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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NEZ PERCE TRIBE,

Plaintiff,

v.

MIDAS GOLD CORP., MIDAS GOLD IDAHO, INC., IDAHO GOLD RESOURCES COMPANY, LLC, and STIBNITE GOLD COMPANY,

Defendants.

Case No.: 01:19-cv-00307-BLW

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STAY LITIGATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

This is a Clean Water Act citizen suit brought by Plaintiff Nez Perce Tribe ("Tribe") against Midas Gold Corp., Midas Gold Idaho, Inc. ("MGII"), Idaho Gold Resources, LLC ("Idaho Gold"), and Stibnite Gold Company ("Stibnite Gold") (collectively "Midas"). Because a progressing administrative process will be concluding and thus will divest this Court of jurisdiction, Midas seeks a stay of these proceedings.

Judicial attention and litigation resources are squandered when expended on a case that is unlikely to reach judgment. That is the instance here, where MGII has been actively engaged in productive negotiations with the United States Environmental Protection Agency ("EPA"), the United States Forest Service ("Forest Service"), and the Idaho Department of Environmental Quality ("IDEQ") regarding the Stibnite Gold Project ("the Project"), portions of which are the subject matter of the Tribe's citizen suit ("the Site"). Those negotiations are focused on developing and executing a formal Administrative Order on Consent ("AOC") governing the cleanup and remediation of the Site, pursuant to the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1990, codified as amended at 42 U.S.C. §§ 9601-9675 ("CERCLA"). Should such an AOC be entered, this Court will be divested of jurisdiction. That is settled law, as this Court itself has held. *See Greater Yellowstone Coal. v. Nu-West Indus. Inc.*, No. 04-cv-116-E-BLW (D. Idaho Aug. 31, 2004) (Winmill, C.J.) (dismissing a Clean Water Act citizen suit on analogous facts).

Congress fashioned CERCLA's regulatory regime with a statutory preference that in certain limited circumstances such as presented here, citizen-driven lawsuits should not have the effect of "slowing down or preventing EPA's cleanup activities . . . and that effective cleanup is not derailed." *See* H.R. Rep. No. 99-253, pt.1, at 266 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2941. The Ninth Circuit has declared that CERCLA section 113(h), codified at 42 U.S.C.

§ 9613(h), "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort," and "furthers the policy underlying CERCLA by allowing a quick response to serious hazards." *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1483 (9th Cir. 1995) (quoting *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (emphasis in *Hanford*). In short, Congress expressly prevented Clean Water Act litigation such as is before this Court from becoming a *de facto* end run around the process by which EPA ensures appropriate remedial actions under CERCLA are developed and implemented. To that end, Congress directed through 42 U.S.C. § 9613(h) that a district court has no jurisdiction to entertain, for example, a Clean Water Act citizen suit if that suit overlaps a CERCLA remedial order issued by EPA.

It is not unusual for citizen suits to prod recalcitrant polluters into action. That is decidedly not the case here. In fact, in an acknowledgment that the Site warrants particular environmental attention prior to construction and operation of the Project, MGII initiated discussion about an approach under CERCLA with EPA and the State of Idaho well over a year and a half before this citizen suit was initiated. Those discussions became more focused and eventually produced a draft Statement of Work ("SOW") based on EPA policy guidance. *See* Declaration of Andy Koulermos filed herewith as Exhibit 1. It is understood that the Tribe was made aware of CERCLA discussions pertaining to the Site prior to the time the draft SOW was provided by MGII to the Tribe on August 1, 2019, more than a week before this suit was filed. The SOW identified areas of work to be performed, several of which were already under discussion with the EPA in the spring of 2019 before the Tribe served its notice of intent to sue, and it includes every location of concern raised in the Tribe's complaint. Despite the outreach to the Tribe by MGII, the Tribe chose a lawsuit rather than engage in information sharing with Midas.

