The SHOSHONE-BANNOCK TRIBES

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November 6, 2020

Assistant Administrator Susan Parker Bodine
Office of Enforcement and Compliance Assistance

Assistant Administrator Peter C. Wright
Office of Land and Emergency Management

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

By email to: Bodine.Susan@epa.gov; Wright.Peter@epa.gov

Re: Shoshone-Bannock Tribes' Comments on Stibnite Mine Administrative Settlement Agreement and Order on Consent

Dear Ms. Bodine and Mr. Wright:

The Shoshone-Bannock Tribes are submitting these comments on the draft CERCLA Administrative Settlement Agreement and Order on Consent (ASAOC) that you sent to us on October 20, 2020. Unfortunately, because you did not send a copy of your letter to our Environmental Waste Management Program (EWMP), which has the lead on this matter (as you may recall from the brief virtual meeting we had with you on September 2, 2020), the letter was not actually received until October 23, 2020. In addition, our comments on the Draft Environment Impact Statement for the Stibnite Mine were due on October 28, 2020. As we have limited resources and thus insufficient staff to address all the mining issues we are currently dealing with, that has left very little time to put together our comments by today, the date you specified in your letter.

As we already expressed to you during our September 2 meeting and in our follow-up letter of September 4, 2020, we are very disappointed that EPA abruptly excluded the Tribes from its settlement discussions with Midas Gold and did not provide for us to be a party to and support agency under the ASAOC. The Shoshone-Bannock Tribes have used the area surrounding the mine site to hunt and fish for generations, as evidenced by archaeological finds in that region, and we continue to do so today, including for subsistence use. Article 4 of the 1868 Fort Bridger Treaty guarantees us the rights to hunt and fish on unoccupied lands of the

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United States, and these rights will be impacted by the Stibnite Mine and the ASAOC. *See* Treaty with the Eastern Band Shoshoni and Bannock, Art. 4, 15 Stat. 673 (1868). EPA, as a federal government agency, has a trust obligation to protect our treaty rights. Moreover, the mine impacts the South Fork of the Salmon River, which is just downstream, where we have been working for decades to enhance habitat and water quality so that impacted fisheries can be returned to the river.

Because EPA has excluded us from the ASAOC process, we do not know the basis for many of the provisions in the ASAOC and attached Statement of Work (SOW). Nevertheless, we have some additional comments that go to the essence of these documents.

First, our main goal and indeed the main goal of CERCLA is for the mine site to be remediated, and not merely for water to be diverted and waste moved around. The draft ASAOC does not, however, require any remediation to take place. Instead, its only requirements are contained in Phase 1 of the SOW, and these do not include remediation. Phase 1 consists of a largely temporary stream diversion project; the removal of approximately 300,000 tons of mining waste (only about 2% of the total) from streams and floodplains and its placement into an on-site repository (to be designed and constructed as part of Phase 1); and "baseline" studies at five of the mine adits. Everything else in the SOW is "optional" and is termed as such in both the ASAOC and the SOW. *See, e.g.*, ASAOC ¶ 33; SOW at p. 1. In fact, other than the removal of an additional 200,000 tons of waste under the "Optional" Bridge Phase, any further actions under the "optional" phases after Phase 1 are not even described in any detail. *See* SOW § 4.1 ("The Agencies will amend the SOW for optional Phase 2 to address the details of Optional Phase 2 Work after Respondents have notified the Agencies in writing of their commitment to perform optional Phase 2.); SOW § 4.2 ("If Respondents and the Agencies elect to continue work under the ASAOC in Phase 3, the Agencies will amend this SOW to identify the specific Source Areas to be addressed and the tasks to be performed."). The ASAOC should require at least some remediation to take place at the site.

