

Exhibit F

August 17, 2007

United States Department of Justice
Attn: Assistant Attorney General
Environmental Enforcement Section
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By e-mail

Re: Comments on CERCLA RD/RA Consent Decree for Groundwater Operable Unit 2, Southwest Jordan River Valley, Utah – United States and State of Utah v. Kennecott Utah Copper Corporation, D.J. Ref.90-11-2-07195/3

Dear Mr. Bacon, Ms. Thomas, and Attorneys in the Environmental Enforcement Section:

On behalf of FRIENDS of Great Salt Lake (“FRIENDS”), we submit the following comments on the proposed RD/RA Consent Decree for groundwater Operable Unit 2 (“OU2”) in United States v. Kennecott Utah Copper Corp., Civil Action No. 07-CV-00485-DAK, lodged with the United States District Court for the District of Utah on July 9, 2007.

I. INTRODUCTION

FRIENDS appreciates the efforts of the United States and the State of Utah in developing a remedy for the contamination to the aquifer underlying the West Jordan River Valley and the resources that the government agencies have devoted to reaching the settlement with Kennecott Utah Copper Corporation ("KUCC") embodied in the proposed July 2007 CERCLA RD/RA Consent Decree ("Decree"). We applaud the unique aspects of the proposed Decree that enhance the authority of the State of Utah to participate in and control the cleanup process, administer the state permit components of the OU2 Record of Decision ("ROD"), and provide for state permit enforcement for waste disposal outside of the OU2 site.

FRIENDS has, as its mission, the preservation and protection of the Great Salt Lake ecosystem and seeks to increase public awareness and appreciation of the Lake through education, research, and advocacy. The organization has long been involved in the protection and restoration of Great Salt Lake and its ecosystems, advocating for ways in which the public may enjoy these resources by fishing, birdwatching, boating, photographing, hiking and studying these natural areas. FRIENDS has commented at every stage of the ROD and remedy process, consistently noting that the aquifer cleanup has the potential to jeopardize Great Salt Lake and the surrounding ecosystem because the hazardous substances¹ that are being withdrawn from the aquifer during the cleanup are being diverted, directly or indirectly, into the Great Salt Lake.

Although the Decree addresses some of FRIENDS's long-standing concerns, the Decree leaves the long-term disposal of the hazardous substances being removed from the groundwater to an indeterminate future. FRIENDS has three principal concerns with the proposed Decree. First is a long-standing objection to a CERCLA cleanup whose remedy contemplates moving contaminants from one polluted water body into another. In the short-term, the government agencies are managing this aspect of the cleanup by allowing the discharge of the contaminants from the aquifer into KUCC's North Tailings Impoundment, a repository from which further discharges into the environment are allowed under various state permits. Permanently removing the contaminants extracted

¹ The Decree recognizes that the contaminants in the OU2 aquifer are "hazardous substances" as defined in CERCLA. Decree at 19 (definition of "Waste Material"). Jurisdictionally, when these substances are removed from the OU2 groundwater, they remain hazardous substances subject to CERCLA, even if they could be defined as "not hazardous" based on the unique provisions of some other law or regulation. The First Circuit has held that there is no minimum quantity threshold for a hazardous substance under CERCLA. United States v. Davis, 261 F.3d 1, 52 (1st Cir. 2001). In Acushnet Co. v. Mohasco Corp., 191 F.3d 69, 76 (1st Cir. 1999), the same court noted that the Ninth, Second, and Fifth Circuits agreed on this point, citing also the absence of any definition of minimum level in CERCLA's definition of a "hazardous substance" in 42 U.S.C. § 9601(14).

from the OU2 groundwater from the environment would be more consonant with the fundamental objectives of a CERCLA cleanup.

Second, even if the short-term handling of the contaminants in the North Tailings Impoundment is regulated by state permitting of the impoundment, the long-term handling of those contaminants – after KUCC ceases mining operations (“post-mining”) – is inadequately defined in the ROD, the Decree, and the associated June 2007 Operation, Maintenance & Replacement Plan (“OM&R Plan”). Instead, the Decree and the OM&R Plan should provide that there will never be direct discharge of contaminants extracted from the aquifer into Great Salt Lake.