As early as 2012, MGII began involving the Tribe in discussions and meetings regarding the Site. In fact, MGII and the Tribe entered into a Communications Agreement, attached as Exhibit 2, several years ago and well before this suit was filed. As recently as July 23, 2019, and after the Tribe served its notice of intent to sue, MGII's President and CEO sent a letter to Nez Perce Tribe Chairman Wheeler requesting an in-person meeting to discuss the Tribe's concerns and to identify a viable path forward. There has been no response from the Tribe to this meeting request.

Given the advanced stage of the CERCLA negotiations between MGII, EPA, the State of Idaho and the United States Forest Service, it is likely that this litigation will soon suffer a jurisdictional defect. Accordingly, the most efficient judicial path would be to stay the case until the CERCLA process has concluded. To reassure the Court that the CERCLA process is progressing with sufficient speed and certainty to warrant the requested stay, Midas suggests that the parties be directed to provide reports to the Court every thirty days to ensure that the prospect of a CERCLA resolution continues to warrant a stay of this litigation.

Such a stay will not result in any 'windfall' to Midas nor deprive the Tribe of the relief it seeks with respect to historic conditions at the Site. The Site is an area with long-abandoned mining operations and legacy contamination. Degraded water quality existed at the Site decades before MGII, Idaho Gold, and Stibnite Gold—interrelated companies that are part of a visionary new mining effort—began acquiring interests at the Site. MGII cannot undertake any active mining at the Site until the Forest Service approves MGII's Plan of Restoration and Operations ("PRO"). Nor can it disturb any legacy mining areas on the Site without the potential triggering of CERCLA

liability.[1] Rather, MGII's activities have been focused on environmental baseline and technical studies to further understand the challenges and opportunities the Site presents for concurrent restoration and active mining.

In short, the Site conditions about which the Tribe complains are the product of legacy conditions rooted in decades of historic mining on the Site. The only viable source to provide revenue to fund cleanups is for MGII to reach maturity and, in the course of future operations, pursue its unique opportunity to resume productive mining while also using the required initial capital and resulting revenue stream to address long-festering legacy problems. Any new mining at the Site will be subject to modern environmental regulation and undertaken with new and far more effective technologies designed to leave the Site in better environmental condition after mining ceases.

In light of these overall considerations, Midas respectfully moves this Court to stay the present action and direct the parties to provide status updates every thirty days.

Midas hereby certifies that it consulted with counsel for the Tribe regarding this motion. On October 8, 2019, the Tribe advised that it declined to agree to the requested stay. *See* Declaration of Preston Carter, attached as Exhibit 3.

[1] Midas comes to the Stibnite Site consistent with bona fide prospective purchaser ("BFPP") status under CERCLA with respect to their patented private lands on the Project Site acquired pursuant to the 1872 Mining Law. The BFPP provision under CERCLA, 42 U.S.C. § 9607(r), protects a party from Superfund owner/operator liability if the party acquires property after January 11, 2002 (the date of enactment of the Brownfields Amendments), and meets each of the criteria in CERCLA, 42 U.S.C. §§ 9601(40) and 9607(r). One of the continuing CERCLA obligations of Midas is that it must exercise "appropriate care . . . by taking reasonable steps" with respect to hazardous substance releases, 42 U.S.C. § 9601(40)(B)(iv).

BACKGROUND

I. History of the Stibnite Mining District

A. Pre-Midas History

The Stibnite Mining District is a historically significant source of precious metals and critical minerals that was first developed in the 1920s. In helping our Nation to win World War II,[2] the Stibnite Mining District is estimated to have produced more than 90% of the Nation's antimony and 50% of the Nation's tungsten; materials that were used in munitions, steelmaking, fire retardants, and other purposes. A series of historic mining activities at the Site—including efforts to support World War II and heap-leaching activities for gold production in the 1990s—have left a legacy of environmental contamination at the Site, all predating MGII's involvement in the Stibnite Mining District.

