



Boulder County Clerk, CO COVENANT

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*R. BLOUM*

AGREEMENT AND DECLARATION OF COVENANTS

THIS AGREEMENT AND DECLARATION OF COVENANTS, dated as of October 12, 1999, is entered into by and among Valmont Butte Corporation, a Colorado corporation having an address at 2450 Central Avenue, Suite A-1, Boulder, Colorado 80301, and Lincoln Trust Company, a Colorado corporation having an address at 6312 South Fiddlers Green Circle, Englewood, Colorado, as Custodian FBO William G. Smith (collectively, "Landowner"), and the State of Colorado, acting by and through the Colorado Department of Public Health and the Environment (the "Department").

RECITALS

WHEREAS, Landowner is the owner in fee simple of certain real property located in Boulder County, Colorado, consisting of more than 100 acres and more particularly described on Exhibit A attached to and made a part of this instrument (the "Valmont Butte Property"); and

WHEREAS, portions of the Valmont Butte Property have historically been used for milling and processing of mineral ores; specifically, from the 1940s until early 1974, the Allied Chemical Corporation ("Allied") processed fluoride ores mined in the Jamestown, Colorado mining district (the "Allied Operations"), and from 1977 until 1985, Hendricks Mining Company ("Hendricks") processed gold ores, principally from the Cross and Caribou mines located west of Nederland, Colorado (the "Hendricks Operations"); and

WHEREAS, approximately 300,000 cubic yards of tailings from the Allied Operations and the Hendricks Operations were deposited in a roughly 14.11-acre portion of the Valmont Butte Property, near its center. That portion of the Valmont Butte Property had been dammed and contoured to create a primary tailings pond (the "Primary Tailings Pond") and a secondary overflow tailings pond located directly east of the Primary Tailings Pond (the "Secondary Tailings Pond") (collectively, the "Tailings Ponds"), as more particularly described on Exhibit B attached to and made a part of this instrument. The tailings deposit in the Primary Tailings Pond is estimated to be approximately 14 feet thick, and the tailings deposit in the Secondary Tailings Pond is estimated to be approximately 1-2 feet thick; and

WHEREAS, the fluoride ore processed in the Allied Operations contained, and the resulting tailings deposited in the Tailings Ponds contain, naturally occurring radioactive materials at concentrations that are greater than those native to the Valmont Butte Property; and



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WHEREAS, as a result of the occurrence of the naturally occurring radioactive materials in the tailings produced by the Allied Operations and deposited in the Tailings Ponds, the State of Colorado, acting by and through the Colorado Department of Health (now, the Colorado Department of Public Health and the Environment), issued to Allied, in August of 1971, Radioactive Materials License No. Colo. 117-01 (together with amendments thereto, the "Allied License"), pursuant to the Colorado Radiation Control Act Chapter 66, Article 26 CRS 1963, as amended (now codified as Colorado Revised Statutes Sections 25-11-101, et seq.), and the Radiation Control Regulations Part III (collectively, the "Control Act and Regulations"); and

WHEREAS, subsequently in 1971, approximately 1500 cubic yards of soil containing low concentrations of radium from a housing construction site in the City of Boulder (the "City Soils") were deposited in the Primary Tailings Pond and capped, at or about that time, with an approximately 4-6 foot thick layer of inert clean fill material, all in accordance with an amendment to the Allied License; and

WHEREAS, in April of 1977, the State of Colorado, acting by and through the Colorado Department of Health, terminated the Allied License and issued to Hendricks Radioactive Materials License No. Colo. 329-01 (together with amendments thereto, the "Hendricks License"), also pursuant to the Control Act and Regulations; and

WHEREAS, the tailings from the Allied Operations deposited in the Primary Tailings Pond, and such capped City Soils, were subsequently capped by an approximately 2-4 foot thick layer of inert tailings material, principally composed of silica sand, from the Hendricks Operations, and by an additional approximately 2-4 foot thick layer of inert clean fill material, all in accordance with the Hendricks License; and