Third, the Decree allows for future decisions modifying the remedy and potentially decreasing the Financial Assurance to be made without public participation and without judicial approval. In view of the many decades over which the remedy will continue to operate, and the potential harm that direct discharge of hazardous substances into the Lake could cause, the Decree must be modified to ensure that future decisions regarding the remedy that could lead to direct discharges to the lake be guaranteed to involve public participation and Court approval.

FRIENDS opposes entry of the proposed Decree unless the parties satisfactorily address its concerns by making changes to the proposed Decree.

II. FACTUAL BACKGROUND

FRIENDS’s principal concern in objecting to the Decree is that the Decree, the ROD and the OM&R Plan do not adequately guarantee that the remedy will prevent contaminants being removed from the aquifer from being discharged into Great Salt Lake or from otherwise posing an unacceptable risk to the Lake. This concern is greatest for the parts of the remedy that are expected to be conducted post-mining, because the ROD, the Decree and the OM&R Plan do not categorically preclude the discharge of the pollution extracted from the groundwater into Great Salt Lake.

Because of the potential for discharge of contaminants from the aquifer into Great Salt Lake, the Decree and underlying remedy are not protective of human health or the environment, do not offer a permanent solution to the contamination, fail to optimize treatment technologies, fail to permanently reduce the volume and toxicity of the contaminants, and, indeed, increase the mobility of these pollutants. The Decree and the associated remedy clean the contaminated aquifer by potentially putting at risk one of the most valuable and unique ecosystems in the world – Great Salt Lake. This is contrary to the public interest, and the Decree should be modified to guarantee that it protects the Lake.

A. GREAT SALT LAKE AND ITS ECOSYSTEM

The local, national and international value of Great Salt Lake, its islands, and its wetlands is enormous. Overall, 257 avian species use the Great Salt Lake ecosystem. Of

these, 112 species are exclusively associated with the Lake's varied wetland areas, while 117 species reportedly nest on the Lake's periphery or on its islands. At least 33 species of shorebirds representing 2 to 5 million individuals use Great Salt Lake annually. In addition, up to 5 million waterfowl migrate through the lake each year, stopping along routes that take them elsewhere in North America or to Central and South America. Approximately 30 percent of the waterfowl migrating along the Pacific Flyway depend upon the Great Salt Lake wetlands. For these migrants, the Lake provides a critical food supply, allowing them fuel up for the rest of their migrations, sometimes doubling their body weight before they leave. In recognition of its role in these transnational flights, Great Salt Lake is designated as one of only 19 sites in the Western Hemisphere Shorebird Reserve Network.

The importance of Great Salt Lake to the birds of the Americas is borne out by the sheer numbers that depend on its resources, including

- 80 percent of the world's population of Wilson's phalaropes,
- The largest staging concentration of eared grebes in North America,
- The world's largest breeding population of white-faced ibis and California gulls,
- Over half of the entire breeding population of snowy plovers west of the Rocky Mountains,
- More than three quarters of the entire western population of tundra swan,
- The largest breeding colony of American white pelicans, and
- One of the ten largest wintering populations of bald eagle in the lower 48 states.

The Lake boasts several protected areas including the Bear River Migratory Bird Refuge, Farmington Bay Waterfowl Management Area, Nature Conservancy Great Salt Lake Shorelands Preserve, Audubon Gilmore Sanctuary and Lee Creek Natural Area.

Hundreds of thousands of bird watchers comb the shores of Great Salt Lake to be rewarded by incredible views of feeding, flying and nesting birds that journey thousands of miles to gorge on the bounty of our nation's largest inland "sea." The Lake also attracts recreationists enjoying other water-based activities such as sailing, rowing, floating, wading and kayaking. Others hike, ride horseback and mountain bike to enjoy scenery, solitude and wildlife. Great Salt Lake also supports a robust community of waterfowl enthusiasts who not only enjoy hunting but are working to preserve and protect Utah's waterfowl, its unique and rich habitat and its rich heritage.

Despite the ecological significance of the Great Salt Lake ecosystem, Great Salt Lake is the only water body in Utah for which numeric water quality standards have never been set. See Utah Admin. Code R317-2-6.5 (classifying Great Salt Lake as "Class 5"); R317-2-14 (listing no numeric standards for Class 5 water bodies). Only narrative water quality standards exist, which are meant to protect the Lake's beneficial uses. Utah Admin. Code R317-2-7.2. However, there is currently no process for implementing the narrative standards, and the lack of numeric water quality standards is illegal because it

has not been shown that numeric criteria cannot be established.² As a result, discharges of pollutants into Great Salt Lake – even those under discharge permits – are not subject to a water-quality based analysis. This fact becomes important in the CERCLA context because the governments rely heavily on an existing discharge permit to justify allowing some of the hazardous substances from the OU2 groundwater to be routed into Great Salt Lake.

