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ATTORNEYS

Memorandum

From: Crowley Fleck PLLP

Re: BLM CERCLA Liability at Bonita Peak

BLM CERCLA LIABILITY AT BONITA PEAK

I. Executive Summary.

Geographically, volumetrically, and chronologically BLM's involvement in and responsibility for hazardous substances at sites within the Bonita Peak Mining District (BPMD) is extensive. It dwarfs that of any other viable potentially responsible party (PRP). There are no significant viable PRPs with potential liability, other than BLM, EPA, and, to a lesser degree, the U.S. Forest Service. Geographically, BLM's percentage of land ownership and/or operational involvement where hazardous substances may have come to be located is extensive. Volumetrically, BLM has managed considerable waste, including material portions of the Mayflower Tailings Impoundments, the American Tunnel, and adjacent to the Gold King Mine's Level 7 Adit. Chronologically, the federal government has extensively participated in mining of the Silverton Caldera for nearly 150 years.

CERCLA provides that the United States, including BLM, is to be treated no differently than any other nongovernmental entity. BLM risks significant liability as an owner, an operator, or an arranger.

II. CERCLA Liability and Cost Allocation Facts.

A. BLM Ownership in the Bonita Peak Mining District.

Approximately 85% of the Upper Animas River Basin is under federal ownership, a considerable portion of which is BLM ownership. More than 200 small mines or prospects are on BLM land, including at least 11 warranting remediation.[1] More than half of the sites listed within the BPMD are owned fully or partially by the federal government, largely by BLM.

BLM owns several notable sites. BLM owns land containing portions of the waste pile adjacent to the Gold King Mine Level 7 adit, part of which was washed away by the August 5, 2015 Blowout. BLM

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[1] Thomas Nash & David L. Fey, *Mine Adits, Mine-Waste Dumps, and Mill Tailings as Sources of Contamination* 324, in *Integrated Investigations of Environmental Effects of Historical Mining in the Animas River Watershed* (Stanley E. Church, Paul von Guerard & Susan E. Finger eds., USGS 2007); *see also* Upper Animas Mining District Site Background and Activities (May 21, 2011) (noting "[a]pproximately 85% of the land in the Upper Animas Basin is under public ownership [and a] large number of abandoned orphan mine sites are locates on U.S. Forest Service (FS) or U.S. Bureau of Land Management (BLM) property"); Upper Animas Mining District Mixed Ownership Site MOU (EPA/BLM Feb. 12, 2013) (recognizing "[t]he Site is a mixed ownership site…at which releases and threatened releases of hazardous substances, pollutants, or contaminants are located partially on, or the source of the release is partially from, both private lands and BLM lands").

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owns the American Tunnel portal and the exterior American Tunnel bulkhead. BLM owns portions of the Mogul and Grand Mogul Mine workings, and a significant portion of the Grand Mogul Mine waste piles. BLM also owns property in the area of the Clipper Mine.[2]

BLM previously owned property undergoing current CERCLA response actions. Until 2012, BLM owned land covered by a significant portion of Mayflower Tailings Impoundment No. 4 and a portion of Tailings Impoundment No. 2. BLM owned this property the entire time that tailings were being deposited on it. BLM is also a prior owner, prepatent, of significant portions of Tailings Impoundment Nos. 1 and 2.

B. BLM Management and Control.

BLM has exercised and does exercise considerable decision making regarding hazardous substances, including their disposal, within the BPMD.

"The Upper Animas Mining District . . . includes public lands under the jurisdiction and control of BLM and the USDA-Forest Service." "It is the BLM's responsibility to protect the public lands from undue and unnecessary degradation."[3] "BLM will be the lead for response actions involving a parcel, project or operable unit located on BLM lands . . . [and] BLM will have the responsibility, consistent with the NCP, for making decisions on federal lands."[4]

In exercising its express managerial control of hazardous substances at BPMD sites, BLM has worked on drainage collection and diversion, capped waste piles and tailings, removed tailings, implemented passive treatment of mine discharge, consolidated and neutralized waste, and conducted repository maintenance. "BLM has an important role to play as manager/owner of the American Tunnel discharge and a portion of the Grand Mogul mine waste dump."[5] The "American Tunnel is public land managed by BLM."[6] BLM has reviewed and approved plans of operation and ensured environmental compliance at the Sunnyside Mine,[7] and BLM owned a portion of Mayflower Tailings Impoundment No. 4 during all periods of tailings deposition. BLM authorized a landfill located at Mayflower Impoundment No. 4 and extending into Impoundment No. 3.

