDENT TO SETTLEMENT**

14. The Parties will ask the Commission to include its Decision and Order on Remand and this Tyrone Agreement on the Commission's agenda for its next available monthly meeting. The Parties will, with the consent of the Commission, (1) brief the Commission on this Tyrone Agreement, (2) ask the Commission to join with the Department and Tyrone in a joint motion to stay the pending appeal for the purpose of implementing the Tyrone Agreement, and (3) ask the Commission to hold in abeyance the requirements of the section entitled Final Order, Paragraphs A through D on pages 84 and 85 of its February 4, 2009 Decision and Order on Remand pending implementation of this Tyrone Agreement. If the Commission decides either not to approve the Parties going forward under this Tyrone Agreement, or not to join the Parties in a motion for stay, then this Tyrone Agreement will be of no effect and the Parties will petition the Court of Appeals to establish a new briefing schedule with a due date for Tyrone's Brief In Chief not sooner than 90 days following submission of the briefing schedule request to the Court of Appeals.

15. Tyrone has applied to the Mining and Minerals Division of the New Mexico Energy, Minerals, and Natural Resources Department ("MMD") for one or more waivers from

certain reclamation and close-out requirements incorporated into Tyrone's permit issued by MMD under the New Mexico Mining Act of 1993. Tyrone shall be responsible to justify and diligently pursue such waivers with MMD. The Department shall not object to MMD's granting of such waivers to the extent they are consistent with the terms of the Tyrone Agreement.

### **III. PERMIT CONDITIONS**

16. This Section (III) sets forth the framework for substantive conditions that shall be included in the Supplemental Discharge Permit for Closure (DP-1341), as renewed. The Department will include, and Tyrone shall not oppose or appeal, terms or conditions in the renewed permit that are set forth in the framework of this Section.

#### **A. CLOSURE REQUIREMENTS**

17. *Regrading.* The Supplemental Discharge Permit for Closure, as renewed, shall require Tyrone to regrade the slopes of leach stockpiles and waste rock piles, as currently defined in the Supplemental Discharge Permit for Closure, to no steeper than 3 to 1 (horizontal to vertical) except for the Open Pit Surface Drainage Areas defined in Paragraph 19 below. In cases where the regrading of an individual slope would intersect a highway or a surface water of the State as defined in section 20.6.4.7.DDD NMAC, Tyrone may regrade such slopes to no steeper than 2.5 to 1. This condition shall not affect slopes already regraded as approved by the Department. A permit condition will be inconsistent with this Paragraph if it requires a leach stockpile or waste rock pile slope to be regraded to shallower than 3 to 1 or, if it would intersect a highway or surface water of the State, shallower than 2.5 to 1.

18. *Cover System.* The Supplemental Discharge Permit for Closure, as renewed, shall require Tyrone to install a "store and release" cover consisting of a minimum of 36 inches, measured following final regrading consistent with current permit conditions, of non-acid

generating material over the leach stockpiles, waste rock piles, and any other areas including surface impoundments where cover is required for closure, except for the Open Pit Surface Drainage Areas defined in Paragraph 19 below. If further studies demonstrate that an alternative cover system will achieve a level of ground water protection equivalent to or better than the cover system specified in this Paragraph, Tyrone may submit to the Department for approval an application for a permit modification for an alternative cover system. A permit condition will be inconsistent with this Paragraph if it requires a cover to be thicker than 36 inches.

**B. CLOSURE REQUIREMENTS FOR OPEN PIT SURFACE DRAINAGE AREAS**

19. Open Pit Surface Drainage Areas as used in this Section (III) are those areas where the following two criteria are met: (1) storm water drains into open pits and cannot feasibly be diverted by gravity outside the pit perimeter; and (2) the underlying ground water is hydrologically contained by pumping or evaporation of water from the pit bottoms. The Department has approved areas surrounding the Main Pit, the West Main Pit, the Savannah Pit, and the Gettysburg Pit as Open Pit Surface Drainage Areas. In addition, the Open Pit Surface Drainage Areas may be expanded to include other contiguous areas and the area surrounding the Copper Mountain Pit, if Tyrone demonstrates to the Department through an adequate hydrologic investigation that such areas meet the two criteria set out in this Paragraph 19. Any such expansion that increases the areas not subject to full reclamation requirements must be approved by the Department.