The lack of numeric water quality standards is also particularly significant in Great Salt Lake, because – as a terminal lake – pollutants can flow into the Lake, but can never be flushed out. Limiting the total load of contaminants that reach the Lake – and not merely the concentration of those contaminants in the waters that enter the Lake – is thus of central importance for preserving the Lake’s water quality. In addition, because the Lake is shallow (averaging about 15 feet in depth), wind and wave action can easily stir the bottom. This action can readily expose hazardous substances in the sediments to resuspension and uptake into the environment.

B. THE SELECTED REMEDY AND ITS POTENTIAL EFFECTS ON GREAT SALT LAKE

As described in the Decree, the ROD for groundwater OU2 involves measures to contain and reduce the areal extent of the acid plume in the West Jordan River valley groundwater. Decree at 7, ¶ M(a)-(d). While the mine is open, the remedy consists of routing the contaminated groundwater extracted from the acid plume into the existing pipeline (“tailings line”) that KUCC uses to transport tailings slurry from its mining operations to the North Tailings Impoundment, mixing the acid plume water with the mine tailings and depositing the resulting mixture in the Impoundment. *Id.* at 7, ¶ M(e). In addition, water from the barrier wells is supplied to a Reverse Osmosis (“RO”) plant, and the concentrates from the RO plant are inserted into the KUCC tailings line. ROD at 65-66. Although the barrier well water is being extracted from the groundwater in OU2, and the hazardous substances in the RO concentrate that originated in OU2 are being inserted into the tailings line, the Decree and the OM&R plan do not address the long-

² Specifically, water quality standards “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use” of a particularly water body. 40 C.F.R. § 131.11(a)(1). Water quality standards are typically expressed as numeric limitations. 40 C.F.R. 131.11(b) (“In establishing criteria, States should: (1) Establish numeric values. . . .), which can be supplemented by “narrative standards.” 40 C.F.R. 131.11(b)(2). Indeed, relying solely on narrative criteria to protect designated uses is appropriate only “where numerical criteria cannot be established. . . .” 40 C.F.R. 131.11(b)(2) (emphasis added). Moreover, where the state relies on narrative criteria for toxic pollutants, such as selenium, to protect beneficial uses, the State must “identify[] the method by which the State intends to regulate point source discharges of toxic pollutants. . . .” 40 C.F.R. 131.11(a)(2). There has been no such identification of methods to regulate discharges to enforce the narrative standards.

term disposal of the RO concentrates, despite the fact that this aspect of the cleanup is included in the 2002 Final Design for Remedial Action.³

The Impoundment and discharges from the Impoundment to the air, groundwater and Great Salt Lake are then regulated and monitored under permits issued by several different state agencies. OM&R Plan at 4-5, ¶ 5.2. When mining operations cease (“post-mining”), the Decree provides that KUCC will create and implement a “Closure Transition Plan.” to replace any components of the remedy, “as described in the OU2 ROD and OM&R Plan.” Decree at 13. These plans do not definitively specify the method for post-mining disposal of the contaminants in the OU2 groundwater, but rather indicate several potential alternatives. ROD at 71-72, 82. Although the OM&R plan provides that “[p]rior to mine closure a replacement treatment system and repository for treatment residuals [from the acid plume water] will be designed and constructed,” OM&R Plan at 5, ¶ 5.2.2, the OM&R Plan and the Decree contemplate that this long-term remedy could be changed. See OM&R Plan at 2, ¶ 2.0; Decree at 91, ¶¶ 108-09. In addition, the OM&R Plan and the Decree make no provision for the post-mining disposal of the RO concentrates, which are also currently being fed into the tailings line and thence into the Tailings Impoundment.

