Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

January 17, 2020

Sent via email to: Hladick.Christopher@epa.gov

Mr. Christopher W. Hladick
Region 10 Administrator
U.S. Environmental Protection Agency
1200 Sixth Avenue, Ste. 155, M/S 21-B03
Seattle, WA 98101

Re: Nez Perce Tribe's objection to the Environmental Protection Agency allowing the Shoshone-Bannock Tribes' participation as a signatory to an administrative settlement agreement for the proposed Stibnite Mine Remedial Investigation and Feasibility Study

Dear Mr. Hladick:

The Nez Perce Tribe objects to the Environmental Protection Agency ("EPA") allowing the Shoshone-Bannock Tribes ("Shoshone-Bannock") to participate as a signatory party to a potential administrative settlement agreement for the proposed Stibnite Mine Remedial Investigation and Feasibility Study under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The Nez Perce Tribe is aware that the Shoshone-Bannock has been directly involved in negotiations with EPA, Forest Service, state of Idaho, and Midas Gold concerning a potential administrative settlement agreement. This involvement includes the Shoshone-Bannock's submission of written comments on the draft Statement of Work requesting, among other actions, that EPA and the other parties include a provision that would identify the Shoshone-Bannock as an "oversight agency" on a potential administrative settlement agreement for the proposed Stibnite Mine.

The proposed Stibnite Mine, located entirely within the Nez Perce's aboriginal territory, is subject to the rights that the Nez Perce reserved, and the United States secured, in its 1855 and 1863 Treaties.[1] In addition to holding treaty-reserved rights at the proposed Stibnite Mine, the

[1] Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957; Treaty with the Nez Perces, June 9, 1863, 14 Stat. 647. The 1863 Nez Perce Treaty by its express terms did not abrogate but was instead "supplementary and amendatory"

proposed mine is located entirely within the Nez Perce's area of exclusive use and occupancy as adjudicated by the Indian Claims Commission ("ICC") in its 1967 decision.[2] The United States Congress established the ICC in 1946 to adjudicate Indian tribes' claims against the federal government for, among other issues, compensation for the taking of aboriginal lands by the United States without fair payment. The ICC required that compensable aboriginal land title be based on "actual exclusive and continuous use and occupancy 'for a long time' prior to the cession, transfer, or loss of the property."[3] In this decision, the ICC made comprehensive findings regarding the Nez Perce's claim for unconscionable compensation for land ceded to the United States in the 1855 Treaty. The ICC's comprehensive findings in its decision were based on detailed anthropological evidence from both the United States and the Nez Perce of the area of "exclusive use and occupancy" and "aboriginal ownership" as against any other Indian tribes. Among other areas, the ICC's decision included the entire area encompassing the proposed Stibnite Mine and affected South Fork Salmon River watershed.

Unlike the Nez Perce, the Shoshone-Bannock lacks any territorial or jurisdictional basis for participation as a signatory to an administrative settlement agreement for the proposed Stibnite Mine. Any treaty right the Shoshone-Bannock purports to have in the proposed Stibnite Mine area is without legal or other evidentiary support. No federal court has ever altered the ICC's findings of fact and conclusions of law nor is there any legal or evidentiary support that would justify doing so.

As a co-manager of its treaty fishery, the Nez Perce maintains and oversees all treaty-related fishing activities for its members, including in the watershed affected by the proposed Stibnite Mine where the Nez Perce still actively uses and manages resources. The Nez Perce expends $2.5 million annually on work to support and increase salmon runs throughout the South Fork Salmon River watershed. The Nez Perce expends funds for hatchery supplementation, fishery research, and habitat restoration projects in the South Fork Salmon River watershed, which is affected by the proposed Stibnite Mine. This work includes moving Chinook salmon above the fish passage blockage at the proposed Stibnite Mine site to spawn. The fish passage blockage was created by the legacy mine pit known as the Glory Hole. The resulting juvenile production from above the Glory Hole helps boost overall returns of Chinook salmon to the South Fork Salmon River watershed.

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of the 1855 Treaty: it reduced the size of the land reservation, but otherwise preserved "all the provisions" not "specifically changed," including the 1855 Article III fishing rights.

[2] *Nez Perce Tribe v. United States*, Docket #175, 18 Ind. Cl. Comm. 1 (1967). ICC decisions are cited by the federal courts as precedent: e.g. *United States v. State of Or.*, 29 F.3d 481, 487 (9th Cir. 1994) (relying on the ICC's 1967 Nez Perce decision on the question of the vesting and exclusivity of the Nez Perce's 1855 Treaty fishing rights, as against the Confederated Colville Tribes).

[3] *Nez Perce Tribe v. United States*, Docket #175, 18 Ind. Cl. Comm. at 128 (citations omitted).

In addition, the Shoshone-Bannock has not, to the Nez Perce's knowledge, expended any funds or taken any fish restoration or remedial actions, or otherwise incurred any costs whatsoever in response to a release or threatened release of hazardous materials at the proposed Stibnite Mine. Under §107(a)(4)(A) of CERCLA, tribes have a right to recover from potentially responsible parties "all costs of removal and remedial action incurred."[4] Shoshone-Bannock's failure to meet these statutory thresholds for proving response costs associated with the proposed Stibnite Mine and for having jurisdiction over the site further highlight why their participation as a signatory party to a potential administrative settlement agreement is impermissible.

Please understand that the Nez Perce will continue full and meaningful engagement with EPA on a government-to-government basis on issues related to the proposed Stibnite Mine. We fully expect, however, that any final administrative settlement agreement will reflect, as a matter of well-settled law, the exclusivity and primacy of the Nez Perce Tribe's treaty rights in the area of the proposed Stibnite Mine

Sincerely,

Mr. Shannon F. Wheeler
Chairman

cc: Ms. Elizabeth McKenna (McKenna.Elizabeth@epa.gov)

[4] CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).