Early mining in the Stibnite Mining District commenced in the 1920s at Meadow Creek. Beginning in the late 1930s, the U.S. Bureau of Mines and the U.S. Geological Survey began exploration activities which led to the discovery of antimony and gold deposits at Yellow Pine, West End, Scout, and several other areas at Stibnite. In November 1952, the Defense Minerals Exploration Administration ("DMEA") awarded the Bradley Mining Company two contracts to explore and develop metals deposits at the Yellow Pine and Meadow Creek mines. In addition, several third parties conducted various exploration and development activities in other areas near

[2] Production of strategic minerals at Stibnite was so critical to the war effort that then-General Eisenhower sent the "Men & Women of Bradley Mining Co." a telegram on May 15, 1943 declaring that "In this Victory the munitions made by American industry, labor and management played a very important role. There is glory for us all in the achievement." The Stibnite Site was estimated to have saved a million American lives and shortened the war by a year. *See* 102 CONG. REC. 4118 (Mar. 7, 1956) ("In the opinion of the Munitions Board, the discovery of that tungsten mine at Stibnite, Idaho, in 1942 shortened World War II by at least 1 year and saved the lives of a million American soldiers.")

Stibnite, such as the Fern and Cinnabar locations. Mining activity in the area temporarily ceased in the 1950s, and much of the surface infrastructure was later removed or abandoned.

Mining activity on the Stibnite Site resumed in the 1970s. The subsequent development of new mining in the area included mining operations developed by Canadian Superior and Hecla Mining in the West End and Yellow Pine (Homestake) areas respectively, and processing facilities in the Meadow Creek Valley. These mines operated through the 1980s and 1990s. With falling gold prices in the late 1990s, all of the then-active companies terminated their mining operations.

The Site has been the subject of multiple site characterization studies undertaken by federal and state agencies between 1974 and 2017, in addition to five engineering evaluation/cost analysis studies between 1999 and 2006. Notably, the Site also has been the subject of three major CERCLA consent decrees to address select issues of greatest priority. Those consent decrees resulted in cleanup activity by prior mine operators (or their successors), including Mobil Oil Corporation, J.J. Oberbillig, and Bradley Mining Company.[3] These efforts were conducted under the oversight of EPA. However, cleanup efforts at the Site were not comprehensive and legacy areas of concern remain. These conditions all predate MGII and its sister companies' involvement in the Stibnite Mining District.

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[3] *See Mobil Oil Corp. v. United States*, Case No. 99-1467-A (E.D. Va.) (consent decree filed June 26, 2000), *United States and State of Idaho v. J.J. Oberbillig*, Case No. CV 02-451-S-LMB (D. Idaho) (consent decree filed Mar. 18, 2004); and *United States v. Bradley Mining Co.*, Case No. 3:08-CV-03968 TEH and *United States v. Bradley Mining Co.*, Case No. 3:08-CV-05501 TEH (N.D. Cal.) (consent decree filed Apr. 19, 2012).

In *Bradley*, the EPA extended covenants not to sue to a group titled "Settling Federal Agencies" to include: United States Department of Agriculture (Forest Service), United States Department of Defense, United States Department of the Interior, United States Environmental Protection Agency, and United States General Services Administration. *See* Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act, 77 Fed. Reg. 10,774-10,775 (Feb. 23, 2012) ("Finally, settling Federal agencies will pay $7.2 million for EPA's response costs at the Sulphur Bank Site and will receive a covenant not to sue and contribution protection for the Sulphur Bank Site and the Stibnite Mine Site.")

B. MGII's Involvement with the Stibnite Site

Midas Gold Corporation was established in 2011, several decades after active mining at the Site had ceased. It had no business relationship with any of the prior operating companies. It was established in the belief that it is possible to resume commercially profitable mining at the Site but with the further recognition that any such effort would require, within the operating effort, simultaneous restoration with redevelopment of the Site in order to improve water quality and other historic contamination left behind by the former operators. In the ensuing years, formal corporate subsidiaries of Midas Gold Corp. were established and other preliminary steps taken to further this work and vision. A combination of patented and unpatented claims under the Mining Law have been lawfully acquired, but no mining has been conducted by Midas on the Site.

