Nez Perce

TRIBAL EXECUTIVE COMMITTEE
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November 13, 2020

The Honorable Raúl Grijalva
United States House of Representatives
1511 Longworth House Office Building
Washington, DC 20515

The Honorable Debra Haaland
United States House of Representatives
1237 Longworth House Office Building
Washington, DC 20515

The Honorable Betty McCollum
United States House of Representatives
2267 Rayburn House Office Building
Washington, DC 20515

The Honorable Chellie Pingree
United States House of Representatives
2162 Rayburn House Office Building
Washington, DC 20515

The Honorable Alan Lowenthal
United States House of Representatives
108 Cannon House Office Building
Washington, DC 20515

The Honorable Nanette Diaz Barragán
United States House of Representatives
1030 Longworth House Office Building
Washington, DC 20515

Dear Madams and Sirs:

Last January you requested that U.S. Forest Service Chief Christiansen explain the Forest Service's unusual decision to allow Midas Gold to write the Biological Assessment for the company's own proposed open pit, cyanide leach gold mine in Stibnite, Idaho—the Stibnite Gold Project—which will largely be located on public land. The Nez Perce Tribe is deeply grateful for your efforts earlier this year to ensure that the federal government does not prioritize a corporation's profits over the public's interests. We write today, however, to alert you to the need for additional Congressional oversight.

The Environmental Protection Agency, at the urging of Midas Gold, has negotiated a draft Administrative Settlement Agreement and Order on Consent ("ASAOC") for the Stibnite site

under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the National Oil and Hazardous Substances Pollution Contingency Plan. Although EPA contends that the intent of the ASAOC is to address legacy contamination at the Stibnite site, the Tribe is deeply concerned that the ASAOC's true purpose is to facilitate the quick and inexpensive permitting of Midas Gold's mine.

Midas Gold has aggressively sought an ASAOC from EPA over the last couple of years because it believes that an ASAOC will serve as a liability shield under section 113(h) of CERCLA[1] against its Clean Water Act liability—including against the Nez Perce Tribe's 2019 litigation against the company for unpermitted pollution discharges at the Stibnite site,[2] litigation in which Midas Gold has now alleged similar violations against the Forest Service. By advancing ASAOC negotiations with Midas Gold at an accelerated pace, EPA may be taking hasty action that primarily benefits Midas Gold's interests and, potentially, those of the Forest Service at the expense of the Nez Perce Tribe and the public.

The draft ASAOC does not contemplate a true, comprehensive cleanup of the Stibnite site. Rather, the ASAOC sets forth removal actions in three phases but only requires that Midas Gold complete Phase 1, which calls for extremely limited studies and evaluations of the site and the removal of a mere fraction of the waste currently housed there. Moreover, EPA has expressed no intention to release the draft ASAOC for public review and comment, as provided for by 40 C.F.R. § 300.820 and 40 C.F.R. § 300.415. EPA's apparent decision not to include the public in its decision-making process for the Stibnite site, the proposed site for an enormous and controversial mine, again raises substantial questions about the federal agency's commitment to objectivity and transparency.

EPA has a trust responsibility to ensure that its actions do not harm the Nez Perce Tribe's treaty rights. EPA also has a duty to protect the rights of Idahoans and all citizens who use and enjoy federal public lands. For this reason, EPA's lack of transparency regarding its ASAOC negotiations with Midas Gold—negotiations which will have critical implications for the management of the Stibnite site for decades to come—is deeply concerning to the Tribe.

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[1] *See* 42 U.S.C.A. § 9613.

[2] On August 8, 2019, the Nez Perce Tribe sued Midas Gold for pollution discharges at the Stibnite Mine site, which have occurred since Midas Gold gained ownership and operational control of the site, in violation of the Clean Water Act. In August of 2020, Midas Gold sued the U.S. Forest Service for the pollution discharges alleged in the Nez Perce Tribe's 2019 complaint to be occurring on Midas Gold's unpatented mining claims located on Forest Service land.

Please request that Administrator Wheeler provide an accounting of his agency's decision to enter into an ASAOC with Midas Gold without public comment and please request that he put the ASAOC out for public comment prior to finalization.

We appreciate your attention to this important, time-sensitive issue. Attached you will find the comments that the Nez Perce Tribe recently sent EPA regarding the draft AOC as well as the Tribe's no-mining, clean-up plan for the Stibnite site and EPA's Statement of Work for the ASAOC. Please contact Michael Lopez, Senior Staff Attorney, Nez Perce Tribe Office of Legal Counsel, at (208) 843-7355 or mlopez@nezperce.org, with any questions or concerns.

Sincerely,

Shannon F. Wheeler
Chairman

cc: Representative Mike Simpson
Representative Russ Fulcher
Senator Mike Crapo
Senator Jim Risch
EPA Administrator Andrew Wheeler
EPA Region 10 Administrator Chris Hladick
U.S. Forest Service Chief Christiansen