Second, while removal of 300,000 tons of waste from streambanks and floodplains and construction of an onsite repository to hold this waste may be beneficial to human health and the environment, it is not clear how that result was determined. For example, what was EPA's basis for selecting the 300,000 ton figure? Was this tonnage based on the estimated 29 lbs/year of arsenic loading? Assuming that any other phases of work take place, how was the subsequent 200,000 ton figure determined? Will removal of this amount of waste material result in appreciable benefits, or should a greater amount of waste removal be required?

Third, how will baseline be determined, for purposes of the baseline studies of mine-influenced water at the five adits listed in the ASAOC? Is the term "baseline" intended to be equivalent to CERCLA background comparisons? If so, wouldn't it be based on historical records rather than current studies, since mining has been taking place at the site for decades?

The ASAOC states that alluvial groundwater sampled in groundwater wells in the Northwest Bradley waste rock dump and in wells downgradient of the Bradley Tailings and Spent Ore Disposal Area regularly show elevated arsenic and antimony concentrations. Do these

alluvial groundwater wells also have elevated concentrations of mercury, cyanide, or any of the contaminants listed in ASAOC ¶ 23?

Finally, whatever actions are eventually required under the ASAOC, we support the post-removal site control requirements in the current draft. CERCLA § 104(a)(2), 42 U.S.C. § 9604(a)(2), requires that "any removal action . . . should, to the extent . . . practicable, contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned." Post-removal site control will at least help ensure that any actions undertaken will not be wasted effort.

In addition, we have the following request and questions. First, the ASAOC references a number of removal actions that the U.S. Forest Service and EPA undertook between 1999 and 2009. The Tribes would like to be provided details on these removal actions and what benefits were gained from them.

Second, are the diversions of Meadow Creek, referenced in ASAOC ¶ 18 as having occurred between 1982 and 1999, still in effect? How many miles of Meadow Creek were diverted?

We also have a few comments on the document drafting. Regarding the ASAOC, we noticed that a signature page is included for the Shoshone-Bannock Tribes, but you have excluded us from the rest of the document; what is the purpose of this signature page? There also is a signature page for the Idaho Department of Environmental Quality (IDEQ), even though IDEQ is listed only in brackets in the definition of "Parties." Does EPA intend to include IDEQ as a party to the ASAOC? With respect to the SOW, the last paragraph on p. 1 does not appear to be entirely consistent with the framework laid out in the ASAOC. Also, the Clean Water Act Section 404 analysis memorandum referenced in SOW ¶ 2.5.1 is required if the recommended removal action alternative will impact jurisdictional wetlands but does not reference other jurisdictional waters; was that an oversight? *See also* SOW ¶ 2.5.2 (same question).

EPA stated in its letter to the Tribes dated October 9, 2020 that "We fully understand that it will be important to obtain additional tribal input after we have developed that draft [ASAOC]." Now that EPA has developed a draft ASAOC, we believe it is time for EPA to hold a true, substantive government-to-government consultation with the Tribes. The Tribes' participation in the Stibnite Mine process should consist of more than just reviewing decisions that EPA and the PRP have already made, especially without having a background understanding of how those decisions were reached. We also would like to hear how EPA's decisions will impact our right to hunt, fish, and perform other cultural and customary activities in the area. After all, EPA committed in its October 9 letter "to regularly communicate with and receive input from the Tribes regarding the ASAOC, the associated Statement of Work, and subsequent work plans and will consider the Tribes' views throughout the negotiation, cleanup, and remining process."

Please coordinate with Ms. Virginia Monsisco @ 208-236-1048 or Mr. Kelly Wright @ 208-236-1049 to schedule a time to further discuss these critical matters to the Tribes.

Sincerely,

Devon Boyer, Chairman
Shoshone-Bannock Tribes

cc: Chris Hladick, Regional Administrator, EPA Region 10
Steven Vaden, General Counsel, USDA
Tom Mariani, Section Chief, DOJ Environmental and Natural Resources Division
Travis Stone, Land Use Director, Shoshone-Bannock Tribes
Kelly Wright, EWMP Program Manager, Shoshone-Bannock Tribes
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