MGII, its parent, and their affiliates have no operating income. They are capitalized through investor funds that have been advanced to develop the Project. Using that capital, MGII has developed and proposed a formal plan to restore the Site, referred to as the Plan of Restoration and Operations ("PRO"), that has been provided to the relevant regulatory agencies, including the Forest Service, EPA Region 10, and IDEQ, as well as to the Tribe as part of the ongoing permitting process.[4]

The PRO takes advantage of advances in mineral-processing technology that will allow MGII to reprocess legacy mine wastes, mine existing reserves, and remediate current environmental Site conditions. Such reprocessing and restoration will only be possible as part of MGII's plan to recommence commercial mining operations in the Stibnite Mining District. Upon completion of mining and Site reclamation, MGII will have addressed the Site's current environmental conditions and will restore previously lost salmon habitat along stretches of the East

[4] The PRO is publicly available at https://www.midasgoldcorp.com/project/plan-of-restoration-and-operations/.

Fork of the South Fork of the Salmon River and Meadow Creek, reconnect salmon to their native spawning grounds and address numerous legacy impacts from historical mining activities in order to improve water quality.

Given the lingering impact of the Site's historical mining activities, an essential step in advancing the Project is reaching an agreement with EPA Region 10, the Forest Service, and IDEQ regarding characterizing and remediating current environmental conditions at the Site. Since 2011, MGII has been collecting the baseline environmental data necessary to characterize both ground and surface water at the Site. As a function of the permitting process, MGII has regularly reported this data, including evidence of releases from historic mining sources, to EPA Region 10, the Forest Service, and the State, and has been working diligently with those agencies to explore how best to address these legacy issues through CERCLA. MGII began meeting with EPA Headquarters in January 2018 and subsequently with EPA Region 10, the Forest Service, and the State, in multiple briefing sessions and information exchanges, including several previous agency visits to the Site, most recently last month. The negotiations have been cordial, fruitful, and continue to this day.

Historic and recent water quality data show elevated arsenic and antimony in ground and surface water sampling locations generally detected downgradient of historical mining areas that long predate MGII's involvement at the Site. For example, elevated arsenic levels were detected downgradient of a legacy hazardous material repository adjacent to the East Fork of the South Fork of the Salmon River, which was constructed as part of prior remediation activities. Also, MGII continues to detect elevated arsenic and antimony levels in the Meadow Creek Valley area in locations downgradient from the Spent Ore Disposal Area where historical milling operations

deposited tailings during World War II and the Korean War. Other areas with elevated metals levels have been identified and are frequently associated with legacy mining activity.

The Site thus presents simultaneous environmental challenges and environmental opportunity. Because there are seemingly no remaining potentially responsible parties ("PRPs") (including federal PRPs) to undertake future response actions at the Site, a party with sufficient expertise and financial wherewithal must step forward to support extensive and expensive remedial work. In addition, as noted above, several aspects of the Site's current configuration are the product of interim actions taken by other parties, but which may not represent the best long-term restoration solution for the Site.

Moreover, under CERCLA, any actions disrupting current Site configurations absent EPA's agreement would introduce substantial liability risks for any party taking those steps. In short, no party would ever risk, nor can it be required to undertake, actions that would interfere with already approved and implemented remedial steps, unless EPA has blessed that action under CERCLA. Given these considerations, MGII is working with EPA to develop a long-term cleanup strategy that works in tandem with mining actions recommencing. Neither can occur without the other, and judicial intervention via this citizen suit could be substantially at odds with that CERCLA process.

C. The Commitment to Community Involvement and Federally Recognized Tribes by Midas

Community involvement is a Core Value of MGII. *See* PRO at 2-1 ("As a proud part of the community, we actively strive to serve the community's needs, to collectively enhance prosperity and well-being.") To date, MGII has planted more than 55,000 trees at the Site. Since 2014, MGII has donated more than $380,000 to local schools, parks, programs and community events, and

MGII employees have volunteered 1,800 hours of their time for various causes. MGII has even rescued 13 people trapped in Idaho's backcountry near the Site.