The ROD is specific that a decision on the post-mining remedy is being deferred to some future date:

Following cessation of nearby mining and milling operations, the NF⁴ and RO concentrates shall be disposed in a facility appropriate to the types of wastes then remaining in the concentrate. None of the specific requirements mentioned in the description of alternatives will be chosen at this time. A disposal method which could be implemented quickly following mine closure must be included as a part of the RD/RA. In 30 years, it is anticipated that other technologies may be available to handle residuals from the treatment plant. Closure of the mine may require infrastructure and O+M which could be used also for the concentrates, the chemistry of the ground water could be significantly less concentrated than today, and more will be known about the nature of any proposed discharge to the Great Salt Lake and the potential effects thereof.

³ The 2002 Final Design for Remedial Action at South Facilities Groundwater does cover both the short-term and long-term handling of the RO concentrates. 2002 Final Design for Remedial Action at South Facilities Groundwater at 6 (noting that the selected remedy includes “Disposal of treatment concentrates in existing pipeline used to slurry tailings to a tailings impoundment prior to closure” as well as “Development of a post-mine closure plan to handle treatment residuals for use when the mine and mill are no longer operating”).

⁴ “NF” stands for “nanofiltration,” the remedy’s original method for treating the acid plume water. Nanofiltration was eliminated, and acid plume water routed directly into the tailings line, after the August 2003 Explanation of Significant Differences (“ESD”). 2003 ESD at 2-3.

ROD at 82. This leaves open the possibility that, in the future, remaining contaminants in the OU2 groundwater could be discharged directly into Great Salt Lake.

The potential for short- or long-term transfer of the hazardous substances from the OU2 groundwater into the Great Salt Lake is troubling. Currently, all water bodies in Utah, except Great Salt Lake, are subject to quantitative water quality standards. Under the pre-mine-closure handling of the acid plume water and RO concentrates, at least some of contaminants from the groundwater cleanup will make their way into Great Salt Lake, indirectly, through the Tailings Impoundment. But without quantitative water quality standards, and with all assessments of impacts on the Lake based on concentrations of the contaminants in the discharge water, rather than the loading (the total amount of each contaminant that is being added to the Lake via the discharge), there is currently no adequate understanding of the impact of the loading of these contaminants on the Lake ecosystem. Allowing any of the hazardous substances being removed in the CERCLA cleanup from OU2 groundwater to eventually end up in Great Salt Lake contradicts CERCLA's remedial purpose.

Although the impacts are not well-understood, and monitoring data is lacking, it is clear that these contaminants can adversely impact aquatic life and wildlife. The state and federal governments have established water quality standards for inorganic substances and metals found in significant levels in the acid plume water and RO concentrates – including chlorine, aluminum, arsenic, cadmium, copper, lead, selenium and zinc – specifically because of the threat they pose to aquatic life. Every water body in Utah except for Great Salt Lake has quantitative water quality standards for these hazardous substances. In the absence of information specific to Great Salt Lake, the prudent course would be to prohibit the discharge of additional quantities of these substances to the Lake, particularly when they are being extracted under legal authority from another contaminated water body. The State has begun the process of establishing a numeric water quality standard for selenium, and has plans to move on to other numeric standards. This commitment is laudable and being undertaken in good faith. But, in the short-term, until those standards are available, protection of the Lake is best achieved by prohibiting new discharges and foreclosing the future discharge of hazardous substances from the OU2 cleanup into the Lake.

III. STANDARDS GOVERNING APPROVAL OF CONSENT DECREE

The courts review a proposed Consent Decree to determine if it is fair, adequate, reasonable, consistent with the purposes of CERCLA, and does not violate law or public policy. United States v. State of Colorado, 937 F.2d 505, 509 (10th Cir. 1991); Utah v. Kennecott Corp., 801 F. Supp. 553, 567 (D. Utah 1992). CERCLA's "'overreaching principles' are 'accountability, the desirability of an unsullied environment and promptness of response activities.'" Kennecott, 801 F. Supp. at 567 (quoting United States v. Cannons Eng'g Corp., 899 F.2d 79, 91 (1st Cir. 1990)).

Fairness incorporates both procedural and substantive components. Id. & n.13. To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to “gauge its candor, openness and bargaining balance.” Id. at n.13 (quoting Cannons Eng’g, 899 F.2d at 85). Substantive fairness involves concepts of corrective justice and accountability: “a party should bear the cost of the harm for which it is responsible.” Id. (quoting Cannons Eng’g, 899 F.2d at 87).