20. The Supplemental Discharge Permit for Closure, as renewed, will not require Tyrone to regrade and cover the side slopes of leach stockpiles and waste rock piles within the approved Open Pit Surface Drainage Areas. Instead, the Supplemental Discharge Permit for

Closure, as renewed, shall require Tyrone to close stockpiles as set forth in Paragraphs 21 through 23 of this Section.

21. The Open Pit Surface Drainage Areas as of the date of this Tyrone Agreement are those areas depicted on Map 1 attached hereto as Exhibit A. The facilities or portions of facilities within the Open Pit Surface Drainage Areas as of the date of this Tyrone Agreement include: the east slopes of the 2A East Leach Stockpile; the east slopes of the 2A West Stockpiles; the west slopes of the 1A and 1B Stockpile; the south slopes of the 3B Waste Rock Pile; the southwest slopes of the 5A Waste Rock Pile; the northeast slopes of the 7B, 4A, 2C, and 2B Leach Stockpiles; the top surfaces and all slopes of the 6B Leach Stockpile; all slopes of the 8C Waste Rock Pile; and the Lube Shop Area.

22. The Supplemental Discharge Permit for Closure, as renewed, shall require Tyrone to regrade the top surfaces of leach stockpiles and waste rock piles, and other level areas of significant size, within the Open Pit Surface Drainage Areas to a grade of 1 percent to 5 percent and to cover such surfaces as specified in Subsection III.A above. Storm water runoff from covered areas will be allowed to drain to the open pits. The permit shall require Tyrone to divert storm water runoff from the slopes located above covered stockpile surfaces, covered industrial areas, and non-impacted areas to avoid contact with these areas.

23. The Supplemental Discharge Permit for Closure, as renewed, shall require Tyrone to design and locate any future leach stockpiles, waste rock piles, and other regulated mine facilities that are located in and surrounding the Open Pit Surface Drainage Areas to minimize adverse impacts to ground water quality by limiting the amount of surface drainage to the open pits and facilitating the drainage of water away from the Open Pit Surface Drainage Areas to the extent practicable. Tyrone shall not, in an effort to minimize closure requirements,

alter the design or location of existing leach or waste rock stockpiles, or other regulated facilities that are located in or surrounding the Open Pit Surface Drainage Areas. Tyrone may expand the area of the existing open pits and the elevation of existing stockpiles within and surrounding the Open Pit Surface Drainage Areas in the normal course of mining operations. Future stockpiles located outside the Open Pit Surface Drainage Areas shall be designed and located to meet the provisions set forth in Section IV.B. The renewed permit shall require Tyrone to submit to the Department annual updates of Map 1 showing any incremental increase or decrease in the extent of the Open Pit Surface Drainage Areas resulting from mine activities, including increases in existing stockpile elevations and any expansion of existing open pits. Approval of expansions of the Open Pit Surface Drainage Areas is governed by Paragraph 19.

24. The Supplemental Discharge Permit for Closure, as renewed, shall require Tyrone to collect all water reporting to pit bottoms and treat that water to water quality standards set forth at section 20.6.2.3103 NMAC prior to discharge, as provided in the current permit.

#### **C. OTHER REQUIREMENTS**

25. The Supplemental Discharge Permit for Closure, as renewed, will include other requirements not addressed in this Section (III). Such requirements shall be developed and addressed through the normal discharge permit renewal process. However, such requirements shall not be inconsistent with the terms of this Tyrone Agreement.

#### **IV. COMPLIANCE WITH GROUND WATER QUALITY STANDARDS**

26. This Section (IV) sets forth the means by which Tyrone may demonstrate compliance with ground water quality standards at the Tyrone Mine.

27. For the purposes of this Section (IV), the term "applicable standards" means either the standards for ground water set forth at section 20.6.2.3103 NMAC, any applicable



background concentrations that the Department may approve, or any applicable alternative abatement standards that the Commission has approved under section 20.6.2.4103.F NMAC.

28. For the purposes of this Section (IV), the phrase “above applicable standards” includes water quality that is outside the applicable range for pH.

**A. ABATEMENT PLAN AND ALTERNATIVE ABATEMENT STANDARDS**

29. The Department has notified Tyrone that it is required to submit an abatement plan in accordance with the Commission’s Abatement Regulations, sections 20.6.2.4101 to 4115 NMAC.