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WHEREAS, as a result of such activities, the tailings and City Soils located in the Primary Tailings Pond are currently capped and stabilized by an approximately 8-14 foot thick layer of inert materials in the approximate center of the Primary Tailings Pond, which layer of inert cap materials diminishes to a thickness of approximately 3-4 feet at the outer edges of the Primary Tailings Pond; and

WHEREAS, the approximately 1-2 foot thick layer of tailings from the Allied Operations and the Hendricks Operations deposited in the overflow Secondary Tailings Pond is currently capped and stabilized by an approximately 2-4 foot thick layer of inert clean fill material; and

WHEREAS, the potential health and environmental risks associated with the Tailings Ponds identified by the Department



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are (i) radon gas and its decay products in enclosed buildings, (ii) penetrating gamma radiation from naturally occurring materials contained in the Tailings Ponds, or from the City Soils, which could result if the inert materials which currently cap and stabilize the Tailings Ponds are materially disturbed or diminished, and (iii) inhalation or ingestion of tailings materials if they are dispersed by wind, surface water or groundwater (collectively, the "Identified Risks"); and

WHEREAS, the Tailings Ponds are currently capped and stabilized by inert materials which (i) contain the tailings deposits and the City Soils, (ii) protect the tailings deposits and the City Soils against material wind and surface water erosion, and (iii) substantially mitigate and reduce to acceptable levels the gamma radiation measurable on the surface of the Tailings Ponds; and

WHEREAS, the small amounts of dispersed tailings materials located on the Property which are not currently capped and stabilized by inert materials in the Tailings Ponds as described in the immediately preceding paragraph have been determined by the Department to occur in sufficiently low concentrations, and/or in sufficiently stable locations, to be considered not contributory to the Identified Risks; and

WHEREAS, it has been determined that no groundwater pathway exists to transport the tailings deposits or City Soils away from the Tailings Ponds, and that no threat of such a groundwater pathway exists so long as the impervious Pierre shale layer underlying the Tailings Ponds (which Pierre shale layer is estimated to be more than 3000 feet thick) remains intact; and

WHEREAS, the Department wishes to provide for the continued protection of the public from the Identified Risks; and

WHEREAS, continued protection of the public from the Identified Risks will be furthered by the imposition of appropriate conditions and restrictions on future uses and development of the Valmont Butte Property which ensure that the stability of the Tailings Ponds and the existing thicknesses of inert cap materials on the Tailings Ponds are preserved and maintained, and which ensure that enclosed buildings constructed on the Valmont Butte Property are designed and constructed in a manner which reasonably prevents radon gas levels in such buildings from exceeding the guidelines recommended by the United States Environmental Protection Agency ("EPA"), or its successor agency; and

WHEREAS, Landowner voluntarily wishes to impose such conditions and restrictions on future uses and development of the Valmont Butte Property, in the form of permanent restrictive



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covenants running with the Valmont Butte Property as more particularly set forth in this instrument; and

WHEREAS, the Department has determined that monitoring and enforcing such permanent restrictive covenants running with the Valmont Butte Property will be an effective means of preserving and maintaining the stability of the Tailings Ponds and otherwise providing for the continued protection of the public from the Identified Risks; and

WHEREAS, the Department has determined that, to the best of the Department's knowledge, there are no unresolved issues potentially affecting health, safety or the environment resulting from historic activities conducted on the Valmont Butte Property, under either the Allied License or the Hendricks License, or otherwise, that would warrant further regulatory action by the Department; and

WHEREAS, contemporaneously with the execution, delivery and recording of this Agreement and Declaration of Covenants, the Department has terminated the Hendricks License, and has confirmed that both the Allied License and the Hendricks License shall have no further force or effect.

NOW, THEREFORE, in consideration of the mutual covenants and obligations hereinafter set forth, Landowner and the Department hereby agree, and Landowner, on behalf of itself and its successors and assigns as owners of any portion of the Valmont Butte Property, hereby declares, as follows:

**1. Landowner's declaration of covenants:**

(A). **No Habitable Structures within the Tailings Ponds.** No buildings or other enclosed structures that serve as living quarters for any person (collectively, "Habitable Structures") shall be constructed or maintained within any portion of the Tailings Ponds. Subject to the foregoing, and to the requirements of Paragraph 1(B), below, buildings or other enclosed structures that serve as working quarters for any person (collectively, "Working Structures"), and other buildings and structures other than Habitable Structures, may be constructed, maintained and repaired within the Tailings Ponds.

