



Staff Report

Agenda Item: **REAL PROPERTY TRANSFER AGREEMENT ON THE WASTEWATER TREATMENT PROPERTY ALSO KNOWN AS THE 'FISHER HOUSE'** – Discussion and possible acceptance of a real property transfer agreement between Freeport-McMoRan (formally Phelps Dodge Corporation) and the Town of Clarkdale on the Wastewater Treatment Property.

Staff Contact: Gayle Mabery, Town Manager
Robert Pecharich, Town Attorney

Meeting Date: February 24, 2009

Background: Robert Pecharich, Town Attorney, has been working with Freeport-McMoRan on completing the transfer of the Wastewater Treatment Property (WWTP), a.k.a. Fisher House, to the Town of Clarkdale. The transfer is part of a Settlement Agreement that was approved by Council on November 13, 2007.

In the Settlement Agreement, Clarkdale agreed to accept conveyance of the WWTP property (at the previously agreed upon value in the Development Agreement of \$347,600) and a cash balance of \$718,737.00. The town has received the funds and the negotiation on the transfer of the property has been ongoing.

If the Transfer Agreement is approved, the Town Attorney will open escrow and begin the transfer of the WWTP to the Town.

Recommendation: Staff recommends that Council approve the Real Property Transfer Agreement as presented by the Town Attorney.

REAL PROPERTY TRANSFER

THIS REAL PROPERTY TRANSFER AGREEMENT ("Agreement") is made as of this ____ day of _____, 2009 (the "Effective Date") by and between **FREEPORT-MCMORAN CORPORATION, formerly known as Phelps Dodge Corporation**, a New York corporation (the "Freeport"), **PHELPS DODGE DEVELOPMENT CORPORATION**, a Delaware corporation ("PD Development"), and **THE TOWN OF CLARKDALE**, an Arizona municipal corporation (the "Town"). Freeport, PD Development and the Town are sometimes collectively referred to herein as the "Parties."

RECITALS

A. PD Development is the owner of a building and property located in Clarkdale, Arizona, commonly known as the Fisher House, more particularly described on Exhibit A (the "Property").

B. Freeport, PD Development, and the Town entered into that certain Restated Development Agreement dated December 9, 2003, (the "Development Agreement") and Freeport and the Town have entered into that certain Settlement Agreement dated November 14, 2007 (the "Settlement Agreement") concerning the Property, among other things.

C. As required under the Settlement Agreement, Freeport and PD Development desire to transfer fee simple ownership of the Property to the Town subject to the terms and conditions of the Restated Development Agreement, the Settlement Agreement and this Agreement.

D. As required under the Settlement Agreement, the Town desires to accept the transfer of fee simple ownership of the Property from PD Development subject to the terms and conditions of the Restated Development Agreement, the Settlement Agreement and this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the covenants contained herein, Freeport, PD Development and the Town, intending to be legally bound, state, confirm, and agree as follows:

1. Incorporation of Recitals. The Recitals stated above are true and correct and are incorporated herein by this reference.

2. Transfer of Ownership.

(a) Transfer. Subject to the terms and conditions of the Restated Development Agreement, the Settlement Agreement and this Agreement, Freeport and PD Development agree to transfer fee simple ownership of the Property to the Town, and the Town agrees to accept fee simple ownership to the Property. In accordance with the terms and conditions of this Agreement, PD Development shall convey title to the Property to the Town by special warranty deed substantially in the same form as Exhibit B attached hereto (the "Deed"). In addition, the Parties shall execute any of the documents or instruments reasonably acceptable

to the Parties and Escrow Agent, defined below, to effectuate the transfer of the Property from PD Development to the Town.