30. Tyrone has submitted a Stage 1 Abatement Plan to the Department. The Department approved the plan of work, and Tyrone currently is conducting additional site characterization work under the approved plan of work. Tyrone shall complete the planned characterization work and shall submit a Stage 1 Abatement Plan Final Report by June 30, 2011. The Department may require additional work to complete the Stage 1 Abatement Plan. If the Department requires additional work to complete the Stage 1 Abatement Plan before it will accept a Stage 2 Abatement Plan, then the schedule set forth in Section IV.A of this Tyrone Agreement shall be modified, if necessary, to accommodate the time needed to conduct the additional work.

31. Following execution of this Tyrone Agreement, Tyrone shall commence an analysis of alternative abatement actions, following closure, in consultation with the Department. The analysis shall include employment of a systems model or other model to predict contaminant levels in ground water after implementation of closure measures. Within 180 days after the effective date of this Tyrone Agreement, Tyrone shall submit to the Department for approval the proposed model, together with a detailed written explanation of all input parameters, operating

assumptions, and supporting documents. Tyrone shall consult with the Department in developing the model to facilitate its approval, and the Department will give Tyrone comments and suggestions. Tyrone shall submit the model results as a component of the Stage 2 Abatement Plan. The model parameters shall include the assumption that the requirements for closure described in Section III of this Tyrone Agreement (*i.e.*, the requirements for and extent of regrading and covering stockpiles and for water treatment) comprise the appropriate technology and appropriate measures to reduce discharges to ground water following closure, and that they will be implemented without change. Tyrone shall not be required to evaluate changes to those measures under the abatement plan.

32. Within 60 days after the Department's approval of Tyrone's Stage 1 Abatement Plan Final Report, Tyrone shall submit to the Department for approval a Stage 2 Abatement Plan Proposal. The Stage 2 Abatement Plan proposal shall include the information set forth in section 20.6.2.4106.E NMAC, including a written analysis of selected abatement actions, including options to capture and transport impacted ground water and seepage to the water treatment system following closure, a preferred abatement option, results of the approved model to predict the performance of the preferred abatement option and other abatement options evaluated for comparison, and a monitoring plan to be implemented following closure and during abatement.

33. No later than 120 days following the Department's approval of the Stage 2 Abatement Plan Proposal, Tyrone shall submit to the Department a proposed petition for alternative abatement standards in accordance with section 20.6.2.4103.F(2) NMAC based upon the Stage 2 Abatement Plan Proposal and the analysis conducted therein and any additional analysis Tyrone presents to support the petition. Tyrone's proposed petition shall identify proposed alternative abatement standards for constituents that are predicted to exceed, after

implementation of closure measures consistent with those specified in Section III of this Tyrone Agreement, the standards of section 20.6.2.3103 NMAC, and any “background concentrations” approved by the Department. Tyrone’s proposal shall demonstrate that the proposal for alternative abatement standards meets the criteria in section 20.6.2.4103.F based upon the results of the model, empirical data, and other relevant information. The abatement plan shall provide that alternative abatement standards may be adjusted from time-to-time based upon the results of post-closure monitoring. The Department will respond to the petition for alternative abatement standards in accordance with section 20.1.3.300.A(3) NMAC consistent with this Tyrone Agreement.

34. The Department will not object to the Stage 2 abatement plan proposal or the petition for alternative abatement standards on grounds that the proposal should consider closure measures for cover thickness or regrading of stockpiles different from those set forth in Section III of this Tyrone Agreement. The water treatment system as required in the current permit shall be incorporated as part of the Stage 2 Abatement Plan.

35. The petition for alternative abatement standards shall be subject to review and action by the Commission in accordance with the criteria in section 20.6.2.4103.F(3) NMAC and the procedures for a variance petition. If the Commission approves alternative abatement standards, they will be applied following closure to those parts of the Tyrone Mine where alternative abatement standards have been approved by the Commission. Different alternative abatement standards may apply to different parts of the mine. At closure, ground water beneath the entire Tyrone Mine site will be subject to either water quality standards set forth in section 20.6.2.3103 NMAC, background concentrations approved by the Department, or alternative abatement standards approved by the Commission.

## **B. VARIANCES AND PERMITTING FOR NEW FACILITIES**

36. For any new facility constructed at the Tyrone Mine that may cause contaminants to move directly or indirectly into ground water, Tyrone shall comply with the provisions of this Subsection (IV.B). A new facility is a facility that was not covered by a discharge permit issued by the Department as of February 4, 2009.