(B). **Compliance with radon guidelines.** Without limiting the effect of Paragraph 1(A), above, prior to Landowner's application for issuance of a final certificate of occupancy with respect to any Habitable Structure or Working Structure constructed within any portion of the Valmont Butte Property, Landowner shall furnish to the Department (i) a true and complete report of a certified laboratory analysis confirming that such structure meets the then-current radon guidelines recommended by the EPA or its successor agency, which guidelines currently



establish an annual average maximum radon concentration of 4 picocuries of radon per liter of air, (ii) a reasonably detailed description of the methods of radon testing, measurement and analysis utilized to achieve such results, and (iii) in the event any radon mitigation design, devices or equipment were employed or installed in the tested structure in order to achieve such results, a reasonably detailed description of such design, devices or equipment, together with true and complete reports of all radon testing, measurements and analyses completed with respect to such structure, including, without limitation, before and after the employment or installation of such radon mitigation design, devices or equipment.

**(C). Tailings Ponds Improvements, Surface Changes, and Permitted Disturbances.** All grading, site preparation, construction and related activities conducted in the Tailings Ponds by or on behalf of Landowner in connection with the construction, improvement, maintenance and/or repair of Working Structures or other permitted structures (i.e., other than Habitable Structures; which are prohibited within the Tailings Ponds pursuant to Paragraph 1(A), above), landscaping and other site improvements (collectively, "Tailings Ponds Improvements") shall be subject to the following conditions and requirements:

(i) Landowner shall notify the Department of Landowner's application to Boulder County (or other governmental agency having jurisdiction over the development and use of the Valmont Butte Property) for any building, grading, land use or other similar permit or approval required in connection with any Tailings Ponds Improvements, and shall furnish to the Department with such notice true and complete copies of all documents submitted to such governmental agency in connection with such application, within ten (10) business days following Landowner's submission of such application to such governmental agency.

(ii) The features, contours and integrity of the existing earthen dam structures which contain and define the Tailings Ponds shall at all times be preserved and maintained.

(iii) All grading, re-contouring or other material alterations of the surface features of the Tailings Ponds (collectively, "Surface Changes") shall be accomplished by importing and depositing additional clean fill material on the affected portions of the Tailings Ponds.

(iv) All excavations, removals and other material disturbances of existing surface materials, soils or tailings within the Tailings Ponds shall be limited to those activities related to the construction, maintenance and repair of (a) foundations, caissons, pilings or other sub-surface structural components, and (b) water, sewer, gas, telephone, electric or other sub-surface utility components,



all in connection with Tailings Ponds Improvements (collectively, "Permitted Disturbances"), subject to the provisions of Paragraphs 1(C)(v) and 1(C)(vi), below.

(v) Any existing surface materials, soils or tailings within the Tailings Ponds which are excavated, removed or disturbed in connection with any Permitted Disturbance shall be (a) fully contained at such construction site, within the Tailings Ponds, during such construction and related activities, and (b) completely re-covered and re-capped within the Tailings Ponds, upon completion of such construction and site restoration activities, with the effect that any such excavated, removed or disturbed surface materials, soils or tailings shall be no less stable and contained within the Tailings Ponds after completion of such construction and related activities than prior to the commencement thereof.

(vi) No wells shall be allowed in any portion of the Tailings Ponds. No drill holes or penetrations of existing surface materials, soils and tailings shall be allowed in any portion of the Tailings Ponds except in connection with any Permitted Disturbances; provided, however, that all such permissible drill holes or penetrations shall be filled with materials that do not materially change or increase water infiltration or flows. In the event of material burrowing, tunneling, penetrations or other similar disturbances of the Tailings Ponds by prairie dogs or other wildlife which the Department reasonably determines will pose a substantial risk of contributing materially to the Identified Risks, Landowner and the Department shall cooperate to develop, and Landowner shall implement, an appropriate plan for managing and controlling such wildlife disturbances.

