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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

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY LITIGATION (DOC. 15)

Midas Gold Corporation, Midas Gold Idaho, Inc. ("MGII"), Idaho Gold Resources Company ("Idaho Gold"), and Stibnite Gold Company ("Stibnite Gold") (collectively, "Midas") submit this reply in support of their motion to stay this litigation to allow a rapidly progressing administrative process to conclude. Upon completion of this process, CERCLA Section 113(h), 42 U.S.C. § 9613(h) ("§ 113(h)"), will bar this Court from considering Plaintiff Nez Perce Tribe's ("Tribe") Clean Water Act ("CWA") claim.

The Tribe's response (Doc. 22, "Response Br.") does not dispute the fact that §113(h) will divest this Court of jurisdiction when an Administrative Order on Consent ("AOC") is finalized. Response Br. at 19. Instead, the Tribe asserts that Midas has not provided the Court with a detailed accounting of its CERCLA negotiations regarding the Stibnite Gold Project ("Project"), and that it is "impossible to predict" whether an AOC will ever materialize. *Id.* at 10. However, the Tribe concedes the relevant facts—that stakeholders, including EPA, the Shoshone-Bannock Tribes, the Idaho Department of Environmental Quality ("IDEQ"), and the United States Forest Service ("Forest Service"), are negotiating an AOC and associated Statement of Work ("SOW") that address each of the alleged point-source discharges identified in the Tribe's Complaint (the "Site").[1] *Id.* at 11. The Tribe also fails to address the most recent developments, including that the negotiating parties have exchanged detailed comments on the SOW draft, set up a repository for a data exchange, agreed upon a process for funding agency costs of the negotiations, agreed to a schedule for exchanging drafts of the AOC, set up on-going review meetings, and committed to completing their negotiations in time to begin field work in spring 2020. Neither does the Tribe

[1] Midas did not see the value in providing a historical recounting of the AOC negotiations, with the associated declarations and documents, in its initial brief; the Tribe has been aware of these negotiations for some time, and the key facts are undisputed. However, Midas provides additional supporting materials with this brief to avoid an unnecessary evidentiary sideshow.

acknowledge, nor explain, its refusal to constructively participate in these good faith AOC negotiations despite being invited to do so, nor why it has not provided comments on the SOW, despite having had a draft for nearly four months while the Shoshone-Bannock Tribes were able to provide their comments on the same document within a matter of weeks. Rather than dispute these relevant facts, or explain its own failure to participate in a constructive dialog with the stakeholders, the Tribe injects arguments irrelevant to the legal standard for granting Midas' motion to stay this litigation and mischaracterizes both the AOC process and the Project.

1. A Stay of Litigation Is Warranted in Order to Promote Efficient Litigation.

Rule 1 of the Federal Rules of Civil Procedure directs courts to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1; *see In re Bradford*, No. 1:18-CV-00397-BLW, 2019 WL 96221, at *5 (D. Idaho Jan. 3, 2019) (Winmill, C.J.); *Hopkins v. PVA TePla AG (In re Hoku Corp.)*, No. 4:16-CV-00086-BLW, 2016 WL 1755711, at *3 (D. Idaho May 2, 2016) (Winmill, C.J.). As the Ninth Circuit has held, "[i]t would serve no rational purpose for this court to engage in further litigation which may or may not prove to be decisive until such time as" a parallel administrative process, already underway, is either completed or abandoned. *Comer v. Stewart*, 312 F.3d 1157, 1158 (9th Cir. 2002).

As explained in Midas' opening brief, the Ninth Circuit described the factors that should be considered when evaluating a motion to stay:

> Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among these competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962).

In considering whether a stay would "simplify [] issues, proof, and questions of law," courts frequently grant stays when resolution of another action may "bear upon the case," because a stay is most "efficient for [the Court's] own docket and the fairest course for the parties[.]" *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). This Court has held that a stay is prudent where "the result of a separate administrative proceeding has some bearing upon the district court case. This rule . . . does not require that the issues in such proceedings are necessarily controlling of the action before the court." *Perez v. Idaho Falls Sch. Dist. No. 91*, No. 4:15-CV-00019-BLW, 2017 WL 743881, at *1 (D. Idaho Feb. 24, 2017) (Winmill, C.J.) (citation omitted).