Consideration of the adequacy and reasonableness of a Consent Decree involves consideration of a number of factors, including whether the decree is technically adequate, reflects the relative strengths and weaknesses of the government’s case, is in the public interest, and advances the objectives of the applicable statute. United States v. Telluride Co., 849 F. Supp. 849 F. Supp. 1400, 1402 (D. Colo. 1994) (citing Cannons Eng’g, 899 F.2d at 89-90). Reasonableness focuses on the effectiveness of the consent decree as a vehicle for cleaning up the environment and providing satisfactory public compensation for the violations under the subject provisions. United States v. Davis, 261 F.3d 1, 26 (1st Cir. 2001); see also United States v. Southeastern Penn. Transp., 235 F.3d 817 (3rd Cir. 2000); United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 279 (1st Cir. 2000).

In suits involving the public interest, the courts’ role is more searching than in typical litigation between private parties. Telluride, 849 F. Supp. at 1402. While the court is not to substitute its judgment for the judgment of the parties as to what constitutes an appropriate decree, it must not “merely imprint their decision as though possessed of a clerical rubber stamp.” Id. at 1403. Further, where the government files suit “merely as the vehicle by which the parties’ settlement could receive judicial enforcement,” rather than “to settle long-running litigation through which the strength and weaknesses of each side’s case was revealed,” a court must “undertake a more searching review of a consent decree’s fairness.” Id.

Despite the deference Courts grant agencies when reviewing consent decrees, several courts have held that CERCLA consent decrees did not satisfy the standards. For example, in Kennecott, the District Court found that the proposed Consent Decree was deficient in three ways: it lacked sufficient foundation for the State’s determination that its ground water natural resource could not be restored; it failed to require substantial protection of State natural resources from further contamination; and it failed to apply the proper measure of damages. Kennecott, 801 F. Supp. at 568. The Court concluded that “the State and Kennecott failed to demonstrate by a preponderance of evidence that restoration and plume remediation is not feasible in justification of the State’s determination not to require such.” The District Court rejected the proposed Consent Decree because it failed “to demonstrate that the remedial purposes CERCLA was intended to achieve [could] not be achieved.” Id. at 569.

As currently proposed, the Decree in this case is substantively unfair because it does not conclusively provide for the permanent sequestration of the contaminants being removed from the groundwater in the OU2 cleanup, but rather allows for the possibility

that those contaminants will be returned to the environment by discharge into Great Salt Lake.

IV. OBJECTIONS TO CONSENT DECREE

A. THE DECREE FALLS SHORT OF THE OBJECTIVE OF A CERCLA CLEANUP TO PERMANENTLY REMOVE CONTAMINANTS FROM THE ENVIRONMENT

As the District Court in which the Decree is lodged has recognized, the overarching purposes of CERCLA are to permanently remove hazardous substances which have been released into the environment, eliminate threats to health or the environment, and place the costs of remediation on the parties responsible for the releases. Kennecott, 801 F. Supp. at 567. FRIENDS and other commenters have pointed out throughout the remedy selection process and cleanup program that the remedy selected in the ROD does not achieve the intended purpose of a CERCLA remedial action because it removes the hazardous substances from the groundwater aquifer but does not remove them permanently from the environment.

While mining continues, the selected remedy involves routing contaminants extracted from OU2 groundwater (from the acid plume water and the concentrates from the RO plant) into the Tailings Impoundment. Hazardous substances in the Tailings Impoundment are not permanently sequestered from the environment; rather, their further discharge back into the environment is regulated by a variety of state permits related to air quality, groundwater, surface water, mining and solid waste. OM&R Plan at 4-5, ¶ 5.2. This process for disposal of the hazardous substances extracted from the OU2 groundwater is planned to continue while mining operations continue at KUCC. Id.

From the Tailings Impoundment, the contaminants from the OU2 groundwater (along with those in the waste from KUCC's mining operations) are capable of reaching Great Salt Lake. The discharge from the Tailings Impoundment to the Lake is regulated under a Utah Pollution Discharge Elimination System ("UPDES") permit. The governments have approved of this means of disposing of the contaminants from the OU2 groundwater cleanup by, in part, comparing the quality of the water being removed from the barrier wells and the acid plume to the current limits set in KUCC's UPDES permit. Response No. 1 to Comments, June 2007 Explanation of Significant Difference Comment Response Summary at (unnumbered) 1-3; see also 2002 Final Design for Remedial Action at South Facilities Groundwater at 68. ¶ 3.4.3 (reporting that testing showed that "reverse-osmosis concentrates are chemically compatible with disposal in the Great Salt Lake and meet current UPDES permit discharge limits").