EPA views BLM as a potentially responsible party, and even attempted to send BLM a CERCLA 104(e) information request.[8] EPA has questioned BLM's failure to treat the American Tunnel discharge. BLM manages the American Tunnel, and owns its exterior portion. At the Clipper Mine, BLM has resisted remediation.

The federal government was aware from at least May 2011 that one of the "worst sources [was] the Gold King Mine 7 Level,"[9] and that a waste pile, owned in part by BLM, existed adjacent to the Gold King Level 7 adit. EPA estimates that 1% of the metals released in the Gold King Blowout came from inside

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[2] Richard Sisk Ltr. to SGC (Dec. 21, 2017).

[3] Removal Action Decision Non-Time Critical Removal Action Lark Mine and Joe & John Mine (April 3, 2006).

[4] Upper Animas Mining District Mixed Ownership Site MOU (EPA/BLM Feb. 12, 2013).

[5] Upper Animas Mining District Site Background and Activities (May 21, 2011).

[6] Robinson (BLM Environmental Engineer) Email to Forrest (EPA Site Assessment Manager) (Oct. 5, 2007).

[7] *See e.g.* BLM Decision Record Plan of Operations (May 11, 1988); Sally Wisely Ltr. to SGC re Plan of Operations Approval (March 11, 1988); Solid Mineral Inspection Report (July 2, 2014).

[8] Ann Umphres Email to Richard Sisk and Carol Campbell (September 29, 2011).

[9] Upper Animas Mining District Site Background and Activities (May 21, 2011).

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the Mine itself, while 99% of the metals were scoured from that same waste pile and the Cement Creek streambed.[10]

Additionally, at sites within the BPMD, the government granted specific mining companies special permission to operate, invested in infrastructure necessary to mine, financed and invested in mining exploration and operations, established ceilings on selling prices and minerals, contemplated premiums for production levels, received royalties from mining operations, and controlled metals mined and the allocation of labor.

III. CERCLA Liability and Cost Allocation Law.

A. Overview.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes liability on both current and former "owners" of property contaminated with hazardous substances. Under CERCLA, fault for the contamination is irrelevant; ownership alone establishes liability. Where the BLM owns contaminated property, or owned property at the time of disposal of hazardous substances on that property, BLM is strictly liable for environmental cleanup costs.

CERCLA also imposes operator liability on anyone in a position to manage, direct, or conduct operations specifically related to pollution. Similarly, CERCLA imposes liability on anyone who arranges for the transport or disposal of hazardous substances. Where BLM is an operator or arranger, it is also strictly liable for environmental cleanup costs.

Regardless of the basis for liability, cleanup costs may be allocated to a responsible party based on the party's relationship with the site. The greater the relationship, the greater the allocated costs. Courts will carefully analyze the government's ownership, operation, or culpability to determine its equitable share of environmental cleanup costs.

CERCLA expressly provides that the United States is treated the same as any other nongovernmental entity.[11] CERCLA imposes liability on "covered persons," including owners, operators, and arrangers. The definition of "person" specifically includes the "United States,"[12] and by extension BLM.

B. Owner and Past Owner Liability.

Under CERCLA, liability may be imposed on both current and past facility owners for a release or threatened release of hazardous substances.[13] Ownership of a facility is broadly construed, and includes, at minimum, the legal title holder.[14] A facility is more than simply a building, structure, or parcel of land. It is defined under CERCLA to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[15] Accordingly, a party may be liable

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[10] U.S. EPA, *Analysis of the Transport and Fate of Metals Released from the Gold King Mine in the Animas and San Juan Rivers*, EPA/600/R-16/296 (January 2016).

[11] 42 U.S.C. § 9620(a)(1).

[12] 42 U.S.C. §§ 9607(a); 9601(21).

[13] 42 U.S.C. § 9607.

[14] *Chevron Mining Inc. v. U.S.*, 863 F.3d 1261, 1273 (10th Cir. 2017).

[15] 42 U.S.C. § 9601(9).

