

## SETTLEMENT AGREEMENT

WHEREAS, the State of Utah filed suit against EPA and the United States, in the case styled, *The State of Utah v. Environmental Restoration LLC, et al.*, Case No. 2:17-cv-0866 (D. Utah) (Utah Action);

WHEREAS, the State of Utah advanced claims against EPA under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and the Clean Water Act (CWA), and against the United States under the Federal Tort Claims Act (FTCA), and also advanced claims against Environmental Restoration, LLC, Weston Solutions, Inc., Harrison Western Corporation, Kinross Gold Corporation, Kinross Gold U.S.A., Inc., Sunnyside Gold Corporation, and Gold King Mines Corporation;

WHEREAS, the Utah Action was consolidated in the U.S. District Court for the District of New Mexico as part of the multidistrict litigation styled, *In Re: Gold King Mine Release in San Juan County, Colorado, on August 5, 2015*, Case No. 1:18-md-02824-WJ (D.N.M.);

WHEREAS, EPA has listed the Bonita Peak Mining District Superfund Site encompassing the Gold King Mine on the National Priorities List under CERCLA;

WHEREAS, EPA has the authority and discretion to investigate and respond to releases or threatened releases of hazardous substances from the Bonita Peak Mining District Superfund Site, and conduct removal and remedial actions at the Site, *see* 42 U.S.C. §§ 9604(a), 9621(a); 40 C.F.R. §§ 300.415, 300.430, 300.435;

WHEREAS, EPA will continue implementing CERCLA response actions to assess and remediate the commingled release of hazardous substances into surface water originating from

historic mining activities within the Bonita Peak Mining District Superfund Site in San Juan County, Colorado;

WHEREAS, EPA is engaging with the State of Utah regarding the ongoing and planned response actions at the Bonita Peak Mining District Superfund Site, which can extend to wherever contamination from the commingled release of hazardous substances from the mining-related source areas in San Juan County, Colorado comes to be located (including Lake Powell); is assessing and characterizing downstream risks attributed to the commingled release of hazardous substances described above; and is providing the State of Utah meaningful and substantial involvement in CERCLA response actions taken at the Bonita Peak Mining District Superfund Site, consistent with 40 C.F.R. Part 300.500(a), to address releases of hazardous substances from the Bonita Peak Mining District Superfund Site causing an unreasonable risk to human health or the environment, including by convening a virtual meeting annually with the State of Utah to discuss the ongoing efforts described in this paragraph, before which EPA and the State shall agree to an agenda, and EPA shall share relevant factual information;

WHEREAS, the Parties have agreed that settlement of the Utah Action is in the public interest and in the interest of the Parties, and is the most appropriate means of resolving the Utah Action;

WHEREAS, EPA has the authority to conduct a removal site evaluation under 42 U.S.C. § 9604(a) and 40 C.F.R. § 300.410;

WHEREAS, a removal site evaluation includes a preliminary assessment and, if warranted, a removal site inspection;

WHEREAS, a removal site evaluation may establish a basis for a possible future CERCLA removal action under 40 C.F.R. § 300.415;

WHEREAS, EPA estimates that the total costs for ongoing CERCLA response actions at the Bonita Peak Mining District Superfund Site, the Rico Argentine Mine Site, the Camp Byrd Mine Site, and the Carribeau Mine Area are expected to exceed \$165 million;

WHEREAS, EPA is continuing ongoing CERCLA response actions at the following sites which impact downstream water quality:

- a. The Rico Argentine Mine Site in Delores County, Colorado;
- b. The Camp Bird Mine Site in Ouray County, Colorado; and
- c. The Carribeau Mine Area within the Iron Springs Mining District Site in San Miguel County, Colorado.

WHEREAS, the State of Utah has submitted a grant application and an accompanying project workplan that satisfy the requirements of 33 U.S.C. § 1329 (hereafter CWA section 319 workplan) and the requirements of 33 U.S.C. § 1256 (hereafter CWA section 106 workplans);

THEREFORE, the Parties agree to the following:

1. The Parties to this Agreement are the United States Environmental Protection Agency and Andrew Wheeler in his capacity as EPA Administrator (together, EPA), the United States, the State of Utah, Environmental Restoration, LLC, and Weston Solutions, Inc.
2. This Agreement applies to, is binding upon, and inures to the benefit of the Parties, and upon the successors and assigns of the Parties.
3. EPA will evaluate the State of Utah's grant application and CWA section 106 workplans consistent with the authorities identified above and take action to approve an application in the amount of \$2 million consistent with 40 C.F.R. § 35.110 and 40 C.F.R. § 35.111.