37. For any new facility, Tyrone shall employ full technological controls to prevent applicable standards from being exceeded, except as provided in this Paragraph. The term "full technological controls" is used herein to mean the specific measures to prevent ground water pollution that will be adopted in rules for new copper mines to meet the requirements of the Water Quality Act, and as further specified in the ground water discharge permit for the facility. Tyrone may construct a new facility that does not include full technological controls if the new facility meets the following three conditions: (1) it will be constructed in an open pit within an Open Pit Surface Drainage Area; (2) the new facility is constructed in an area with existing ground water contamination above applicable standards at the time construction begins; and (3) the new facility is constructed in an area that is covered by a variance that has been approved in accordance with the Commission's regulations.

38. The Department may issue a discharge permit for discharges from a new facility that exhibits the three conditions in Paragraph 37 above, notwithstanding that such discharge may cause an increase in ground water contamination in an area that already exceeds applicable standards, provided that such increase is temporary and that such contamination will be abated to applicable standards following cessation of mining operations in accordance with the abatement regulations in sections 20.6.2.4101 to 20.6.2.4115 NMAC.

39. The Department will not object to the approval of a variance consistent with Paragraphs 37 and 38.

40. For any new facility that is constructed in an area where alternative abatement standards have been approved by the Commission, a variance will not be required if the approved alternate abatement standards will not be exceeded during operations. For any new facility that is constructed in an area where background concentrations exceed the ground water quality standards in section 20.6.2.3103 NMAC, a variance will not be required if the approved background concentration levels will not be exceeded during operations.

**C. VARIANCES AND PERMITTING FOR EXISTING FACILITIES**

41. For each existing facility that is causing or has caused ground water contamination above applicable standards, Tyrone shall comply with the provisions of this Subsection (IV.C). An existing facility is a facility that is covered by a discharge permit issued by the Department as of February 4, 2009.

42. For each existing facility that is causing or has caused ground water contamination above applicable standards, Tyrone may obtain a variance as described in Paragraph 41 that allows contamination above applicable standards while the facility is in operation.

43. The Department may recommend approval of a variance for an existing facility within the area covered by DP-1341 provided that each of the following conditions are met:

a) Tyrone must demonstrate that ground water pollution from the facility will be abated to meet applicable standards following closure.

b) Tyrone must demonstrate that it is technically and economically infeasible to prevent ground water contamination above applicable standards during operation of the facility.

c) Tyrone must implement measures to control the source and extent of contamination to the maximum extent practicable consistent with current discharge permit terms and conditions.

d) Tyrone must fully contain ground water contamination from the facility consistent with current discharge permit terms and conditions.

e) Tyrone must not expand the authorized footprint of the facility during operation without a permit modification.

## **V. RULEMAKING PETITION**

44. In the Commission proceedings to promulgate regulations to prevent water pollution and to monitor water quality for the copper industry under section 74-6-4(K) of the Water Quality Act, the Department will petition the Commission to adopt rules that include the requirements of this Section (V), and Tyrone shall not oppose the adoption of rules containing these requirements.

### **A. VARIANCE PROCEDURES AND CRITERIA**

45. The petition will propose, among other things, new variance procedures and criteria for copper mines that include the following requirements:

a) All hearings on variance petitions for copper mines will be before the Department.

b) The Department will make a recommendation to the Commission regarding a variance petition based on the hearing record. The Department may recommend that a variance be granted, granted subject to conditions, or denied.

c) The Commission will grant the variance, grant the variance subject to conditions, or deny the variance based on the record created in the Department hearing.

d) One hearing will cover all variance petitions pending at a particular time for a particular copper mine.

e) Variances may be granted for a period of time exceeding five years, and may be granted for the operational life of the facility.

f) A variance shall not be granted that would allow ground water contamination in excess of applicable standards to continue after closure of the facility and abatement is complete.

g) A variance will not be required if alternative abatement standards have been approved for a facility and operation of the facility will not cause ground water contamination above the approved alternative abatement standards.

#### **B. FEE REGULATIONS**

46. The petition also will propose fee regulations applicable to copper mines that include the following requirements:

a) A schedule for payment of permit fees that will require annual fees.

b) Fee amounts will be increased for copper mines commensurate with the estimated cost to the Department of issuing and administering discharge permits. The Department in its discretion may consolidate discharge permits for large copper mines to improve permitting efficiency.

