Nez Perce

TRIBAL EXECUTIVE COMMITTEE
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January 14, 2021

Submitted via email only to: bodine.susan@epa.gov; wright.peter@epa.gov; shiffman.cari@epa.gov

Ms. Susan Parker Bodine, Assistant Administrator
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United States Environmental Protection Agency
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Mr. Peter C. Wright, Assistant Administrator
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United States Environmental Protection Agency
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Ms. Cari Shiffman, Chief of Staff
Office of Enforcement and Compliance Assurance Stibnite
United States Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: ***Nez Perce Tribal Executive Committee's Response to January 12, 2021, Government-to-Government Consultation with EPA Regarding the Draft ASAOC for the Stibnite Mine Site***

Dear Ms. Bodine, Mr. Wright, and Ms. Shiffman:

Thank you for consulting with the Nez Perce Tribal Executive Committee ("NPTEC") on Tuesday, January 12, 2021, regarding the Administrative Settlement Agreement and Order on Consent and Statement of Work for Time Critical Removal and Non-Time Critical Removal Actions (collectively "ASAOC") for the Stibnite Mine Site ("Site") in Valley County, Idaho. The NPTEC appreciated the engagement and dialogue from the Environmental Protection Agency's ("EPA") Washington and Region 10 offices. The Tribe is also in receipt of Susan Bodine's January 14,

2021, letter regarding EPA's efforts to uphold its trust responsibility to the Tribe. After reflecting on our conversation and Ms. Bodine's letter, the NPTEC wishes, however, to make and reiterate the following points.

At several junctures during the January 12, 2021, consultation, the NPTEC expressed its dismay regarding the ASAOC's lack of acknowledgement of the Tribe's treaty-reserved rights at the Stibnite Site. EPA responded that the ASAOC was silent as to the existence and effect of the Tribe's treaty-reserved rights at the Site because the ASAOC is being completed under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Ms. Bodine also stated in her January 14, 2021 letter: "With respect to the United States' trust responsibility, the actions taken under the ASAOC pursuant to EPA's statutory responsibilities under CERCLA will improve water quality and fish habitat. The actions are consistent with the federal government's trust responsibility." These post-hoc explanations reveal EPA's fundamental misunderstanding of its federal trust responsibility and the status of the Tribe's treaty rights under federal law.

The federal Indian trust responsibility is the United States' affirmative, legally-enforceable fiduciary obligation to protect Indian tribes' rights, lands, assets, interests, and resources.[1] The trust responsibility is the United States' duty to fulfill those obligations, expectations, and promises that have arisen from the arc of relations between it and Indian nations. EPA's own tribal consultation policy states: "EPA recognizes the federal government's trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law."[2] These responsibilities are overarching; There is no arena in which EPA is exempt from understanding, considering, and acting upon its responsibilities to tribes.

On June 11, 1855, the Tribe ceded almost 13 million acres to the federal government, while reserving certain rights, including the right to hunt, fish, pasture, and gather, within the Tribe's aboriginal homeland that the Nez Perce, the Nimiipuu, have exercised since time immemorial.[3] In exchange, the federal government promised to secure these rights, which, for the Nez Perce, remain a guarantee of our ability to preserve our culture and identity. Through the Treaty of 1855, these treaty rights and federal promises became the "supreme Law of the Land."[4] Moreover, they are bargained-for rights for which the Tribe paid dearly. In EPA's January 14, 2021, letter received today, EPA described the Tribe's treaty rights as "claims regarding treaty reserved fishing rights." The Tribe's rights are not "claims" and they are not limited to the right to fish. No entity should know this better than the United States, which signed the 1855 treaty. Let us be clear, the federal government has a treaty <u>and</u> trust responsibility to consider and protect all of the Tribe's treaty-

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[1] *See Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. State of Ga.*, 30 U.S. 1 (1831); *Worcester v. State of Ga.*, 31 U.S. 515 (1832); Felix Cohen, Handbook of Federal Indian Law § 5.04[3][a] (2012).

[2] EPA, Policy on Consultation and Coordination with Indian Tribes, p. 3 (2011) Available at: https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf (last visited January 13, 2021).

[3] Treaty with the Nez Perces, June 11, 1855, 12 Stat 957.