(b) **Closing.** The date of recordation of the Deed with the Yavapai County Recorder's Office shall be referred to hereinafter as the "Closing." The Closing shall occur on or before March 1, 2009. All costs and expenses associated with the Closing, including, without limitation, any title report, environmental assessment reports, escrow fees, any policy of title insurance and endorsements required by the Town, and any recording fees, shall be paid by the Town at or prior to the Closing. The Closing shall be coordinated through Land America Title Agency, located at 325 West Gurley Street, Suite 101, Prescott, Arizona 86301 (the "Escrow Agent"), unless the parties mutually agree otherwise.

(c) **Tax Prorations.** Real property taxes and assessments on the Property shall be prorated between PD Development and the Town, based upon a calendar year (January 1 to December 31), as of the Closing. If any portion of the Property is not separately assessed, real property taxes and assessments with respect to such portion of the Property shall be prorated as of the date of the Closing based on the square footage of such portion relative to the square footage of all other real property that is assessed with such portion. If any of the prorations set forth in this Section 2(c) cannot be reasonably calculated as of the Closing, then the amounts shall be calculated within thirty (30) days after the Closing, or as soon as sufficient information is available to permit the parties to accurately calculate such proration(s), and either party owing the other party an amount of money based on such subsequent proration(s) shall pay the amount owed to the other party within ten (10) days after such calculation is made. The obligations under this Section 3(c) shall survive the Closing.

(d) **Inspection/Due Diligence.**

(1) Freeport and PD Development have delivered to the Town and the Town hereby acknowledges receipt of copies of the items described on the attached Exhibit "D," provided that as a condition to delivery Freeport and PD Development required, and the Town executed, the confidentiality and site access agreement ("CSA") attached as Exhibit "C," the terms and conditions of which are fully merged into this Agreement and shall survive the Closing. The Town hereby agrees that Freeport and PD Development have made no representations or warranties whatsoever regarding the items described on Exhibit "D," including without limitation, the accuracy or completeness of such items. The Town acknowledges that any records, information, agreements, documents or any other materials listed or described on Exhibit "D" have been furnished to the Town on the express condition that the Town independently verifies the accuracy and completeness of the information presented or contained therein. The Town shall not attempt to assert any claim for liability or damages against Freeport or PD Development as a result of Freeport and PD Development's having furnished those items or because of the incorrectness or inaccuracy of the information presented or contained therein. The Town hereby releases, and agrees to defend and protect Freeport and PD Development from and against any claims, liabilities or damages by any person (a) claiming that such information was wrongfully disclosed, or (b) to or through whom the Town may have disclosed such information. The provisions set forth in this Paragraph 2(d)(1) shall survive the Closing.

(2) The Town has inspected the Property in strict compliance with the terms and conditions of the CSA. The Town has investigated any and all other matters concerning the Property, including status of title, zoning, access, easements, availability of water and utilities, the physical and environmental condition, assessments and improvement liens and any restrictions or other matters concerning the Property. The Town hereby waives any right to further inspect the Property or to review the status of title to the Property. Procurement of any policy of title insurance for the Property shall solely be the Town's responsibility at the Town's sole cost and expense. Obtaining title insurance for the Property shall not serve as a condition precedent to the Closing.

(3) The Town hereby acknowledges and agrees that Freeport and PD Development shall have no obligation to remediate, cure or correct any environmental condition associated with the Property. The provisions of this Paragraph 2(d)(3) shall survive the Closing.