The preference of MGII is to build bridges with those interested in the Project by listening, responding, and reconciling differences in perspective whenever possible. In executing this element of the MGII's social license to work with those closest to the Project, MGII has entered into Community Agreements with the local Idaho jurisdictions of Cascade, Council, Donnelly, Idaho County, New Meadows, Riggins, and Yellow Pine, as well as creating the Stibnite Advisory Council and Stibnite Foundation, an entity that will support projects benefiting communities surrounding the Site.[5]

MGII's commitment to working with Idaho's local communities has extended to Tribal governments. By separate funding agreements, MGII is underwriting important ethnographic studies for the federally-recognized Shoshone-Bannock Tribes, the Shoshone-Paiute Tribes, and the Nez Perce Tribe. MGII regularly initiates direct independent discussions with Idaho's Tribal governments to develop candid and productive dialogue, including cultural training provided to MGII leadership and employees by the Nez Perce Tribe in 2017, and most recently with the Shoshone-Bannock Tribes. Through such engagement, the development of the Stibnite Gold Project will be better informed.

[5] *See* News Release, Midas Gold, *Midas Gold Enters into Collaborative Agreement with Communities Surrounding its Site: Agreement Ensures Transparency Throughout the Stibnite Gold Project & Establishes Foundation* (Dec. 4, 2018), http://midasgoldidaho.com/wp-content/uploads/2018/12/2018-15-MAX-Community-Agreements-FINAL.pdf (Midas Gold Idaho CEO Laurel Sayer announcing that "Working alongside communities has always been an important pillar of the Stibnite Gold Project. We've spent a lot of time out in the community speaking with our neighbors and listening to their ideas because we know this information helps make our project stronger. With this agreement, we've formalized this philosophy and given every signatory to the agreement a voice and seat at the table throughout the life of our project.")

D. MGII's Engagement with the Nez Perce Tribe

From the time it began initial Project scoping at the Site, MGII understood that the Stibnite Mining Area, particularly Sugar Creek, is culturally significant to the Nez Perce Tribe. Over the past several years, MGII has worked to actively engage with the Tribe, seeking to develop a PRO that benefits all stakeholders and attempts to ensure that the Tribe's expertise and local knowledge help to inform MGII's efforts at the Site.

In addition to working directly with the regulatory agencies, since 2012 MGII has unfailingly requested the Nez Perce Tribe's participation in principal-to-principal meetings with senior management. For example, on August 11, 2016 and at the invitation of MGII, the Chair of the Tribe participated in a presentation to the Boards of MGC and MGII to afford MGII leadership particular insight as to the interests of the Nez Perce in the Site and the prospect of future cooperation with MGII to advance those interests. Collaboration between MGII and the Tribe has also led to mutual agreements to improve public roads, reduce sediment runoff,[6] share technical and other information with the Tribe and its staff, [7] brief the Tribe on significant data pertaining to Project permitting,[8] and fund an ethnographic study for the Site. The association between the

[6] *See, e.g.,* Golden Meadows Exploration Project Mitigation Agreement between the Tribe, Midas Gold Corp., and MGII, Dec. 23, 2015 (wherein MGII committed to gravel several roads in the Site area with a total cost of up to $400,000, agreed not to withdraw water from the West End Creek or from Sugar Creek, and committed to coordinate on siting drill pad locations).

[7] Between July 2017 and October 2018, MGII sent more than a dozen transmittals of data, modeling documents, and planning documents to the Tribe.

[8] These meetings included:

- A discussion of water resources and water modeling on July 27, 2017;
- Geochemistry and water modeling on August 23, 2017;
- Financial assurance on August 25, 2017;
- Wetland and mitigation on November 6, 2017;
- Recreation access alternatives on June 11, 2018;
- Hydrologic and site-wide water balance modeling on August 16, 2018;
- Air modeling on August 17, 2018; and

Tribe and MGII advanced so significantly that on July 12, 2017, the Tribe and Midas executed a "Communications Memorandum of Understanding" in which the parties agreed that "the Tribe and Midas Gold desire to understand each other and to communicate in an open, respectful, and transparent manner regarding Midas Gold's proposed Project in Stibnite, Idaho" and which laid out an extensive plan for ensuring ongoing communications about the project (see attached Exhibit 2).