4. EPA will evaluate the State of Utah's grant application and CWA section 319 workplans consistent with the authorities identified above and take action to approve the application in the amount of \$1 million consistent with 40 C.F.R. § 35.110 and 40 C.F.R. § 35.111.
5. A grant agreement or cooperative agreement as described in 2 C.F.R. § 200.51 and 2 C.F.R. § 200.24 awarded to the State of Utah based on EPA approval of the application and workplans described in paragraph 3 and 4 will be subject to all applicable authorities governing the CWA section 319 and/or CWA section 106 grant program and the terms and conditions of the award.
6. EPA will initiate one removal site evaluation in accordance with the National Contingency Plan, at each of the following areas by December 31, 2021:
  - a. The Mill D Fork and Cardiff Fork areas of the Big and Little Cottonwood Mining District, Utah.
  - b. The Bauer Dump and Tailings area of the Ophir Mining District in Tooele County, Utah.
  - c. A release associated with legacy uranium mining operations in the Lisbon Valley area of San Juan County.
7. The State of Utah hereby releases, discharges, and covenants not to assert any and all claims of any kind that it may have had, or may now hereafter have, against the United States, EPA, Environmental Restoration, LLC, or Weston Solutions, Inc., based upon matters which were asserted, or could have been asserted, by the State of Utah in the Utah Action. Nothing in this paragraph shall affect the State of Utah's remedy under paragraphs 8 and 9. Further, this Agreement is only binding on the Parties to the Agreement, and nothing in this paragraph shall affect the rights of any other person to

bring claims for injuries allegedly resulting from the release of hazardous substances from the Gold King Mine on August 5, 2015, or from any site in the Bonita Peak Mining District Superfund Site. Utah specifically retains all claims against Harrison Western Corporation, Kinross Gold U.S.A., Inc., Sunnyside Gold Corporation, and Gold King Mine Corporation.

8. Within 7 days of execution of this Settlement Agreement, the State of Utah shall file a stipulation for voluntary dismissal without prejudice of its CERCLA, RCRA, and CWA claims in the Utah Action as to the United States and the EPA. The stipulation shall state that the dismissal without prejudice will continue under the terms and conditions of paragraph 10, even if EPA awards the section 106 and 319 grant agreement or cooperative agreement described in paragraphs 3, 4, and 5 above, and initiates the removal site evaluations described in paragraph 6. The State of Utah shall be barred from reinstating these claims except pursuant to the terms and conditions specified in paragraphs 9 and 10. The State of Utah shall, at the same time as the filing of the motion of voluntary dismissal without prejudice of the CERCLA, RCRA and CWA claims, file a motion for voluntary dismissal with prejudice of all FTCA and common law claims in the Utah Action as to the United States, as well as a motion for voluntary dismissal with prejudice of all of its claims against Weston Solutions, Inc., and Environmental Restoration, LLC. At the same time, Environmental Restoration, LLC, shall voluntarily dismiss with prejudice its claims against the State of Utah.
9. If EPA does not award the CWA Section 106 and 319 grants, as described in paragraphs 3, 4 and 5, for a total of \$3 million, or fails to initiate removal site evaluations, as described in paragraph 6 by December 31, 2021, the State of Utah may immediately

reinstitute the CERCLA, RCRA, and CWA claims against EPA that it previously pled in the Utah Action notwithstanding the terms of paragraph 10. In such circumstances, EPA agrees not to raise any statute of limitations defense that is based on the State's voluntary dismissal of these claims under this Agreement.