This solution to the disposal of the hazardous substances from the OU2 groundwater cleanup depends squarely on the absence of numeric water quality standards in Great Salt Lake: the governments' determination appears to be that, because the quality of the discharge water from the OU2 cleanup is "better" than the current water in Great Salt Lake, allowing the contaminants from the groundwater to be routed into the

Lake does not harm the Lake. The four long-term treatment alternatives studied in the 2002 Final Design for Remedial Action at South Facilities Groundwater likewise depend on the conclusion that “[a]ll four configurations produced treated waters that would meet the current UPDES permit limits for [the discharge from the Tailings Impoundment], which discharges into the Great Salt Lake.” 2002 Final Design for Remedial Action at South Facilities Groundwater, Appendix A, at 25, ¶ 6.0.

However, the argument that the addition of any additional pollutants to the Lake – even at concentrations lower than the current concentrations in the Lake – will not harm the Lake lacks foundation in the absence of numeric water quality standards. So long as there are no numeric, water-quality-based standards, and the governments lack hard data about how pollution affects Great Salt Lake and its ecosystem, the loading of any additional pollution into the Lake has the capability of harming the Lake. The extraction of hazardous substances from OU2 groundwater may continue for 40 years or more, with several aspects of the remedy contemplating that some of those substances will reach the Lake. There is currently no way of telling whether the additional discharge harms the Lake – yet the discharge is nonetheless allowed.

FRIENDS has long contended that a proper CERCLA remedy should not move the contamination removed from the OU2 groundwater into another water body (albeit indirectly), which is allowed in this case only because the Great Salt Lake has no numeric water quality standards. Because there are no numeric standards, the State undertakes very little monitoring of the water quality in Great Salt Lake (there are no long-term or short-term monitoring stations on the Lake listed in EPA’s STORET database). As a result, the State and EPA are not in a position to know whether or not they are protecting Great Salt Lake from the discharge of contaminants that are extracted from the OU2 groundwater. In the absence of adequate information, CERCLA contemplates that a remedy enforced by a fair Consent Decree would be one that leaves an “unsullied environment.” Until quantitative water quality standards are established for Great Salt Lake, eliminating all additional discharge from the CERCLA cleanup into the Lake would best guarantee its protection. FRIENDS objects to the Decree and the underlying remedy insofar as it allows the indirect transport of contaminants from the OU2 cleanup into the Great Salt Lake.

B. THE DECREE SHOULD BE AMENDED TO PROVIDE THAT THERE WILL NEVER BE A DIRECT DISCHARGE OF CONTAMINANTS EXTRACTED FROM THE AQUIFER INTO GREAT SALT LAKE

FRIENDS also respectfully requests that the Decree be modified to guarantee that there will be no discharge of contaminants from the OU2 groundwater cleanup into Great Salt Lake after mining operations cease at KUCC. The OM&R Plan contemplates that the current plan for treatment of the acid plume water will involve treatment of acidic waters with lime and the disposal of the sludge in a prepared facility. OM&R Plan at 5, ¶ 5.2.2; see also 2002 Final Design for Remedial Action at South Facilities Groundwater, Appendix A. However, the same paragraph in the OM&R Plan indicates that the plan for post-mining water management and disposal of treatment residuals will be updated in the

course of the 5-year reviews, and another provision in the OM&R Plan provides that “modification of this OM&R Plan ... shall not require court approval or amendment to the Consent Decree so long as the modification does not fundamentally change or materially alter the basic components of the remedy.” OM&R Plan at 2. ¶ 2.0.

As noted above, the selected remedy has expressly not made a determination regarding the post-mining handling of acid plume water and RO concentrates. ROD at 82. Indeed, the ROD included, as an alternative for disposal of the toxic concentrates from the RO facility following mine closure, “Direct disposal in the Great Salt Lake via a new pipeline and outfall. This depends on the nature of the concentrate and impacts on the Great Salt Lake.” ROD at 71. Hence the possibility exists that hazardous substances extracted from the groundwater contaminated by KUCC’s mining operations could be pumped directly into Great Salt Lake at some point in the future. The post-mine-closure handling of the RO concentrates does not appear to be addressed in the OM&R Plan or the Decree, except to mention that the water from the barrier wells feeds the RO plant. OM&R Plan at 4, ¶ 5.1. The Decree should provide explicitly that the concentrates from the RO plant – which remain CERCLA hazardous substances even after they are withdrawn from the contaminated groundwater – along with the acid plume water, should never be directly discharged into Great Salt Lake or otherwise discharged into the environment.