For reasons still unclear to the Defendants, the Tribe recently declined further efforts at continuing communication and cooperation. Shortly thereafter, it commenced this litigation.

II. CERCLA Section 113(h)

Enacted in 1980, CERCLA was intended to create a comprehensive framework that would govern the cleanup of hazardous substances. CERCLA ensures that the parties responsible for contaminating an area are "tagged with the cost of their actions." *United States v. Bestfoods*, 524 U.S. 51, 56 (1998). Given the importance of the problems and the desire that litigation not intrude on EPA's ability to manage sound and sensible processes to identify and implement remedies, Congress specifically provided in CERCLA § 113(h) that

> [n]o Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title.

42 U.S.C. § 9613(h).

This provision was designed by Congress "[t]o ensure that the cleanup of contaminated sites will not be slowed or halted by litigation . . . ." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d

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- Site-wide water chemistry and stream and pit lake network temperature modeling on September 20 and October 15, 2018.

236, 239 (9th Cir. 1995). As this Court recently summarized, "[b]y its language, § 113(h) withdraws the jurisdiction of federal courts" to review challenges to a removal or remedial order issued pursuant to CERCLA. *Greater Yellowstone Coal. v. Nu-West Indus. Inc.*, No. 04-cv-116-E-BLW, slip op. at 5 (D. Idaho Aug. 31, 2004) (Winmill, C.J.).

Moreover, a "remedial" order, such as an AOC that directs studies and other actions at the affected site as a step toward identifying and finalizing the actual on-site steps that will be taken, begins the development of EPA's process to finalize a remedy. *Id.* at 4-8 (holding that a Clean Water Act citizen suit governed by a site-specific AOC directing the defendant to "conduct a Site Investigation (SI) to determine the scope of any release or threatened release of hazardous substances to the environment at or from the site" constituted a challenge to "the CERCLA cleanup and [was] prohibited by § 113(h)." (internal quotation marks omitted)). *See also Razore*, 66 F.3d at 238 (holding that the development and implementation of a remedial investigation and feasibility study barred a Clean Water Act claim).

ARGUMENT

This Litigation Should Be Stayed Pending The Resolution Of The CERCLA Process

I. The Court Has Inherent Power to Manage Litigation Through a Stay.

There is no doubt that the Court has the authority to stay this matter. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). A court may enter a stay "pending resolution of independent proceedings which bear upon the case . . . whether the separate proceedings are judicial, administrative, or arbitral in character," and granting the stay

"does not require that the issues in such proceedings are necessarily controlling of the action before the court." *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979).

Thus, "[i]n determining whether to grant a stay of proceedings, the Court considers the length of the requested stay, the hardship that the movant would face if the motion were denied, the burden a stay would impose on the nonmovant, and whether the stay would promote judicial economy." *Donnelly v. Branch Banking & Tr. Co.*, 971 F. Supp. 2d 495, 501-02 (D. Md. 2013) (citation and internal quotation marks omitted). Balancing these factors favors a stay here.

II. Once an AOC Is Finalized, CERCLA Section 113(h) Will Withdraw the Court's Jurisdiction Over This Matter Long Before It Reaches Final Judgment; Thus, Judicial Efficiency Is Served by Staying Further Action.

Taking the last factor first, courts have regularly noted that CERCLA § 113(h) is worded broadly and it precludes not only citizen suits brought under CERCLA, but also causes of action brought under any federal statute that would intrude on the remedy, including the Clean Water Act. *Greater Yellowstone Coal.,* No. 04-cv-116-E-BLW (D. Idaho Aug. 31, 2004); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir 1995); *see also Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008) (holding that § 113(h) precludes a claim brought under RCRA); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Richardson*, 214 F.3d 1379, 1382-83 (D.C. Cir. 2000) (holding that § 113(h) precludes a claim brought under NEPA); *N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991) (holding that § 113(h) precludes claims brought under RCRA and NEPA). The D.C. Circuit has summed this up, stating that § 113(h) "effectuates a 'blunt withdrawal of federal jurisdiction.'" *Oil, Chem. and Atomic Workers*, 214 F.3d at 1382 (quoting *N. Shore Gas Co*., 930 F.2d at 1244). "Under this jurisdictional limitation, the Court may hear [a plaintiff's] complaint only if '(1) the Government has not initiated a removal or remedial action under § 9604, or (2) [the plaintiff] is not challenging such action.'" *Greater Yellowstone*