Without question, the outcome of the ongoing EPA administrative process will bear upon this case. The AOC's entire purpose is to establish the legal framework for investigating and remediating the Site. As the Tribe concedes, the draft SOW (which the Tribe has had since August) addresses each of the alleged discharges at issue in this case. Response Br. at 11. Midas began working on the AOC process in early 2018, and the process has forged ahead notwithstanding this lawsuit. *See* Declaration of L. Michael Bogert in Support of Motion to Stay Litigation ("Bogert Dec.") ¶¶5-28.[2] Midas regularly engaged in discussions with EPA regarding the AOC until August 2019, when progress was halted as EPA waited for the Tribe to determine whether it would participate in the CERCLA process and, if so, under what conditions. As the Tribe notes in its Response, after several months of deliberation it declined to participate in multi-party negotiations. Response Br. at 12; Dec. of Amanda Rogerson in Support of Opposition to Motion to Stay (Doct. 22-2) ¶10.

[2] The Tribe asserts that the AOC process began in 2019 and that Midas misled the Court by indicating that it started in January 2018. Response Br. at 10. The Tribe is incorrect. The Bogert Declaration contains a timeline of these discussions, which did indeed begin in January 2018.

This puts the Tribe at odds with every other interested government agency. Most recently, on November 1, 2019, representatives from EPA, the Forest Service, IDEQ, the Shoshone-Bannock Tribes, and Midas met in Seattle to discuss a schedule to reach a final AOC. *See* Bogert Dec. ¶27 & Exh. 12. Pursuant to the agreed-upon schedule, the Shoshone-Bannock Tribes and IDEQ provided comments on the draft SOW on November 12, 2019; EPA agreed to provide a first draft of the AOC by November 15, 2019; and the parties agreed to meet to discuss the draft AOC on November 22, 2019. *Id.* Although the Tribe has declined to directly participate in AOC negotiations, Midas has agreed to provide the Tribe with access to a website that contains technical and other data that will inform the progressing AOC framework. *Id.* ¶27, Exh. 12 ¶8. Midas is providing this information in an effort to accommodate the Tribe's idiosyncratic decision to consult with EPA separately rather than collaboratively engage in the AOC discussions. This process is far from hypothetical or speculative. It is well underway—the parties have established concrete steps toward its completion—and it will be dispositive of this case once completed.

Regarding the weighing of competing interests, the Tribe summarily dismisses the hardship imposed on Midas in conducting multi-party CERCLA negotiations while simultaneously defending a citizen-suit that addresses the same locations. Response Br. at 17. Rule 1 expressly directs courts to promote the "inexpensive determination of every action and proceeding." Allowing this litigation to continue actively given EPA's commitment to release a draft AOC this month is patently inconsistent with this directive. Indeed, this briefing has highlighted one of the hardships of simultaneously negotiating an AOC and litigating the CWA case. The Tribe has faulted Midas for not presenting to the Court a step-by-step rehash of the AOC negotiations. *Id.* at 14. Requiring Midas to engage in those negotiations, and then rehash those negotiations to the Court (through non-hearsay evidence), threatens to bog down both the AOC process and this

litigation. This is hardly an efficient result for the parties or the Court.

The Tribe rightly points out that Midas bears the burden of demonstrating that a stay is warranted. Response Br. at 17, 18. However, as Midas has demonstrated, it has been engaged in CERCLA discussions with EPA., Midas has agreed on a schedule and milestones with EPA and other stakeholders for AOC negotiations. This CERCLA AOC will address the Tribe's concerns reflected in its Complaint. Thus, Midas has already satisfied even the highest burden.

In an attempt to demonstrate its own hardship, the Tribe points to alleged "unlawful discharges" from "unpermitted point sources identified in the Complaint" as causing "substantial injury and prejudice if a stay is granted." Response Br. at 18. But the Tribe fails to mention that these alleged "unlawful discharges" have been ongoing for decades, far longer than the defendant entities even existed, much less were involved with the Site. Only now—when Midas, EPA, the Forest Service, the Shoshone-Bannock Tribes, and Midas are nearing agreement on an overarching solution to investigate and address the Project Site—has the Tribe found a sense of urgency in asserting CWA claims. Moreover, the Tribe's decision to pursue isolation instead of collaboration on the AOC process, while enthusiastically pursuing a parallel CWA lawsuit, undercuts any claim of hardship to the Tribe.