Any result of the CERCLA cleanup that leads to the direct discharge into Great Salt Lake, even if it were to be done under a permit, is directly antithetical to CERCLA’s overriding purpose of removing contaminants permanently from the environment. Prior to mine closure, the contaminants in the acid plume water and the RO concentrates can be mixed with the similar substances in the tailings line from KUCC’s on-going mining operations, and managed in the Tailings Impoundment. Although FRIENDS believes that this management of the contaminants extracted from the groundwater is not an appropriate CERCLA remedy because of the potential for re-discharge into the environment from the Impoundment, FRIENDS recognizes that there is some practical basis, and certainly a cost benefit to KUCC, in managing the acid plume water and RO concentrates together with the mine tailings.⁵ This does not change the fact that the additional loading of contaminants from the groundwater cleanup into the Impoundment increases the potential for harm to Great Salt Lake by increasing the quantity of these

⁵ Note that although FRIENDS acknowledges that there is a practical aspect to this method of handling the hazardous substances in the acid plume water and the RO concentrates while the mine continues to discharge tailings into the Impoundment, FRIENDS does not concede that this complies with the law. For example, FRIENDS has a pending challenge before the Utah Water Quality Board that asks (among other issues) whether it is legal, under the Clean Water Act, to regulate the eventual discharge from the Tailings Impoundment into Great Salt Lake under the effluent standards for discharges from mining operations when the contents of the Tailings Impoundment consist of co-mingled mining effluent and effluent that includes hazardous substances extracted from the CERCLA cleanup – even if the chemical makeup of the two waste streams is similar.

contaminants in the Impoundment beyond the levels that would be present from the mine tailings alone.

However, this practical method of treatment (the permits which FRIENDS assumes will be tightened to ensure protection of the Lake as the State develops protective water quality standards) disappears at the time of mine closure because the tailings slurry from mining activities will cease. Rather than allowing any potential for direct discharge to Great Salt Lake after the mine closure, the Decree should be modified to mandate disposal of RO concentrates and acid plume water reaction products (sludge) in a prepared facility, isolated from the surrounding environment, and foreclose any alternatives that would allow a discharge of hazardous substances from the OU2 cleanup into Great Salt Lake. Leaving any possibility that the remedy will be changed in the future to allow direct disposal of the hazardous substances extracted from OU2 into Great Salt Lake is substantively unfair because it directly conflicts with CERCLA's mandate of "an unsullied environment" following a cleanup. Kennecott, 801 F. Supp. at 567.

The Decree and the OM&R Plan should be amended to eliminate any discretion that would allow any possibility of future discharge of the acid plume water or RO concentrates into Great Salt Lake. Flexibility in the post-mine closure acid plume water treatment and RO concentrate discharge could still be allowed, so long as their direct discharge into Great Salt Lake were categorically and explicitly removed as an option. Unless this is done, the Decree will not achieve the remedial purpose of CERCLA. CERCLA does not permit contamination to simply be shifted from one part of the environment to another – particularly not when the receiving part of the environment is a resource as precious and fragile as Great Salt Lake, and particularly not when the governments' ability to use Great Salt Lake as a disposal site for the hazardous extracts from the groundwater is a result of the governments' own long-standing neglect to adopt numeric water quality standards for the Lake. There is no reason that the express preclusion of discharge of the contaminated residues from the OU2 groundwater cleanup into Great Salt Lake cannot be written into the Decree and the OM&R Plan, and the overarching purpose of CERCLA requires that it be done.

C. THE DECREE SHOULD PROVIDE FOR A PUBLIC PROCESS AND JUDICIAL APPROVAL OF ANY FUTURE MODIFICATIONS TO THE REMEDY

In addition to the Decree prohibiting any future discharge of the by-products of the OU2 groundwater cleanup into Great Salt Lake, the Decree should be amended to explicitly require that future modifications to the remedy and to the Financial Assurance provided in the Decree for completing the remedy be subject to a public notice and comment process, and also be subject to Court approval. FRIENDS believes that the governments intend, in good faith, to engage in a public process for making future changes to the remedy. However, this should be made explicit in the Decree.