(vii) All Surface Changes, Tailings Ponds Improvements and Permitted Disturbances shall be completed in a manner which does not materially increase (a) surface water drainage or flows to or from the Tailings Ponds, or (b) surface water accumulation on, or infiltration in or through, the Tailings Ponds.

(viii) In addition to, but not in limitation of, the notice requirements set forth in Paragraph 1(C)(i), above, not later than thirty (30) days prior to the commencement of work within the Tailings Ponds in connection with any Surface Changes, Tailings Ponds Improvements or Permitted Disturbances, Landowner shall notify the Department thereof in order to afford the Department a reasonable opportunity to review any plans, specifications or other documentation prepared by Landowner in connection with such work, and to consult with and provide reasonable advice and suggestions to Landowner in connection with the means employed by



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Landowner to comply with the covenants set forth in this Paragraph 1.

(D). Improvements or alterations to, or removal of, existing ore mill building and improvements. Landowner shall notify the Department not later than thirty (30) days prior to the commencement of any material improvements or alterations to, or demolition or removal of, any of the ore mill buildings or other structures or improvements located on the Valmont Butte Property as of the date hereof. Landowner shall conduct and perform reasonable and appropriate radiation monitoring and control activities during the performance of any such improvement, alteration, demolition or removal work. Any tailings materials discovered in the course of such work which are reasonably determined to pose, as a result of disturbances caused by such work, a substantial risk of contributing materially to the Identified Risks shall be appropriately deposited, capped and stabilized within the Primary Tailings Pond or in another suitable location acceptable to both Landowner and the Department.

2. Term of covenants. Except as otherwise amended or terminated in accordance with the provisions of Paragraph 3, below, the covenants set forth in Paragraph 1, above, shall be perpetual; provided, however, that any covenant to which the rule against perpetuities or the rule against restraints on alienation may be determined to be applicable shall continue only until twenty-one years after the death of the last survivor of the now living descendants of Elizabeth II, Queen of England.

3. Covenants running with the land; further conveyances; amendments and termination. The covenants set forth in Paragraph 1, above, shall constitute a burden on title to the Valmont Butte Property and perpetual covenants running with the land which shall bind and inure to the benefit of Landowner and Landowner's successors and assigns as owners of any portion of the Valmont Butte Property, and the State of Colorado, acting by and through the Colorado Department of Public Health and the Environment or its successor agency. All deeds and other instruments evidencing any conveyance of title or other real property interest in any portion of the Valmont Butte Property shall specifically refer to this instrument and incorporate this instrument by reference. The covenants, terms and provisions set forth in this instrument shall bind and inure to the benefit of the parties hereto and their respective successors and assigns, and may be amended or



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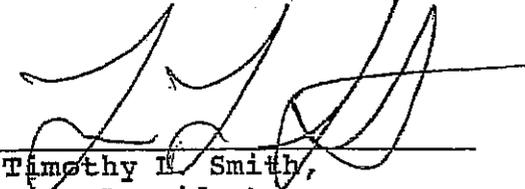
terminated only by a written instrument executed, acknowledged, delivered and properly recorded against the Valmont Butte Property by the Department (or its successor agency) and by all of the then current owners of the Valmont Butte Property.

4. Enforcement of covenants. This instrument and the covenants set forth herein shall be construed in accordance with Colorado law, and shall be enforceable in a court of competent jurisdiction.

IN WITNESS WHEREOF, Landowner and the Department have executed and delivered this instrument for recording as of the date first written above.