#### **VI. STAY OF APPEAL PROCEEDINGS**

47. Within ten days of Commission approval of this Tyrone Agreement, the Parties shall file with the Court of Appeals a joint motion to stay the matter (No. 29,321) to allow the Parties to implement the terms of this Tyrone Agreement. A form of motion that the Parties will submit to the Court is attached hereto as Exhibit B.

48. If the Court denies the motion to stay the matter, this Tyrone Agreement will be without effect and the Parties will petition the Court of Appeals to establish a new briefing schedule with a due date for Tyrone's Brief In Chief not sooner than 90 days following submission of the briefing schedule request to the Court of Appeals.

49. If the Court grants the motion to stay the matter, the Parties will proceed with the actions identified in this Tyrone Agreement. The Parties will provide status reports to the Appellate Mediation Office as may be required by the Court during the pendency of this Tyrone Agreement. If within 24 months of the execution of this Tyrone Agreement, final agency action by the Department or the Commission is completed in a manner that the Parties agree is consistent with the terms specified in this Tyrone Agreement, including: (1) MMD grant of a waiver; (2) renewal of Tyrone's closure permit; (3) grant of a petition for alternative abatement standards; and (4) adoption of final, non-appealable rules for copper mines, the Parties shall promptly file a joint motion to dismiss the pending appeal under Rule 12-401(B) NMRA.

## **VII. TERMINATION OF AGREEMENT**

50. If, within 24 months of the execution of the Tyrone Agreement, or any extension thereof agreed to by the Parties, the matters set forth in Subparagraphs (a) through (e) below are not resolved, this Tyrone Agreement shall terminate:

a) final agency action by the Department or the Commission renewing DP-1341 consistent with this Tyrone Agreement; and

b) MMD grants a waiver of reclamation requirements within the Open Pit Surface Drainage Area depicted on Map 1, consistent with the terms of this Tyrone Agreement; and

c) the Commission adopts alternative abatement standards consistent with the terms of this Tyrone Agreement; and



d) the Commission adopts rules for copper mines consistent with the terms of this Tyrone Agreement.

Neither Party shall unreasonably oppose or unreasonably seek to delay the resolution of any of these matters.

51. If the Agreement terminates, within ten (10) days after termination Tyrone shall petition the Court of Appeals, in consultation with the Department, to establish a new briefing schedule with Tyrone's Brief In Chief due not sooner than 120 days following submission of the briefing schedule request to the Court of Appeals. The Department shall not oppose Tyrone's petition, but may oppose the proposed schedule.

## **VIII. GENERAL PROVISIONS**

### **A. EFFECTIVE DATE**

52. This Tyrone Agreement shall become effective on the date it is last signed by a duly authorized representative of the two Parties.

### **B. INTEGRATION**

53. This Tyrone Agreement merges all prior written and oral communications between the Parties concerning the subject matter of this Tyrone Agreement, contains the entire agreement between the Parties, and shall not be modified without the express written agreement of the Parties. The Parties may jointly include addenda to this Tyrone Agreement containing additional information that may be used to clarify and interpret this Tyrone Agreement.

### **C. BINDING EFFECT**

54. Unless terminated as specified herein, or by mutual writing of the Parties, this Tyrone Agreement shall be binding on the Department and its successor agencies, and on Tyrone and its successors and assigns, and shall be fully enforceable in a court having jurisdiction over

the subject matter hereof and the Parties. This Tyrone Agreement may be enforced only by the parties hereto.

**D. RESERVATION OF RIGHTS**

55. The Parties reserve all of their respective legal and factual positions, and preserve their respective appellate rights in the pending appeal in the New Mexico Court of Appeals, No. 29,321, without limitation, except as those rights may be expressly modified by the terms of the Tyrone Agreement.

**E. MODIFICATION OF AGREEMENT**

56. This Tyrone Agreement may be modified by written agreement signed by the Parties.

57. The requirements of this Tyrone Agreement could be affected by future changes in laws applicable to the Tyrone Mine. If a future change in law materially affects a requirement of this Tyrone Agreement, the closure permit, the abatement plan, or financial assurance, the change in law will supersede any conflicting requirement of this Tyrone Agreement. In that event, the Parties may amend this Tyrone Agreement to reflect the change in law, and if the Parties cannot agree on an amendment, then Tyrone may terminate this Tyrone Agreement by written notice to the other Party.