Finally, the Tribe holds out the IPDES permitting process as an easy one: the Court simply must order Midas to obtain permits, the Tribe argues, and at least some issues will be taken care of "quickly and easily." Response Br. at 18. Far from it. Applying for, obtaining, and implementing an IPDES permit is a time-consuming and complicated administrative process.[3]

[3] For example, over a year ago Idaho Conservation League and the State of Idaho entered into a settlement under which the State would seek an IPDES permit for a historical mine on State property. *See* Settlement Agreement, *Idaho Conservation League v. David Groeschl*, No. 18-CV-00403-EJL (D. Idaho Oct. 1, 2018), ECF No. 8. Over a year has passed, and it does not appear that a draft permit for the Triumph Mine site has been published for public comment. Permits issued

The IPDES process that the Tribe now portrays as a quick-and-available remedy is anything but. It will be more efficient to let the AOC process play out rather than initiate a second, duplicative, years-long administrative proceeding.[4]

In addition, a final remedy governed by the AOC under CERCLA would be at least as stringent as any requirements imposed by IPDES permits because CERCLA § 121(d)(2) requires remedial actions comply with State environmental laws and requires that "all applicable, relevant, and appropriate regulations" be considered. 42 U.S.C. § 9621. Indeed, § 121(d) expressly requires consideration of state water quality standards developed under the CWA, 42 U.S.C. § 9621(d)(2)(A)(ii), such as IPDES standards. Conversely, such CERCLA remedial actions are exempted by law from being required to formally obtain local, state, or federal permits. 42 U.S.C. § 9621(e)(1). Thus, again, efficiency dictates that Midas continue working with EPA on an AOC without being required to simultaneously pursue IPDES permits that will not be necessary under a CERCLA AOC. In sum, the AOC process is both closer to completion than any IPDES permit process and it promises a more thorough and comprehensive remedy to resource issues at the Site than separate IPDES permits.

The Tribe also fails to confront the fact that the AOC process addresses the very conditions the Tribe complains of. While the Tribe asks the Court to order Midas to apply for CWA permits, the Complaint prays that the Court enter an order directing Midas to "take specific actions to

by EPA and IDEQ are publicly available online at https://www.epa.gov/npdes-permits/idaho-npdes-permits and https://www.deq.idaho.gov/permitting/issued-permits/. Neither shows a draft or final permit for the Triumph Mine.

[4] Midas does not concede that Clean Water Act permits are required, or even available, for the locations identified in the Complaint. As detailed in the accompanying Declaration of Alan Haslam, Midas has engaged in extensive communication with EPA and IDEQ regarding Clean Water Act compliance and permitting; neither has indicated that IPDES permits are currently required for the Site. Declaration of Alan Haslam in Support of Motion to Stay Litigation ¶19.

evaluate and remediate the environmental harm" at the Site. Complaint (Doc 1), p. 26, ¶ D. Midas is already engaged in a process that will result in the Site's investigation and remediation. Midas respectfully requests that the Court let the multi-party,[5] robust CERCLA administrative be appropriately pursued by the responsible regulatory agencies and interested parties currently at the negotiating table.

2. The Parties Agree that an AOC Will Divest This Court of Jurisdiction Under §113(h) —This Litigation Merely Delays Completion of that Process.

The Tribe does not dispute that an AOC will divest this court of jurisdiction under § 113(h)—on this point, it seems, the parties agree. Nor does the Tribe dispute that Midas is actively working with EPA to negotiate an AOC; the Tribe cannot do so, particularly in light of the most recent November 1 meeting. Bogert Dec. ¶¶27-28. These developments demonstrate that Midas, EPA, and the other stakeholders with interests in the Project are committed to finalizing the AOC and moving forward with the CERCLA process.

3. The Tribe's Response Seeks to Inject Irrelevant Factual Issues into the Discrete Legal Issue Midas' Motion Raised.

Instead of disputing an AOC's legal implications or, by extension, the significance of ongoing negotiations to granting a stay, the Tribe trots out a frontal attack on the Project itself, including the procedural and permitting hurdles that the Project faces. Response Br. at 1-12. The Tribe's irrelevant assertions include those about the Forest Service's permitting process, Midas' status as a Bona Fide Prospective Purchaser ("BFPP") under CERCLA, and the fact that the draft SOW contemplates a remedial investigation and feasibility study ("RI/FS"), rather than a detailed work plan for remediation. *Id.* at 9-12. But this amounts to little more than a red herring—

[5] The Tribe has not included in this lawsuit the Forest Service, which owns the patented land on which some of the alleged point sources are located. Defs' Br. in Supp. of Mot. to Dismiss 1, Doc. 19-1.