10. Following dismissal under Paragraph 8, during the four years following execution of this Agreement by the Parties, and after giving 90 days' notice to EPA, Utah shall have the right to file a motion seeking reinstatement of its CERCLA claims stated in the Utah Action as to EPA, if Utah can demonstrate that new data establishes a human health risk of greater than  $1 \times 10^{-4}$  (i.e. an increased cancer risk of 1 in 10,000) or non-cancer impacts defined as a Hazard Quotient greater than 1 from aluminum, iron, manganese, lead, copper, arsenic, zinc, cadmium, or mercury (hereinafter "specified heavy metals") contamination in sediment in Lake Powell or the San Juan River caused solely by the August 5, 2015 release from the Gold King Mine. Risk to human health must be calculated using a specific methodology that is mutually agreed to by the State of Utah and EPA at the time the new data is identified. Such methodology for evaluating potential human health risks must follow relevant EPA guidance, including but not necessarily limited to, U.S. EPA, Office of Emergency and Remedial Response, *Risk Assessment Guidance for Superfund Vol. 1 Human Health Evaluation Manual (Part A)* (Dec. 1989). Reinstatement of the CERCLA claims in the Utah Action is not permitted if the amount of the specified heavy metals in sediment in Lake Powell or the San Juan River was knowable as of the date this Agreement was executed by the Parties. Defendants shall not oppose reinstatement of the CERCLA claims in the Utah Action under this Paragraph on timeliness or statute of limitations grounds if the motion meets the timing requirements of

this Paragraph, but otherwise reserve any and all defenses or arguments against reinstatement.

11. The Parties may agree in writing to modify any term of this Agreement.
12. This Settlement Agreement was negotiated between the State of Utah, EPA, and the United States in good faith and jointly drafted by the Parties. The Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.
13. This Settlement Agreement contains all terms and conditions agreed upon by the Parties. All statements or representations, oral or otherwise, among the Parties or counsel that are not included herein are specifically superseded by this Agreement and shall have no force or effect.
14. This Settlement Agreement shall not constitute or be construed as an admission by any of the signatories by any other person or entity of any question of fact or law with respect to any of the claims raised in the action, nor is it an admission of violation of any law, rule, regulation, or policy by the United States or EPA or by any other person or entity.
15. Except as expressly provided in paragraphs 3, 4, 5 and 6, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to EPA under general principles of administrative law, or under any other statutes or regulations.
16. Nothing in this Settlement Agreement shall bind, obligate, or otherwise create any rights or duties applicable to or enforceable by, or impose any conditions or limitations upon, any person or entity that has not signed this Settlement Agreement, nor shall this

Settlement Agreement be construed to make any such person or entity a third-party beneficiary.

17. EPA's obligations under this Settlement Agreement are subject to the availability of appropriated funds applicable for such purpose. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other provision of law.
18. EPA will promptly notify the State of Utah if it believes that it will be unable to meet the deadline specified in paragraph 6 above because of any of the following circumstances beyond its control: (a) a government shutdown; (b) an extreme event that renders EPA staff unable to complete the work needed to meet the deadline; (c) a catastrophic environmental event (e.g., natural disaster or environmental accident) that results in the necessary diversion of EPA staff resources away from the work needed to meet the deadlines in this Agreement. Should EPA be unable to meet the deadline specified in paragraph 6 above due to one or more of the specific circumstances listed in this paragraph, then any resulting failure by EPA to meet that date shall not constitute a failure to comply with the terms of this Agreement, and the date so affected shall be extended one business day for each day of the unavoidable delay, unless the Parties agree to a longer period. In the event that EPA invokes this provision, it will provide the State of Utah with reasonable notice and explanation for any unavoidable delay.
19. The individuals signing this Agreement on behalf of the Parties hereby certify that they are authorized to bind their respective parties to this Agreement.



So agreed by:

DATED: August 5, 2020

THE STATE OF UTAH  
By: Sean D. Reyes  
Attorney General

DATED: August 5, 2020

U.S. ENVIRONMENTAL PROTECTION AGENCY  
By: Matthew Z. Leopold  
General Counsel

DATED: August 5, 2020

CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE  
By: Adam Bain  
Senior Trial Counsel

DATED: August 5, 2020

ENVIRONMENTAL RESTORATION LLC  
By: Terry D. Avchen  
GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO  
LLP

DATED: August 4, 2020

ENVIRONMENTAL RESTORATION LLC  
By: Mark Ruck, Vice President

DATED: August 5, 2020

WESTON SOLUTIONS, INC.  
By: Jeffrey J. Wechsler  
Louis Rose  
MONTGOMERY & ANDREWS, P.A.