(e) As is, Where is. TO FREEPORT AND PD DEVELOPMENT'S ACTUAL KNOWLEDGE, WITHOUT INVESTIGATION OR INQUIRY OR DUTY TO DO SO, THE BUILDING ON THE PROPERTY IS VACANT. EXCEPT FOR THE WARRANTY OF TITLE IN THE DEED AND THE REPRESENTATIONS CONTAINED IN SECTION 3, NOTWITHSTANDING ANYTHING CONTAINED IN THIS AGREEMENT TO THE CONTRARY, THE TOWN EXPRESSLY AGREES THAT PD DEVELOPMENT IS TRANSFERRING AND CONVEYING THE PROPERTY AND THE TOWN IS ACQUIRING THE PROPERTY IN ITS STRICT "**AS IS, WHERE IS**" CONDITION, AND "**WITH ALL FAULTS**". EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, FREEPORT AND PD DEVELOPMENT HAVE MADE NO REPRESENTATIONS, WARRANTIES OR GUARANTEES, WHETHER ORAL, WRITTEN OR IMPLIED TO THE TOWN AS TO THE QUALITY, CONDITION (WHETHER ENVIRONMENTAL OR OTHERWISE), MERCHANTABILITY, SUITABILITY OR FITNESS OF THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ANY IMPROVEMENTS THEREON, FOR ANY OF THE TOWN'S PURPOSES OR INTENDED USES WHATSOEVER. THE TOWN HEREBY EXPRESSLY WAIVES ANY AND ALL REPRESENTATIONS, WARRANTIES OR GUARANTEES OF ANY TYPE, WHETHER ORAL, WRITTEN OR IMPLIED, AS TO THE QUALITY, CONDITION (WHETHER ENVIRONMENTAL OR OTHERWISE), MERCHANTABILITY, SUITABILITY OR FITNESS OF THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ANY IMPROVEMENTS THEREON, FOR ANY OF THE TOWN'S PURPOSES OR INTENDED USES WHATSOEVER. THE TOWN ACKNOWLEDGES THAT BY THE TIME OF THE CLOSING, THE TOWN WILL HAVE HAD THE OPPORTUNITY TO INSPECT AND REVIEW THE PROPERTY, WILL HAVE INDEPENDENTLY INSPECTED THE PROPERTY AND WILL ACQUIRE THE PROPERTY SUBJECT TO ANY AND ALL CONDITIONS INHERENT THEREIN, WHETHER APPARENT OR LATENT IN NATURE, INCLUDING, BUT NOT LIMITED TO, THE ENVIRONMENTAL CONDITIONS OF THE PROPERTY. THE PROVISIONS OF THIS PARAGRAPH 2(E) SHALL SURVIVE THE CLOSING AND RECORDING OF THE DEED.

3. Representations and Warranties.

(a) General Representations and Warranties. Freeport represents and warrants to the Town that it is a duly formed and validly existing New York corporation; PD

Development represents and warrants to the Town that it is a duly formed and validly existing Delaware corporation; the Town represents and warrants to Freeport and PD Development that it is duly formed, validly existing, and in good standing in the State of Arizona; each of the Parties represents and warrants that it has full power and authority to enter into and carry out the provisions of this Agreement and all documents or instruments contemplated hereunder; that doing so will not violate or be in conflict with any law, rule, regulation, order, or any agreement to which it is a party or under which it is bound; and that this Agreement has been authorized by all necessary action and is the valid and binding obligation of such Party.

(b) Limitation on Freeport and PD Development's Representations and Warranties. Pursuant to Section 2(e) above, the Town acknowledges, represents, warrants and agrees that it is accepting the Property at Closing in "AS-IS, WHERE-IS" condition. Except as otherwise expressly set forth in this Agreement, Freeport and PD Development make no other guaranties, warranties or representations, express or implied, with respect to the Property, the condition of title to the Property, compliance of the Property with any law, including Environmental Laws, as defined below, suitability of the Property for any intended purpose, habitability of the Property, the accuracy of any information or report provided to the Town regarding the Property, the size, location or physical condition of the Property, the existence of encroachments or legal access, availability of utilities, zoning, value, future value, income potential, productivity, rights to or adequacy or quality of the water supply or water rights, presence or absence of archeological sites or artifacts, soil content or quality, geological condition or any other matter relating to the Property. As used herein, "Environmental Law" shall mean, as amended and in effect from time to time, any federal, state or local statute, ordinance, rule, regulation, judicial decision, or the judgment or decree of a governmental authority, arbitrator or other private adjudicator by which the Town or the Property is bound, pertaining to health, industrial hygiene, occupational safety or the environment, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-et seq. ("CERCLA"); the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-et seq.; the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.; the Federal Clean Air Act, 42 U.S.C. §§ 7401 et seq.; the Federal Safe Drinking Water Act, 42 U.S.C. §§ 300f-et seq.; the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1251-et seq.; the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d; and all similar state laws and regulations and all rules adopted and guidelines promulgated pursuant to the foregoing. The Town hereby expressly agrees to waive and release any and all claims or causes of action which it has or may have in the future against Freeport and PD Development, their parents, subsidiaries and affiliates including, without limitation, statutory remedies, claims or causes of action, such as those created by Environmental Laws, including CERCLA and any remedies, claims or causes of action pursuant to common law. It is the express intent of Freeport and PD Development that the provisions above are material inducements to this transaction and Freeport and PD Development would not enter into this transaction but for the understanding of the Town herein.