CERCLA's § 113(h) bar does not depend on the outcome of a NEPA process, nor does it depend on a party's status as a BFPP. As to the work plan, as a factual matter it is standard practice for an initial CERCLA AOC to require an RI/FS because the RI/FS informs EPA's final remedy decision for a particular site. And, as a legal matter, as this Court has previously held, an AOC that requires only an investigation triggers the §113(h) bar. *See* Mem. Decision (Doc. 23), *Greater Yellowstone Coal. v. Nu-West Indus. Inc.*, No. 04-CV-00116-E-BLW (D. Idaho Aug. 31, 2004) (Winmill, C.J.), (dismissing a CWA citizen suit based on an AOC requiring a "site investigation," the determination that the citizen suit challenged the CERCLA AOC, and thus was barred under §113(h)). The Tribe's assertions have nothing to do with the development of the AOC and, therefore, nothing to do with the pending motion.

While The Tribes' assertions regarding these issues are ultimately irrelevant to disposition of the Motion to Stay, Midas feels the need to respond to several of them.

The Tribe asserts that it "has no reason to believe that Midas Gold has even begun to draft a NPDES permit application, the first step for it to comply with its CWA duties." Response Br. at 12. However, Midas has communicated extensively with its regulators regarding compliance with the CWA. These communications include numerous meetings, exchanges of data, and at least three on-site visits. Declaration of Alan Haslam in Support of Motion to Stay ("Haslam Dec.") ¶¶15, 19. None of the agencies has indicated that IPDES permits are currently required for existing discharges on the Site. *Id.* ¶19. Moreover, as noted above, the CERCLA process itself will account for substantive CWA standards.

The Tribe argues that, under the PRO, remediation will not start for decades—after the Site is mined. Response Br. at 1. That is flat wrong. Under the PRO—which again is not relevant to the issue currently before the Court—investigatory and remedial activities will occur concurrent

with mining. Haslam Dec. ¶¶6-10. In fact, the PRO proposes to restore several prominent areas where mining will not occur, including Blowout Creek, and the restoration will include constructing a fish passage around the Yellow Pine Pit. *Id.* Further, the Tribe misleadingly suggests that there is a risk that Midas will leave the Site in worse condition than it is now. Response Br. at 8-9. This is simply not true under modern mining laws, and fails to take into account the stringent requirements for financial assurance. As the D.C. Circuit recently explained, "substantial advances have been made in the development of mining practices and the implementation of federal and state regulatory programs to address releases at hardrock mining facilities." *Idaho Conservation League v. Wheeler*, 930 F.3d 494, -505-06 (D.C. Cir. 2019) (quoting Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry (Final Action), 83 Fed. Reg. 7556, 7580 (Feb. 21, 2018)). As a result, today states "have comprehensive regulations governing how mines handle hazardous substances and include their own financial responsibility requirements." *Id.* at 505.

The Tribe's attack on the Project—rather than factors relevant to the Motion to Stay—also demonstrates the lengths to which the Tribe will go to oppose the Project. For example, the Tribe filed suit to block construction of an access road (referred to as the Golden Meadows project), even after Midas worked with the Tribe and others to address concerns. Notably, the Tribe ultimately withdrew the lawsuit. Response Br. at 7 n.1. The Tribe notes "heavy criticism" to aspects of the PRO, and then criticizes the alternate plan Midas came up with to address those issues. *Id.* Viewed in this light, it seems that this CWA lawsuit is but one piece of the Tribe's multi-faceted attempt to delay and hinder the Project by whatever means possible.

Conclusion

Deferring to the administrative process under CERCLA will not cause the Tribe additional injury, and the Tribe's reasons to reject a stay are easily outweighed by the burdens on the parties

and the Court that additional litigation will impose. Plus, as explained in Midas' Motion to Dismiss, *see* Doc. 19-1, the remediation actions the Tribe seeks will require the involvement of the U.S. Forest Service and EPA due to the ownership interests in the land and the existing site CERCLA orders (to which Midas is not a party).

As this Court has stated, "the Court's central concern is how it can best help the parties achieve a just, speedy, and inexpensive resolution of their claims. Cf. Fed. R. Civ. P. 1." *In re Bradford*, 2019 WL 96221, at *5. "A district court has inherent authority and wide latitude in controlling—among other things—its calendar and docket, as well as its orders and decisions." *United States ex. rel. Rafter H. Constr., LLC v. Big-D Constr. Corp.*, 358 F. Supp. 3d 1096, 1098 (D. Idaho 2019). Here, there is an ongoing administrative process, involving Midas, the Shoshone-Bannock Tribes, the Federal government, and the State of Idaho that will divest this Court of jurisdiction. Rule 1 of the Federal Rules of Civil Procedure counsels that this case be stayed while the CERCLA process runs its course.

Accordingly, Midas requests that the Court stay the proceedings pending further order of the Court and that the parties file a status report every 30 days to keep the Court informed of progress in the AOC negotiations.

DATED: November 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this November 13, 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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