**F. AUTHORITY OF THE SECRETARY**

58. The Parties agree that the Department Secretary has all necessary authority to issue this Tyrone Agreement as a Stipulated Final Order pursuant to the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 to 74-6-17, and the Parties shall not challenge such authority in any proceeding. If a court of competent jurisdiction nevertheless rules that the

Department Secretary is without such authority, this Tyrone Agreement shall remain enforceable as a contract between the Parties.

**G. AUTHORITY OF SIGNATORIES**

59. Each person executing this Tyrone Agreement represents that he or she has the authority to bind the Party he or she represents to this Tyrone Agreement, and such representation shall be legally sufficient evidence of actual or apparent authority to bind such Party to this Tyrone Agreement.


**For the NEW MEXICO ENVIRONMENT DEPARTMENT:**

By:  \_\_\_\_\_ Date: 12/17/10  
**MARCY LEAVITT**  
**DIRECTOR**  
**WATER AND WASTE MANAGEMENT DIVISION**

**For FREEPORT- McMoRAN TYRONE INC.:**

By:  \_\_\_\_\_ Date: December 16, 2010  
**L. RICHARDS MCMILLAN II**  
**SENIOR VICE-PRESIDENT**  
**FREEPORT-McMoRAN TYRONE INC.**

This Settlement Agreement and Stipulated Final Order, agreed to by the Department, Freeport-McMoRan Tyrone Inc., and Gila Resources Information Project, is hereby **APPROVED** as a **FINAL ORDER** under NMSA 1978, § 74-6-10.G.




  
\_\_\_\_\_  
RON CURRY  
SECRETARY OF ENVIRONMENT  
Date: 12/20/10

# **EXHIBIT A**

Drawn	MS
Checked	MS
Date	12-1-2009
Job No.	

**Freeport-McMoan**  
**Copper & Gold**

**TYRONE MINE**  
**Map 1-Tyrone Open Pit Surface Drainage Areas**

	Open Pit Surface Drainage Areas
	Potential Future Open Pit Surface Drainage Areas
	Areas to be Reclaimed within Drainage Areas

Scale: AS SHOWN  
Dept. Information, LMS & SURM  
**2009 Aerial Photo**  
Rev. **0**



# **EXHIBIT B**

**IN THE COURT OF APPEALS  
FOR THE STATE OF NEW MEXICO**

**PHELPS DODGE TYRONE, INC.  
and WATERMATTERS, LLC**

**Appellants,**

**No. 29,321**

**v.**

**NEW MEXICO WATER QUALITY  
CONTROL COMMISSION,  
NEW MEXICO ENVIRONMENT  
DEPARTMENT and GILA RESOURCES  
INFORMATION PROJECT**

**Appellees.**

**JOINT MOTION TO STAY THE APPEAL  
TO ALLOW FOR TERMS OF SETTLEMENT**

Appellant, Phelps Dodge Tyrone, Inc. (“Tyrone”)<sup>1</sup>, and Appellees, the New Mexico Water Quality Control Commission (“WQCC”), and the New Mexico Environment Department (“Department”), jointly and respectfully request that this appeal be stayed, and in support thereof state:

1. In a prior appeal, *Phelps Dodge Tyrone, Inc. v. Water Quality Control Commission*, 2006-NMCA-115, ¶¶ 35-38, 140 N.M. 464, 143 P.3d 502, this Court remanded this case to the WQCC with instructions to “create some general factors or policies to guide its determination” regarding the meaning and locations of “place[s] of withdrawal” in the Water Quality Act, NMSA 1978, § 74-6-5(E)(3).

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<sup>1</sup> Tyrone is now known as Freeport McMoRan Tyrone Inc.



2. On remand, the WQCC held hearings on the matter and, on February 4, 2009, entered a Decision and Order on Remand, which contains specific criteria for determining what a “place of withdrawal” is within the meaning of § 74-6-5(E)(3).

3. Tyrone disagreed with certain of the WQCC’s determinations, and timely filed a notice of appeal to this Court.

4. This appeal is assigned to the General Calendar, but this Court has graciously granted multiple extensions of the briefing schedule, at the parties’ request, to enable them to engage in a lengthy series of settlement discussions.

5. Tyrone, the Department and the Gila Resources Information Project (“GRIP”) have engaged in numerous settlement discussions, and Tyrone and the Department have agreed to pursue a course of action that may obviate the need to litigate this appeal without waiving their respective positions on the proper interpretation of “place of withdrawal” under the Water Quality Act. The agreement is known as the “Tyrone Settlement Agreement.”