4. Notices. Any and all notices, consents or other communications required or permitted by this Agreement shall be given in writing and telecopied, personally delivered, sent by registered or certified mail, return receipt requested, postage prepaid, or sent by Federal Express, DHL, U.P.S. or other similar nationally recognized overnight courier, addressed as follows:

To Freeport and
PD Development:

Freeport McMoRan Corporation
One North Central Avenue
Phoenix, Arizona 85004
Attn: Director, Land & Water Department

with a copy to:

Fennemore Craig, P.C.
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012
Attn: Joe Chandler, Esq.

To the Town:

Town of Clarkdale
P. O. Box 308
Clarkdale, Arizona 86324
Attn: Town Clerk

with a copy to:

Robert S. Pecharich
Boyle, Pecharich, Cline, Whittington & Stallings,
P.L.L.C.
125 North Granite Street
Prescott, Arizona 86301-0122

or at any other address or telecopier number designated by any party hereto in writing. Any notice or communication shall be deemed to have been delivered and received (i) as of the date of receipt, if sent by telecopier (with written confirmation of error-free transmission) on or before 5:00 p.m., Arizona time, on a business day; (ii) the date of delivery, if hand delivered or sent by nationally recognized overnight courier; or (iii) three (3) business days after the date of mailing, if mailed by registered or certified mail, return receipt requested.

5. Remedies. If any Party breaches its obligations under this Agreement, the non-breaching Party shall give written notice to the breaching Party setting forth in reasonable detail the breaching Party's default and giving the breaching Party five (5) days within which to cure such breaching Party's default. If the breaching Party fails to cure the default within such five (5)-day period, then the non-breaching Party shall be entitled to exercise any and all rights and remedies available to it at law or in equity, including, without limitation, the right to terminate this Agreement, to seek specific performance, and to seek actual money damages from the breaching Party, but no punitive or consequential damages.

6. General.

(a) Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by Freeport, PD Development or the Town of any default under this Agreement shall be construed as a waiver of any preceding or succeeding default.

(b) Attorneys' Fees. In the event any Party finds it necessary to bring any action at law or other proceeding against the other Party to enforce any of the terms, covenants, or conditions hereof, or by reason of any default hereunder, the Party prevailing in any such action or other proceeding shall be paid all reasonable costs, attorneys' fees, and litigation related

expenses by the other Party, and in the event any judgment is secured by the prevailing Party, all such costs, attorneys' fees, and litigation related expenses shall be included therein, with the fees to be set by the court and not by jury.

(c) Exhibits. All exhibits to this Agreement are hereby incorporated into this Agreement by this reference.

(d) Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from the counterparts and the signature pages may all be attached to a single instrument.

(e) Forms of Instruments; Cooperation. Except as otherwise specified herein, the forms of all instruments required to close this transaction shall be those customarily used in similar transactions in Yavapai County, Arizona, and each party agrees promptly to execute such documents as may reasonably be requested by Escrow Agent or the other party and to perform such acts as may reasonably be necessary to carry out the purpose and intent of this Agreement.

(f) Successors and Assigns. All of the provisions of this Agreement shall inure to the benefit of and be binding upon the Town, Freeport and PD Development and their successors-in-ownership and assigns.