LANDOWNER:  
VALMONT BUTTE CORPORATION

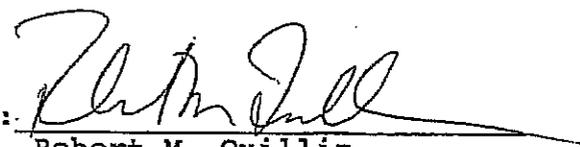
LINCOLN TRUST COMPANY,  
CUSTODIAN FBO WILLIAM G. SMITH

By:   
Timothy H. Smith,  
Vice President

By:   
Its: *Manager*

DEPARTMENT:  
THE STATE OF COLORADO, ACTING BY AND THROUGH THE COLORADO  
DEPARTMENT OF PUBLIC HEALTH AND THE ENVIRONMENT

By:   
Howard Roitman

By:   
Robert M. Quillin





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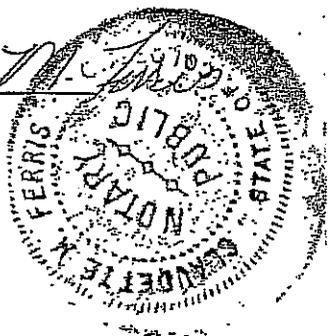
STATE OF COLORADO )  
 ) ss.  
COUNTY OF )

The foregoing Agreement and Declaration of Covenants instrument was acknowledged before me this 6<sup>th</sup> day of October, 1999, by Howard Roitman, as Howard Director of The Colorado Department of Public Health and the Environment.

Witness my hand and official seal.

My commission expires: October 21, 1999.

Claudette M. Ferris  
Notary Public



STATE OF COLORADO )  
 ) ss.  
COUNTY OF )

The foregoing Agreement and Declaration of Covenants instrument was acknowledged before me this 6<sup>th</sup> day of October 1999, by Robert M. Quillin, as LARS Director of The Colorado Department of Public Health and the Environment.

Witness my hand and official seal.

My commission expires: October 21, 1999.

Claudette M. Ferris  
Notary Public





EXHIBIT "A"

PARCEL A:

Part of Sections 22 and 23, Township 1 North, Range 70 West of the 6th P.M., described as follows:

Beginning at the Southeast corner of said Section 22; thence Northerly along the East line of said Section 22, a distance of 214.50 feet; thence Westerly and parallel with the South line of said Section 22, a distance of 625.00 feet; thence Southerly and parallel with the East line of said Section 22, a distance of 214.50 feet to the South line of said Section 22; thence Westerly along the South line of said Section 22, a distance of 654.00 feet; thence North, 26.00 feet; thence West, 304.00 feet; thence North 720.00 feet; thence East, 304.00 feet; thence South, 215.00 feet; thence North 78°30' East, 299.88 feet; thence North 00°16'30" West, 385.00 feet to the South bank of the Housel Mill Ditch; thence Northeasterly along the South bank of said Housel Mill Ditch to the East line of said Section 22; thence Southerly along said East line to the centerline of County Road No. 1 as shown on the recorded Plat of said County Road No. 1 which is recorded in Public Roads Book C at Page 87; thence Northeasterly along the centerline of said County Road No. 1 to the East line of the SW1/4SW1/4 of said Section 23; thence Northerly along said East line to the Northwest corner of the SE1/4SW1/4 of said Section 23; thence Easterly along the North line of said SE1/4SW1/4 to the centerline of said County Road No. 1; thence Northeasterly along the centerline of said County Road No. 1 to the East line of the NE1/4SW1/4 of said Section 23; thence South along the East line of the SW1/4 of said Section 23, a distance of 1,638.90 feet to the South Quarter corner of said Section 23; thence Westerly along the South line of said Section 23, a distance of 2,626.12 feet to the POINT OF BEGINNING;

EXCEPT a parcel in the SE1/4SE1/4 of said Section 22, described as follows:

Commencing at the Northwest corner of said Southeast 1/4 of the Southeast 1/4; thence South, 21 rods; thence East, 20 rods to the TRUE POINT OF BEGINNING; thence South, 8 rods; thence East, 20 rods; thence North, 8 rods; thence West, 20 rods to the TRUE POINT OF BEGINNING.