[4] U.S. CONST. art. VI, cl. 2.

reserved rights and resources and the best interests of the Tribe first when undertaking any action, under any statutory authority, within the Tribe's aboriginal homeland. The best mechanism EPA has to accomplish this is through government-to-government consultation.[5]

Consultation is not meant to be a box-checking exercise. Rather, as the EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights explains: "EPA consultation with tribes provides the opportunity to ask whether a proposed EPA action that is focused on a specific geographic location may affect treaty-protected rights."[6] For example, "[i]f a treaty reserves to tribes a right to fish in the water body, then EPA should consult with tribes on treaty rights, since protecting fish may involve protection of water quality in the watershed. Another example of an action in a specific geographic area is a site-specific decision made under the Comprehensive Environmental Response, Compensation, and Liability Act, such as a Record of Decision for a site, or the potential use of Applicable or Relevant and Appropriate Requirements for a cleanup."[7]

In light of federal Indian law and EPA's own guidance, the NPTEC must reiterate that EPA cannot simply and straightforwardly interpret and implement CERCLA's provisions at the Stibnite Site without considering the effect on the Tribe's rights, interests, and resources—or by assuming that any CERCLA action will necessarily benefit the Tribe.

As EPA knows, the Tribe has sued Midas Gold to enforce the Clean Water Act at the Stibnite Site. And, as EPA also knows, CERCLA can have a preclusive effect over some Clean Water Act litigation.[8] Moreover, the NPTEC rejects EPA's assertion that the ASAOC is entirely separate from Midas Gold's mining plan at the Site. Midas Gold sought the ASAOC in order to gain some liability protection from Clean Water Act enforcement while it plans and permits its proposed mine. EPA is helping Midas Gold in this mission by negotiating and executing an ASAOC for the Stibnite Site—a CERCLA action that EPA and the Forest Service had no intention of pursuing prior to being approached by Midas Gold.

The ASAOC may, in the short term, improve water quality to some degree at the Stibnite Site. But, that work must be understood in its full context. The ASAOC only requires Midas Gold to

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[5] EPA, Policy on Consultation and Coordination with Indian Tribes, p. 4-5, (2011) Available at: https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf (last visited January 13, 2021). See also Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights Related to Natural Resources, p. 1 (2016) ("The signatory agencies (Parties) enter into this Memorandum of Understanding (MOU) to affirm our commitment to protect tribal treaty rights and similar tribal rights relating to natural resources through consideration of such rights in agency decisionmaking processes and enhanced interagency coordination and collaboration.") Available at: https://www.epa.gov/sites/production/files/2016-12/documents/mou_treat_rights_12-01-16_final.pdf (last visited January 14, 2021).

[6] EPA, Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights, p. 1 (2016). Available at: https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf (last visited January 13, 2021).

[7] *Id.* at p. 1-2.

[8] *See* 42 U.S.C. 9613(h).

address a fraction of the millions of tons of existing contamination at the Site and will not abate (only study) many of the point sources the Tribe has identified at the Site. And, most of the cleanup activities contemplated in the ASAOC are only voluntary and expressly contingent on Midas Gold re-mining the Site. Additionally, as pointed out previously, the ASAOC was also apparently designed to preclude the Tribe's own enforcement action at the Site and thus helps pave the way for Midas Gold to construct a full-scale, open-pit mine—a mine which, as documented in the Forest Service's own Environmental Impact Statement, will generate hundreds of millions of tons of new toxic waste at the Site, will require water treatment in perpetuity, and will result in destruction of tribal treaty resources and block tribal treaty access to the Site for decades. EPA itself pointed out that Midas Gold's proposed mine has the potential to have "disproportionately high and adverse impacts to tribal populations."[9] Thus, regardless of any short term benefits the ASAOC may provide, it is simply not in the Tribe's best interest. Instead, the ASAOC represents a failure on the part of EPA to listen to the Tribe and to understand and perform its trust responsibilities to the Tribe. Simply stated, EPA has chosen to promote the short-term interests of a private mining company over the long-term interests of its trustee and the environment.

The NPTEC continues to reject the idea that the ASAOC's Phase 1 removal actions are time critical. According to EPA's 2000 memo, Use of Non-Time Critical Removal Authority in Superfund Response Actions, in order for a lead agency to determine that "a removal action is warranted, the lead agency must first make the determination, [...] that there is a release or threat of release into the environment of a hazardous substance, or [...] pollutant [...] which may present an imminent and substantial danger to public health or welfare."[10] Additionally, under federal regulations, a CERCLA action should only be designated as "time critical" if there is not at least 6 months before onsite activities can begin.[11] "Emergency and time-critical removal actions respond to releases requiring action within 6 months; non-time-critical removal actions respond to releases requiring action that can start later than 6 months after the determination that a response is necessary."[12] When the NPTEC asked EPA why the ASAOC had been termed "time-critical" during consultation, EPA stated it was because there are releases at the Site. This is clearly an insufficient justification under EPA's policy and regulations.