(g) No Partnership and Third Parties. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture, or other similar arrangement between Freeport, PD Development and the Town. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, organization, or corporation not a party hereto, and no such other person, firm, organization, or corporation shall have any right or cause of action hereunder.

(h) Entire Agreement. This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof. All prior and contemporaneous agreements, representations and understandings of the Parties, oral or written, are hereby superseded and merged herein.

(i) Amendment. No change or additions may be made to this Agreement except by a written amendment executed by the Parties hereto.

(j) Governing Law. This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of Arizona.

(k) Severability. In the event that any part of this Agreement is held to be illegal, invalid, or unenforceable by a court of competent jurisdiction, the validity and enforceability of the remainder of the Agreement shall not be affected.

(l) No Brokerage. The Parties represent and warrant each to the other that they have not dealt with any real estate broker or agent in connection with the transaction that is the subject matter of this Agreement, and each party agrees to protect and defend the other from and on account of any claims, demands, costs and expenses including, but not limited to,

reasonable attorneys' fees, that may be asserted against, suffered or incurred on account of the default by a party under this Section 6(1). Freeport and PD Development's and the Town's representations and warranties set forth in this Section 6(1) shall survive the Closing or termination of this Agreement.

(m) Time is of Essence. Time is of the essence of every provision of this Agreement.

(n) Time Periods.

(i) For the purpose of counting time periods herein, the date of delivery shall not be counted.

(ii) If the time period references "business" days, then neither intermediate nor last Saturdays, Sundays or holidays (defined below) shall be included.

(iii) If the time period does not reference "business" days, then all calendar days shall be counted, except as set forth in (iv) and (v) below.

(iv) The last day of the period so computed under either (ii) or (iii) above shall be included unless it is a Saturday, Sunday or holiday.

(v) A holiday shall be defined as a federal holiday as found in USC Title 5, Section 6103 (as amended or replaced from time to time) or a day on which the recorder's office for the County of Yavapai, Arizona is closed (whether or not this Agreement contemplates a recording at such office). If the holiday is on the last day of the applicable period, then that last day of the time period shall be the next business day.

[SIGNATURE BLOCKS APPEAR ON NEXT FOLLOWING PAGE]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

Approved as to form: _____

FREEPORT-MCMORAN CORPORATION, a New York corporation

By: _____

Title: _____

PHELPS DODGE DEVELOPMENT CORPORATION, a Delaware corporation

By: _____

Title: _____

TOWN OF CLARKDALE, an Arizona municipal corporation

By: _____

Title: _____

Approved as to form:

Attorney of the Town of Clarkdale

Attested:

Clerk of the Town Council

EXHIBITS

- Exhibit A - Property Description
- Exhibit B - Form of Deed
- Exhibit C - Confidentiality and Site Access Agreement
- Exhibit D - Confidential Information

EXHIBIT A

Property Description

Land and improvements, if any, acquired under the following listed deeds: (all book and page references refer to the Official Records in the County Recorder's Office, Yavapai County, Arizona):

Special Warranty Deed dated January 19, 1996 between First American Title Insurance Company as Trustee under Trust No. 8180 and Phelps Dodge Corporation, recorded on February 6, 1996 at Book 3151, Page 635 through 639.

Quit Claim Deed dated January 24, 1997 between Verde Exploration Limited and Phelps Dodge Development Corporation recorded on May 14, 1997 at Book 3407, Pages 315-318.

Quit Claim Deed dated May 5, 1997 between First American Title Insurance Company as Trustee under Trust 7060 and Phelps Dodge Corporation, recorded on May 14, 1997 at Book 3407, Pages 319-321.

Excluding the interest of Arizona Central Railroad, Inc. as evidenced by Quit Claim Deed dated April 10, 1989 between The Atchison, Topeka and Santa Fe Railway Company and Arizona Central Railroad, Inc. recorded on May 18, 1989 at Book 2149, Page 512-518.