PARCEL B:

Part of the Southeast 1/4 of the Southwest 1/4 of Section 22, Township 1 North, Range 70 West of the 6th P.M., described as follows:

Beginning at the Southeast corner of the Southwest 1/4 of said Section 22; thence North along the East line of said Southwest 1/4, a distance of 355.26 feet; thence South 36°39' West, 433.80 feet; thence on a 20° curve to the right to the South line of said Southwest 1/4; thence East along said South line to the POINT OF BEGINNING.

Continued....



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PARCEL C:

Part of the Southeast 1/4 of the Southwest 1/4 of Section 22, Township 1 North, Range 70 West of the 6th P.M., described as follows:

Beginning at the Southeast corner of the Southwest 1/4 of said Section 22; thence North along the east line of said Southwest 1/4, a distance of 355.26 feet; thence South 47° West to the South line of said Southwest 1/4; thence East along said South line to the POINT OF BEGINNING;

EXCEPT that parcel described herein as Parcel B;

AND EXCEPT from the above tracts any portion thereof conveyed by Lucile C. Cannon to Design Products, Inc., in Deed recorded December 20, 1965 on Film 534 as Reception no. 802406.

AND EXCEPT portions deeded to Boulder County by deeds recorded May 23, 1984 on Film 1303 as Reception Nos. 622620 and 622628;

AND EXCEPT any portions thereof conveyed to The Colorado Brick Company, Inc., by deed recorded September 14, 1987 on Film 1495 as Reception No. 876679.

All being in the County of Boulder, State of Colorado.



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**EXHIBIT B**  
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Recorder's Note: 10-21-99  
Portion of document  
is a photocopy.

**LEGAL DESCRIPTION - TAILINGS POND:**

A PARCEL OF LAND LOCATED IN THE SOUTH ONE-HALF OF THE SOUTHWEST ONE-QUARTER OF SECTION 23, TOWNSHIP 1 NORTH, RANGE 70 WEST OF THE 6<sup>TH</sup> PRINCIPAL MERIDIAN, COUNTY OF BOULDER, STATE OF COLORADO, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWEST CORNER OF SAID SECTION 23, FROM WHICH THE SOUTH ONE-QUARTER CORNER OF SAID SECTION 23 BEARS S. 89°23'30" E., WITH ALL BEARINGS HEREIN RELATIVE THERETO;  
THENCE N. 12°25'06" E., A DISTANCE OF 355.03 FEET TO THE TRUE POINT OF BEGINNING;  
THENCE N. 10°12'17" E., A DISTANCE OF 370.19 FEET;  
THENCE N. 81°16'19" E., A DISTANCE OF 1655.47 FEET;  
THENCE S. 12°57'47" E., A DISTANCE OF 164.11 FEET;  
THENCE S. 78°04'15" W., A DISTANCE OF 540.93 FEET;  
THENCE S. 06°02'57" W., A DISTANCE OF 344.17 FEET;  
THENCE S. 89°55'28" W., A DISTANCE OF 1173.18 FEET TO THE TRUE POINT OF BEGINNING;  
CONTAINS 614635 SQUARE FEET OR 14.110 ACRES, MORE OR LESS.