Coal., No. 04-cv-116-E-BLW, slip op. at 5 (D. Idaho Aug. 31, 2004), (quoting *Razore*, 66 F.3d at 239).

The allegations in this case cover eight alleged points of discharge. Each is addressed in the draft SOW shared with the Tribe before this litigation was filed.[9] Thus, there is a complete overlap in the Complaint's allegations and the expected scope of the AOC. In turn, there can be no doubt that implementing a SOW through an EPA Administrative Order on Consent whereby MGII agrees to conduct this work would trigger the jurisdictional bar and divest this Court of jurisdiction. *Cf. Greater Yellowstone Coal.,* No. 04-cv-116-E-BLW (D. Idaho Aug. 31, 2004) (comparing geographic areas described as of concern in complaint with geographic scope of remedial order from EPA).

In the absence of a stay, Midas expects to formally respond to the complaint with a motion to dismiss. Several of the locations referenced in the complaint, for example, are not on lands owned by any of the Midas entities. Rather, Midas holds only unpatented claims on Forest Service lands, which raises the question of how the Clean Water Act's owner or operator liability attaches to Midas, if at all. Similarly, it raises the question of whether the Forest Service is an indispensable party to this litigation.

[9] *Compare* Complaint ¶¶ 49-55 (reciting allegations regarding the "Glory Hole" or the Yellow Pine Pit), *and id.* ¶¶ 56-62 (reciting allegations regarding the Bradley Tailing Pile & Keyway Dam), *and id.* ¶¶ 63-67 (reciting allegations regarding the Hangar Flats Tailings Pile), *and id.* ¶¶ 68-71 (reciting allegations regarding the Bailey Tunnel), *and id.* ¶¶ 72-75 (reciting allegations regarding the DMEA Adit & DMEA Waste Rock Dump), *and id.* ¶¶ 76-80 (reciting allegations regarding the Bonanza Adit), *and id.* ¶¶ 81-84 (reciting allegations regarding the Cinnabar Tunnel), *and id.* ¶¶ 85-88 (reciting allegations regarding the Meadow Creek Adit), *with* Declaration of Andrew Koulermos (describing the site to be addressed in the SOW as the Yellow Pine Pit (formerly known as "The Glory Hole"); the Bradley Tailings Pile; the Hangar Flats Tailings Pile; the Bailey Tunnel; the Cinnabar Tunnel; and the Meadow Creek Adit).

As noted above, features at the Site are currently governed by three major CERCLA consent decrees involving prior mine operators including the United States, Mobil Oil Corporation, J.J. Oberbillig, and Bradley Mining Company. Midas is assessing whether these decrees divest this Court of some or all of its jurisdiction.

A stay will prevent the Court and litigants from expending substantial resources grappling with challenging questions such as these in the context of a case that is likely ultimately to be dismissed due to § 113(h)'s jurisdictional bar.

III. Considerable Hardship Will Be Imposed on Midas if the Motion for a Stay Is Denied.

MGII, its parent, and their affiliates have no operating income. The Midas entities are capitalized through investor funds which in turn support the Project development. MGII is not in operation nor does it possess significant assets or an ongoing income stream. Rather, MGII is being supported through investor financing on the capital markets. That investor financing has been generated by the potential to turn MGII's and its sister entities' only real asset, the future Stibnite Gold Project, into a commercially sustainable brownfield mining operation. Without that prospect, investor financing will disappear and, so too, will MGII as a viable operating entity. Therefore, given the lack of a current active profit stream, expending resources on litigation is a significant burden.