SUBJECT TO: Existing taxes, assessments, liens, encumbrances, covenants, conditions, restrictions, rights of way and easements of record.

EXHIBIT B

Form of Deed

WHEN RECORDED, RETURN TO:

Town of Clarkdale
Attn: Town Clerk
P. O. Box 308
Clarkdale, Arizona 86324

**SPECIAL WARRANTY DEED WITH DEED RESTRICTIONS,
RESERVATIONS AND REVERSIONARY RIGHTS**

For and in consideration of Ten Dollars (\$10.00) and other valuable consideration, **PHELPS DODGE DEVELOPMENT CORPORATON**, a Delaware corporation ("Grantor"), does hereby grant and convey to **THE TOWN OF CLARKDALE**, an Arizona municipal corporation ("Grantee"), the following described real property situated in Yavapai County, Arizona (the "Property") together with all improvements thereon, and all rights, privileges, easements, hereditaments, tenements and appurtenances belonging to such Property:

SEE EXHIBIT "A" ATTACHED HERETO AND
INCORPORATED HEREIN BY THIS REFERENCE

Subject to the taxes and assessments not yet delinquent, reservation in patents and all easements, rights of way, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record; and such state of facts as would be disclosed by a proper inspection or accurate ALTA survey of the Property, the Grantor warrants the title against all acts of the Grantor and no other.

Nothing herein shall be deemed a dedication of the Property to the general public.

DATED this _____ day of _____, 2009.

Approved as to Form: _____

GRANTOR:

**PHELPS DODGE DEVELOPMENT
CORPORATION**, a Delaware corporation

By: _____

Name: _____

Title: _____

AGREED & ACCEPTED BY GRANTEE:

THE TOWN OF CLARKDALE, an
Arizona municipal corporation

By: _____
Name: _____
Title: _____

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2007, by _____, the _____ of **PHELPS DODGE DEVELOPMENT CORPORATION**, a Delaware corporation, on behalf of said corporation.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
) ss.
County of Yavapai)

The foregoing instrument was acknowledged before me this _____ day of _____, 2008, by _____, the _____ of **THE TOWN OF CLARKDALE**, an Arizona municipal corporation, on behalf of said municipality.

Notary Public

My Commission Expires:

Exhibit "A"
To Deed

Property Description

Land and improvements, if any, acquired under the following listed deeds: (all book and page references refer to the Official Records in the County Recorder's Office, Yavapai County, Arizona):

Special Warranty Deed dated January 19, 1996 between First American Title Insurance Company as Trustee under Trust No. 8180 and Phelps Dodge Corporation, recorded on February 6, 1996 at Book 3151, Page 635 through 639.

Quit Claim Deed dated January 24, 1997 between Verde Exploration Limited and Phelps Dodge Development Corporation recorded on May 14, 1997 at Book 3407, Pages 315-318.

Quit Claim Deed dated May 5, 1997 between First American Title Insurance Company as Trustee under Trust 7060 and Phelps Dodge Corporation, recorded on May 14, 1997 at Book 3407, Pages 319-321.

Excluding the interest of Arizona Central Railroad, Inc. as evidenced by Quit Claim Deed dated April 10, 1989 between The Atchison, Topeka and Santa Fe Railway Company and Arizona Central Railroad, Inc. recorded on May 18, 1989 at Book 2149, Page 512-518.

SUBJECT TO: Existing taxes, assessments, liens, encumbrances, covenants, conditions, restrictions, rights of way and easements of record.

EXHIBIT C

Confidentiality and Site Access Agreement

(See attached)

EXHIBIT D

Confidential Information

Geotechnical and Environmental Consultants, Inc., Phase I Environmental Site Assessment, Guy S. Fisher Property, Parcels 400-06-16J, 400-06-020 and 400-07-003D, 375 South Broadway, North of Old Route 89A and Tuzigoot Road, Clarkdale, Arizona, dated November 14, 1995.