PREPARED 7-06-99 BY: JOHN W. CHRISTY, P.L.S. 17477  
4100 E. MISSISSIPPI AVE.  
SUITE 1200  
GLENDALE, CO 80246





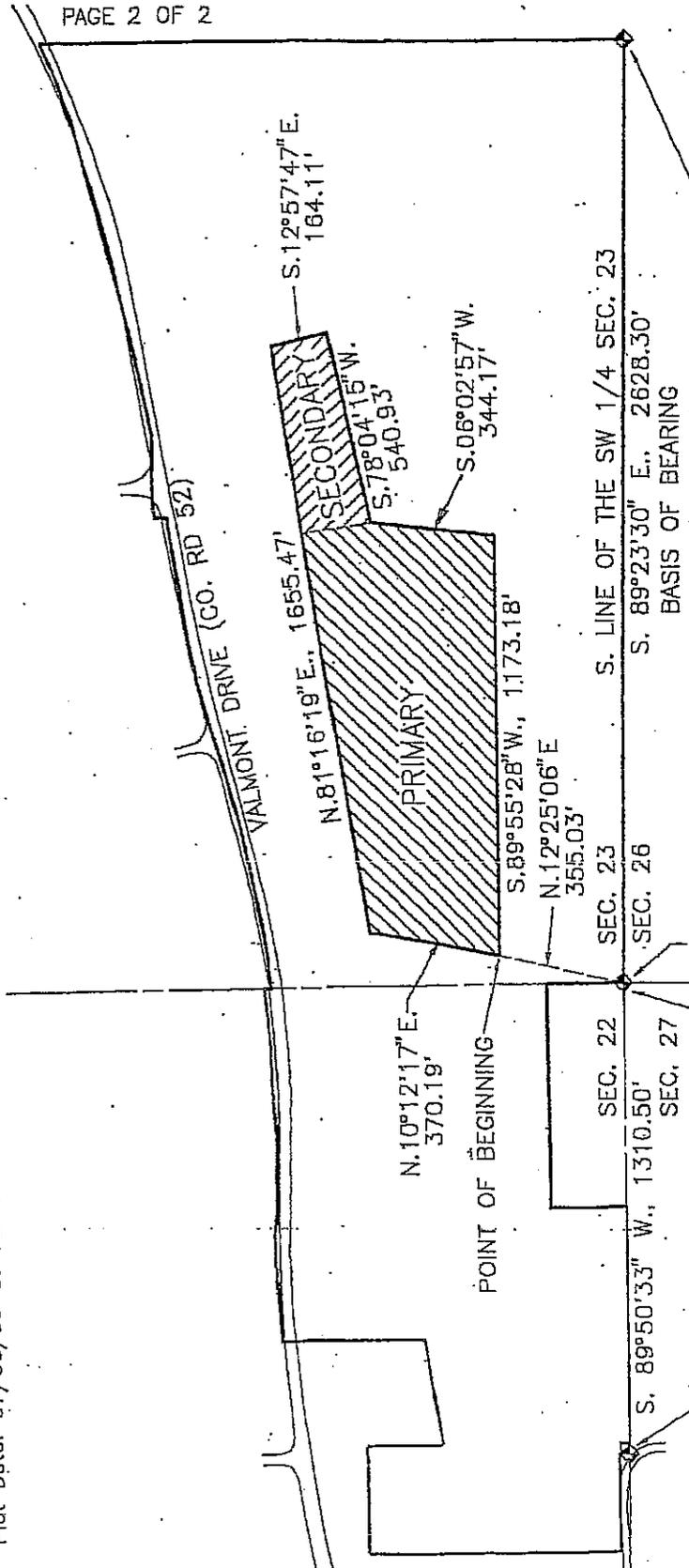
**EXHIBIT B.**

DESCRIPTION OF TAILINGS POND  
 LOCATED IN THE S 1/2 OF THE SW 1/4  
 OF SECTION 23, T1N, R70W OF THE 6TH PM

SOUTH 1/4 CORNER SECTION 23  
 FOUND #6 REBAR WITH 2-1/2" ALUM.  
 CAP STAMPED PLS 17477, 1996  
 MONUMENT RECORD ON FILE.

SOUTHWEST CORNER SECTION 23  
 FOUND GRANITE STONE MARKED  
 WITH "X" ON TOP, 3" x 1-1/2"  
 TOP DIMENSION, MONUMENT RECORD.  
 FILED 1-09-87, BY PLS 11372

EAST 1/16 COR. SECTIONS 22 & 27  
 FOUND #5 REBAR WITH ALUMINUM CAP  
 STAMPED "LS 11372 1/16 1986",  
 MONUMENT RECORD FILED ON 1-29-92.



PC Operator: MWL  
 Plot Date: 07/06/99 at 12:45

PROJECT VALMONT TAILINGS POND

PROJECT NO. \_\_\_\_\_  
 CROSS REFERENCE NO. \_\_\_\_\_  
 DATE OF SURVEY 6-29-99 SURVEYED BY JWH, MJP

**FOREIGN WEST**  
**SURVEYING INC.**  
 4100 E. Mississippi Ave., Suite 1200