CERCLA Sections 117 and 122(d)(2), 42 U.S.C. §§ 9617, 9622, require that remedy selection and consent decrees be subject to public participation; see also 40

C.F.R. 300.430(c)(2)(ii)(A) (requiring that the lead agency “ensure the public appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy.” (emphasis added)). However, the Decree and the OM&R contemplate that the governments could act to amend the remedy, and potentially allow discharges directly into Great Salt Lake, without either public participation or judicial approval. The relevant provisions must be changed to ensure that the public will be allowed to participate in future decisions on changes to the remedial design, and that the State and EPA must seek judicial approval for such changes. Since the ROD expressly asserts that the post-mining remedy has not yet been selected, this Decree must explicitly ensure that the public – and the Court – will be involved in that future selection process.

Specifically, Paragraph 109 of the Decree should be amended to specify that any modification to the remedy that results in a discharge of hazardous substances from the OU2 cleanup into Great Salt Lake (other than through the tailings line and Tailings Impoundment) shall be deemed a modification that “fundamentally alter[s] the basic features of the selected remedy.” The CFR provision cited in that paragraph, 40 C.F.R. 300.435(c)(2)(B)(ii) specifies that “fundamentally alter” means “with respect to scope, performance, or cost.” Allowing a direct discharge into the Lake certainly alters the remedy with respect to both scope and performance, and likely cost, and the governments should make explicit in this provision that no such modification is allowed without Court approval. In addition, Paragraph 109 should expressly provide that any modifications that fundamentally alter the remedy (including direct discharge into the Lake) must be approved by the governments only after public notice and an opportunity to comment.

Likewise, the section in the OM&R regarding changes (OM&R at 2, ¶ 2.0) should be amended to reflect that any modification to the OM&R Plan that allows discharges of the hazardous substances from OU2 into Great Salt Lake other than through the tailings line and Tailings Impoundment shall be deemed a modification that “fundamentally change[s]” the remedy, and thus subject to Court approval and public notice and comment. It is not sufficient that a direct discharge to the Lake from the OU2 acid plume wells or the RO plant could be later regulated under some other environmental law – a fundamental part of a CERCLA cleanup is the opportunity for the public to participate, and a Court to approve, a remedy before it is selected and implemented. The current provisions of the Decree and OM&R could allow the governments, in the future, to circumvent this process to the detriment of the Great Salt Lake ecosystem.

Another significant concern regarding Court (and public) participation in future modifications is Paragraph 108, which provides that the governments and KUCC can modify the “scope” of the Financial Assurance without Court approval. It is not clear whether this means that the parties can alter the amount of the Financial Assurance without Court approval – but the governments should ensure that any modification to the amount of the Financial Assurance be subject to Court review. Of the \$15 million currently provided as Financial Assurance, nearly \$10 million is expected to be devoted to the disposal of the acid plume water sludges in a prepared facility for the thirty years after projected mining cessation in 2018. Current officials who negotiated and will

implement this decree in the short-term should guarantee that a Court will oversee decisions by future officials involved after the mining operations cease many years from now, if they should wish to reduce the amount of the Financial Assurance. This will serve as a further guarantee that all aspects of the OU2 cleanup, and long-term handling of the acid plume water and RO concentrates, will not result in a direct discharge of those contaminants into Great Salt Lake.

In addition, the Decree includes a provision that prevents EPA from unilaterally modifying the OM&R Plan if KUCC is meeting the minimum extraction rate established in the ROD and the acid plume is contained. Decree at 25, ¶ 11(a). Because the OM&R plan provides not only for the extraction of the contaminated groundwater and the containment of the plume, but also for the transmission and disposal of the hazardous substances from the groundwater, this provision should be deleted to ensure that EPA can alter the disposal method based on future environmental protection considerations – and not be precluded from doing so if only certain aspects of the CERCLA cleanup are being met.

V. CONCLUSION

FRIENDS requests the United States and the State of Utah refrain from moving to enter the Consent Decree until the objections described above are resolved. We reiterate that we support many of the proposed Decree's provisions, and hope that these objections can be worked out quickly to avoid significant delay in entry and implementation of the Decree. Please contact me to discuss these issues at your earliest convenience. Thank you.

Respectfully submitted,

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