Each quarter of Project operational delay costs Midas approximately $1.5 million in permitting costs payable to the United States Forest Service and their contractor, and $2.6 million for MGII personnel and consultants to address the quarterly permitting requirements.[10] Due to its

[10] Testimony of Laurel Sayer, President and CEO of Idaho Gold Idaho, Inc., United States Senate Committee on Energy and Natural Resources (July 17, 2018) at 3. An archived video stream of the full Senate ENR hearing can be found at https://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=2D5F4BAB-365C-4D91-88C9-2426057E869B (last visited October 2, 2019).

thorough analysis of Project alternatives and development of the proposed action, the cost of the PRO alone was approximately $20 million. By any measure, these are substantial pre-construction costs.

Additionally, litigation is always a distraction. It diverts time and attention from business leadership, attention that should be spent on the efforts to develop an active mine that can provide the path to active remediation.

IV. There Is No Significant Hardship on the Tribe by Staying the Pending Litigation.

The Tribe's goal here, presumably, is a long-term permanent fix. Given the complexity of pollution sources and technological remedies and the length of time litigation would take, any "remedy" for the Tribe through the Clean Water Act litigation (even assuming it prevails) is likely years away, and will take years longer to implement.

Indeed, the remedy the Tribe seeks can best be effectuated through the very process that Midas proposes. The maturing CERCLA AOC process with MGII, EPA, the State of Idaho, and the Forest Service is *perfectly consistent with*—if not a manifest requirement of—the Tribe's formal position on the Site and the culpability of MGII for Site remediation.

Thus, a stay that is granted in anticipation of an AOC that would preclude jurisdiction over this matter under § 113(h) does not impose any substantial hardship on the Tribe. It leaves in place the *status quo* at the Site that is likely to persist for some time in any event. For example, the East Fork of the South Fork of the Salmon River currently passes through Yellow Pine Pit (or "Glory Hole" as referenced in the complaint), which is an historical open pit mine that presently contains 31 million gallons of water and 13 million cubic feet of saturated sediments. Fish have not been able to migrate upstream of this point of the East Fork of the South Fork of the Salmon River since the mid-1930s.

Pursuant to the PRO, the Pit will be dewatered, mined, backfilled, and the historical surface watershed will be restored. During Project construction and operation, fish will be reconnected to their upstream habitat via a tunnel connecting the East Fork of the South Fork of the Salmon River around the Pit. Finally, further characterization and assessment of this area of the Site will likely take place under the proposed AOC. Because of this current CERCLA path, none of these anticipated actions in this area of the Site represents a hardship. In fact, the AOC discussions advance, rather than impede, improved water quality on the Site.

V. Length of Stay

MGII cannot predict with precision the length of time required for this stay. The Court has the authority to terminate or modify a stay at any time, and Midas is not requesting an indefinite stay of these proceedings. Based on EPA's recent efforts and recent progress with EPA to develop a long-term remedial strategy under CERCLA, we anticipate that will efficiently confront the allegations that are the subject of this case, MGII anticipates that the process will conclude in a timely fashion. Thus, the jurisdictional bar imposed by CERCLA § 113(h) is likely to be triggered before this litigation concludes (if it has not already through prior CERCLA actions), and any judicial resources this matter will have consumed will have been wasted.

In sum, each of the factors here favors a stay of this action. For these reasons, Midas urges the court to stay this litigation until such time as MGII enters into a final AOC, at which time Midas will formally move to dismiss the Tribe's claims.

CONCLUSION

MGII is embracing Site restoration as a fundamental cornerstone of its business model for the Stibnite Gold Project. For well over a year and a half, MGII has been negotiating with federal and state regulators on a mutually acceptable path forward—one that addresses both cleanup and mining goals. Certainly, a legacy area such as this presents unique challenges that cannot be

instantly resolved. However, MGII is diligently working toward a CERCLA agreement that will resolve the interests asserted by the Tribe in this action, and MGII respectfully asks this Court to allow it the time to finish that work.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 9th day of October, 2019, I filed the foregoing document electronically through the CM/ECF system which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic filing:

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