6. The agreed upon course of action in the Tyrone Settlement Agreement includes requesting the WQCC to hold in abeyance requirements A through D of the section entitled “Final Order” in the February 4, 2009 Decision and Order on Remand pending implementation of the Tyrone Settlement Agreement.

7. Other terms of the Tyrone Settlement Agreement include, among other things, the pursuit of certain regulatory processes allowed under the Water Quality Act and the WQCC's regulations in order to: (1) seek the WQCC's establishment of alternative abatement standards for certain areas of the Tyrone Mine pursuant to section 20.6.2.4103(F) NMAC; (2) seek the Department's establishment of certain variances for existing and new facilities at the Tyrone Mine; (3) seek the WQCC's implementation of new regulations specific to the copper industry in New Mexico; and (4) seek the Department's renewal of operational and closure permits for the Tyrone Mine that incorporate agreed upon reclamation measures.

8. Because the fulfillment of the Tyrone Settlement Agreement is dependent upon the outcome of these regulatory processes, and to allow for the opportunity to continue Tyrone's appeal in the event the regulatory processes do not fully achieve certain expectations of the parties to the agreement, movants request that this Court enter a Stay Order in the form of the attached Exhibit 1. The proposed order provides a stay for the anticipated period required to fulfill the agreement, as well as provisions for petitioning this Court to reinstate a briefing schedule in the appeal as allowed by the terms of the Tyrone Settlement Agreement or in the event of termination of that agreement for any reason.

9. The parties to the Tyrone Settlement Agreement believe, after consultation with the Appellate Mediation Office, that this Court has authority to stay this appeal for purposes of allowing them to implement the terms of the Tyrone Settlement Agreement. While the parties have not located any New Mexico case that discusses a stay in the particular and complex circumstances of this case, they consider the opportunity to resolve their longstanding dispute, and the practical resolutions that may be achieved through the pursuit of the regulatory processes discussed in the Tyrone Settlement Agreement, to be matters of important public policy to the State of New Mexico, and to be wholly consistent with the letter, spirit and intent of the Water Quality Act and the WQCC's regulations issued thereunder.

10. The other parties in this appeal, GRIP, and WaterMatters, LLC, [oppose/do not oppose] this motion.

For the foregoing reasons, the parties respectfully request that the Court enter a Stay Order in the form of the attached Exhibit 1.

Jointly and Respectfully Submitted,

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& SISK, P.A.

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**IN THE COURT OF APPEALS  
FOR THE STATE OF NEW MEXICO**

**PHELPS DODGE TYRONE, INC.  
and WATERMATTERS, LLC**

**Appellants,**

**No. 29,321**

**v.**

**NEW MEXICO WATER QUALITY  
CONTROL COMMISSION,  
NEW MEXICO ENVIRONMENT  
DEPARTMENT and GILA RESOURCES  
INFORMATION PROJECT**

**Appellees.**

**STAY ORDER**

This matter came before this Court upon the joint motion of Appellants, Phelps Dodge Tyrone, Inc. (“Tyrone”),<sup>2</sup> and Appellees, the New Mexico Water Quality Control Commission (“WQCC”) and the New Mexico Environment Department (“Department”), to stay this appeal to allow Tyrone and the Department to pursue certain regulatory processes as part of a comprehensive effort to complete the steps necessary to conclude a settlement of the issues in this appeal.

This Court FINDS that the joint motion is well-taken and should be granted to allow the parties to pursue further administrative proceedings in order to

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<sup>2</sup> Tyrone is now known as Freeport McMoRan Tyrone Inc.

complete the steps necessary to conclude a settlement and obviate the need for this appeal.

It is therefore ORDERED that this appeal shall be stayed for a period of one (1) year from the date of this Order or until the appeal is either dismissed or appeal briefing is reinitiated upon this Court's action taken upon the motion of one or more party.

It is further ORDERED that, at any time during the one year period of this Stay Order, the Court will entertain any motion to dismiss the appeal or reinitiate appeal briefing, and will decide such motion based upon the circumstances presented to it at the time by the parties.

It is further ORDERED that this Court will entertain any necessary motion to further extend the one year period of this Stay Order upon a showing of good cause and the continued diligent pursuit of the terms of the parties' settlement agreement.

Signed and entered this \_\_\_\_\_ day of December, 2010.

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For the New Mexico Court of Appeals