Releases have been ongoing at the Stibnite Site for years and the federal government has taken no action nor indicated any interest in abating them since the 2000s. Also, EPA clearly made the "determination that a response is [now] necessary" at the Stibnite Site more than six months ago. EPA has been negotiating an ASAOC with Midas Gold for at least two years. Moreover, Midas Gold may not even be able to start work under the ASAOC for at least 6 months from the date of this ASAOC due to snow loads at the Site. And, the ASAOC contemplates that the Phase 1 work could take four years to complete. In light of these timelines, the Tribe believes that EPA

[9] EPA, Detailed Comments for the Stibnite Gold Project Draft Environmental Impact Statement, p. 28 (2020).
[10] EPA, Use of Non-Time Critical Removal Authority in Superfund Response Actions, p. 2 (2000). Available at: https://semspub.epa.gov/work/HQ/174826.pdf (last visited January 13, 2021). *See also* 42 U.S.C. § 9604(a)(1).
[11] *See* 40 C.F.R. § 300.415(b)(4); 40 C.F.R. § 300.415(n)(2).
[12] EPA, Transmittal of Guidance on Conducting Non-Time-Critical Removal Actions Under CERCLA (Publication 9360.0-32), p. 3-4 (1993). Available at: https://semspub.epa.gov/work/HQ/122068.pdf (last visited January 13, 2021) (emphasis added).

designated Phase 1 as "time critical"—not to fulfill the human health and environmental purposes of CERCLA but—to exempt the EPA and Midas Gold from the legal processes intended to promote transparency, including pre-decisional public comment, for non-time-critical removal actions.[13] This is unacceptable.

The NPTEC left the consultation with EPA just as concerned about the financial assurance required of Midas Gold in the ASAOC as when the consultation began. When the NPTEC asked EPA to explain why it reduced Midas Gold's financial assurance from $16.6 million in the October 2020 draft of the ASAOC to $7.5 million in the December 2020 draft of the ASAOC, EPA stated that the $7.5 million was arrived at after considering Midas Gold's status as a "start up" and the company's financial wherewithal as well as the amount of money required for EPA to complete the ASAOC's removal work were Midas Gold to walk away. Contrary to EPA's characterization of Midas Gold's finances, the company has some extremely wealthy backers, one of whom is John Paulson who owns ~ 44% of the company and who has a net worth of over $4 billion dollars. Midas Gold should not be getting such favorable treatment from EPA and the American taxpayers. EPA also failed during consultation to assure the NPTEC that $7.5 million would be sufficient for EPA to complete the ASAOC's work, especially in light of the difficulties and escalating costs that could attend such an undertaking at the remote Stibnite Site.

The NPTEC feels compelled to also reiterate how unacceptable EPA's mishandling is of the Tribe's August 2020 Freedom of Information Act ("FOIA") request regarding the development of the ASAOC. The Tribe submitted the FOIA request in order to gain insight into the development of the ASAOC and to inform its comments on the ASAOC. EPA, however, in its own words, "misplaced" the Tribe's request and still has not provided the Tribe with a single responsive document. During consultation, EPA did acknowledge its failure but provided the NPTEC with no explanation of what happened and rejected the NPTEC's request that EPA correct the situation by producing the requested documents for the Tribe to review prior to the finalization of the ASAOC. Coincidentally, the Tribe received correspondence from EPA Headquarters today informing the Tribe of EPA's denial of the Tribe's FOIA fee waiver request. The Tribe submitted a virtually identical request in 2019, which EPA granted. EPA's failure to uphold its statutory obligations under FOIA and its unwillingness to comply with the Tribe's proposed remedy raises serious questions about EPA's commitment to transparency in its dealings with Midas Gold on the ASAOC.

The ASAOC is an anemic removal action. It deals with a mere fraction of the mining waste at the Stibnite Site and accommodates and facilitates a mine that will produce many times more waste than that currently found at the Site. The ASAOC is a transparent vehicle through which EPA is helping a private mining company avoid its Clean Water Act liability and get through the permitting process for a mine the Tribe opposes. EPA's loyalties are misplaced. In negotiating and signing this ASAOC, EPA will have failed to uphold its trust responsibilities to the Tribe. It will also have ultimately done a disservice to the people of Idaho.

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[13] *See* 40 C.F.R. § 300.415(b)(4); 40 C.F.R. § 300.800(a).

The NPTEC reiterates its opposition to the ASAOC, asks that EPA seriously consider its substantive comments, and that EPA put the ASAOC out for public comment prior to taking any final action. The Tribe also reiterates its request, made during consultation, for a full written response to its comments on the ASAOC.

As I stated during consultation, the Trump administration has run out of time and legitimacy to finalize this matter. The Tribe urges EPA to allow the incoming administration to review the merits of the ASAOC and make the final determination as to whether it is in the best interest of the Tribe and public or whether there are other, better options for addressing contamination at the Site.

Sincerely,

Rachel P. Eduardo

for Shannon F. Wheeler
Chairman

cc: Mr. Chris Hladick, EPA Region 10 Administrator, via email at: hladick.christopher@epa.gov