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even if it only owns a portion of a facility, and its liability may extend to wherever hazardous substances from that facility have come to be located.[16]

CERCLA provides that the United States, and by extension BLM, is subject to CERCLA liability "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity[.]"[17] The U.S. Court of Appeals for the Tenth Circuit recently affirmed this conclusion in the context of unpatented mining claims, making clear that holding legal title alone is sufficient to impose CERCLA liability on the federal government. Even if a facility is not federally controlled or operated, but the underlying title is federally owned, the government is liable under CERCLA.[18]

C. Operator and/or Arranger Liability.

CERCLA imposes operator liability on anyone in a position to "manage, direct, or conduct operations specifically related to pollution[.]"[19] An operator must make relevant decisions specific to hazardous substances, including decisions about compliance with environmental regulations.[20] CERCLA also imposes operator liability where the government controls decisions over what products would be produced, or the extent and nature of product sales.[21]

CERCLA imposes arranger liability on anyone who arranges for the transport or disposal of hazardous substances. CERCLA also imposes arranger liability where the government knew or should have known activities would result in the generation of hazardous substances, including in the context of mining exploration and development.[22]

Where the United States is liable as an operator or arranger, it is strictly liable for its equitably allocated share of cleanup costs.[23]

D. Allocating Environmental Cleanup Costs.

An owner, operator, or arranger may be allocated environmental cleanup response costs. Courts consider numerous factors in allocating costs, including: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste; (4) the degree of involvement of the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste; (6) the degree of cooperation by the parties to prevent any harm to the public health or the environment;[24] (7) the extent to which cleanup costs are attributable to wastes for which a party is responsible; (8) the party's level of culpability; (9) the degree to which the party benefitted from disposal of the waste; and (10) the

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[16] *Chevron*, 863 F.3d at 1270.
[17] 42 U.S.C. § 9620(a)(1).
[18] *Chevron*, 863 F.3d at 1274.
[19] *U.S. v. Bestfoods*, 524 U.S. 51, 67 (1998).
[20] *Lockheed Martin Corp. v. U.S.*, 35 F. Supp. 3d 92, 121 (D.D.C. 2014), *aff'd*, 833 F.3d 225 (D.C. Cir. 2016).
[21] *FMC Corp. v. U.S. Dept. of Com.*, 29 F.3d 833, 844 (3d Cir. 1994).
[22] *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1134 (D. Idaho 2003).
[23] *See Chevron*, 863 F.3d 1261.
[24] *U.S. v. Colorado & E. R. Co.*, 50 F.3d 1530, 1536 n.5 (10th Cir. 1995).

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party's ability to pay its share of the cost.[25]

Other factors considered, particularly in the case of government liability, include: (1) the knowledge and/or acquiescence of the parties regarding the contaminating activities; (2) the value of the contamination-causing activities to furthering the government's national defense efforts; (3) the financial benefit that a party might gain from remediation of the site; (4) the potential that a plaintiff might make a profit on the contamination at the expense of another PRP; and (5) CERCLA's intent that responsible parties bear the costs of cleanup.[26]

These factors are neither exhaustive nor exclusive, and a court may use any relevant factor in allocating cleanup costs between responsible parties.[27] Courts will carefully scrutinize the government's ownership, operation, or culpability to ensure the government is allocated its equitable share of environmental cleanup costs.[28]

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[25] *Lockheed Martin Corp. v. U.S.*, 35 F. Supp. 3d 92, 123 (D.D.C. 2014), *aff'd*, 833 F.3d 225 (D.C. Cir. 2016).

[26] *Lockheed Martin Corp. v. U.S.*, 35 F. Supp. 3d 92, 123–24 (D. D.C. 2014), *aff'd*, 833 F.3d 225 (D.C. Cir. 2016) (citing *Weyerhaeuser Co. v. Koppers Co.*, 771 F.Supp. 1420, 1426 (D. Md. 1991); *Cadillac Fairview/Cal., Inc. v. Dow Chemical Co.*, 299 F.3d 1019, 1026 (9th Cir.2002); *Halliburton Energy Servs., Inc. v. NL Indus.*, 648 F.Supp.2d 840, 863 (S.D. Tex. 2009); *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 447 (3d Cir. 2005); *Litgo New Jersey, Inc. v. Martin*, 2011 WL 65933, *9 (D. N.J. Jan. 7, 2011); *Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 391 (3d Cir.2013); *Friedland v. TIC–The Indus. Co.*, 566 F.3d 1203, 1207 (10th Cir. 2009); *Vine St., LLC v. Keeling ex rel. Estate of Keeling*, 460 F.Supp.2d 728, 765 (E.D. Tex. 2006)).

[27] *Id.*

[28] *TDY Holdings, LLC v. U.S.*, 872 F.3d 1004 (9th Cir. 2017).

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