

SGC

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March 27, 2019

Bonita Peak Mining District Citizens Advisory Group
c/o Trout Unlimited Durango
1309 E 3rd Avenue, Unit 109
Durango, Colorado 81301

Re: Consent Decree

Dear Community Advisory Group:

I am writing because I understand that the Colorado-SGC Consent Decree¹ is on the Agenda for the Citizens Advisory Group (CAG) Meeting scheduled for 28 March 2019. I wanted to provide a short summary of the facts relating to the Consent Decree as I believe it might be of utility to the CAG.

As most members of the CAG are aware, SGC was formed and acquired the Sunnyside Mine in 1985 and mined it from 1986 until 1991 using modern techniques and under the modern era of environmental regulation. SGC closed the Mine in accordance with the law, its permits and the Consent Decree. As noted in a recent cover story in the Engineering & Mining Journal "*It is incontrovertible that both SGC's five years of mining [. . .] and SGC's 30 years of remediation and reclamation in the Silverton Caldera each substantially reduced metals loading in the Animas River from what would have otherwise been the case.*"² As discussed below, the Consent Decree played an important role in SGC's improvement of Animas River water quality.

Background to the Consent Decree. SGC acquired the Sunnyside Mine from Standard Metals on November 19, 1985. At the time, Standard Metals was in bankruptcy and the Mine was closed and under a Cease and Desist Order for multiple permit violations, including failure to comply

¹ Consent Decree and Order, as amended, *Sunnyside Gold Corporation v. Colorado WQCD* (D. Colo. May 8, 1995) (Case No. 94 CV 5459) ("Consent Decree").

² *Remediation Helps Rescue a River*, Engineering & Mining Journal (July 2018).

with water discharge permits. The water treatment plant at Gladstone was not operating and was in a state of complete disrepair. SGC brought all discharge permits into compliance and reopened the Mine. The Colorado Mined Land Reclamation Division awarded SGC the 1987 Mined Land Reclamation Award in the classification "Most Improved Sites." During mining operations, SGC treated the entire American Tunnel discharge at the Gladstone water treatment plant, despite the fact that much of the water in the Tunnel did not originate on SGC property. Thus, "[d]uring the period of SGC's operations, the "net" load that SGC removed from the Animas was tremendous [and] SGC's five years of mining [. . .] substantially reduced metals loading in the Animas River from what would have otherwise been the case."³ Having seen Animas River water quality improve during SGC's mining operations, there was a consensus to protect water quality post mining.

Purpose of the Consent Decree. With the objective of improving water quality and habitats in the Animas River, the State of Colorado and SGC agreed on a comprehensive watershed approach in which SGC would complete numerous reclamation projects in the region and install engineered concrete bulkheads with the primary purpose of isolating the interior workings of the Sunnyside Mine and preventing water flow from the interior workings. It was always expected that the installation of the bulkheads would cause the local water table to return toward natural levels, which would result in the re-emergence of springs and seeps.⁴ The Consent Decree was the vehicle for executing the watershed reclamation approach.

Endorsement of the Consent Decree. While the Consent Decree was entered into by the State of Colorado, acting pursuant to authority delegated by the EPA, the Consent Decree enjoyed broad local support. The Animas River Stakeholders Group (ARSG) endorsed the Consent Decree. As noted by William Simon, Animas River Watershed Coordinator:

The nature of this agreement is consistent with the process and intent of the goals of the Animas River Stakeholders Group which hopes to improve water quality and aquatic life throughout the Animas watershed. The Stakeholders support this innovative agreement as a step toward preventing further degradation and possible improvement of stream water quality in the basin.⁵

The EPA, both as a member of the ARSG and independently, endorsed the Consent Decree. For example, after extensive internal review of the Consent Decree, EPA expressed its congratulations:

The Environmental Protection Agency (EPA) commends both the State of Colorado and Sunnyside Gold Corporation (SGC) on your innovative approach

³ *SGC Mining and Reclamation Activities and Metals Loading in the Animas River*, Steven Lange, Knight Piésold Consulting (January 2018).

⁴ The Consent Decree specifically negated any liability for such anticipated springs and seeps. See Consent Decree at 12, 23, and 29 (noting that "no future CDPS point source permits will be required of SGC [. . .] for seeps or springs which may emerge or increase in the Upper Animas River or Cement Creek drainages following installation and closure of bulkhead seals[.]).

⁵ Letter to Robert Shukle, Chief, Water Quality Control Division, Colorado Department of Public Health and the Environment from William Simon, Animas River Watershed Coordinator (April 4, 1996).

*to problems encountered in final closure of the Sunnyside Gold Mine. Further, the EPA is pleased that Colorado has chosen to use a watershed/trading approach as one step toward achieving the goals of improving water quality in the Animas River. As active members of the Animas River Stakeholders Group, EPA understands and supports the concepts of community based environmental protection.*⁶

Colorado's Two-Prong Plan. The Consent Decree reflected Colorado's plan to address water quality issues in the Upper Animas Basin. Colorado's plan had two prongs: 1) SGC completing the bulkheading and remediation obligations set forth in the Consent Decree; and 2) a third party running a water treatment plant at Gladstone. Each separate prong was designed to address a portion of the metals loading and thereby improve water quality. The first prong was SGC's obligation under the Consent Decree. The second prong was not an SGC obligation and SGC's only commitment was to "transfer ownership of the water treatment facility to the Gold King Mines Corporation ("Gold King") as envisioned in a separate agreement, to be executed between SGC and Gold King."⁷ The Consent Decree recognized that "The water treatment facility will be transferred to Gold King . . . and the transfer of CDPS Permit No. CO-027529 to Gold King . . . will also terminate SGC's obligation to continue operation of the water treatment facility (and the reclamation of the ponds and surface disturbances)."⁸ Pursuant to the Consent Decree, following the transfer of SGC's CDPS permit "SGC will have no further obligation to treat Cement Creek or any seepage that may issue from the vicinity of the plugged American Tunnel . . ."⁹

The Completion of the Consent Decree. SGC successfully completed all requirements under the Consent Decree. The Colorado Department of Public Health and Environment, under the leadership of Acting Executive Director Doug Benevento, who is now the EPA Region 8 Administrator, determined in February of 2003 that SGC had improved water quality in the region and released SGC from further obligations.¹⁰

The Ongoing Success of the Consent Decree. SGC's remediation and bulkheading under the Consent Decree is a continuing success. A recent peer-reviewed analysis of more than 22 years of water samples "conclusively demonstrates that SGC's Bulkheading and Remediation was successful and improved water quality by substantially reducing acid rock drainage and metals loading in the Animas River and its tributaries."¹¹ Due in part to the success of SGC's actions,

⁶ Letter from Max Dodson, EPA to David Holm, Director CDPHE (April 5, 1996).

⁷ Joint Petition for Fourth Amendment to Consent Decree, *Sunnyside Gold Corporation v. Colorado WQCD*, 2 (D. Colo. Dec. 4, 2002) (Case No. 94 CV 5459).

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ Letter from Sarah Johnson of Colorado WQCD to Larry Perino of SGC, 1 (February 26, 2003).

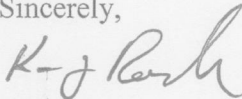
¹¹ *SGC Mining and Reclamation – Evaluating Animas River Water Quality at A-72*, SME Annual Conference & Expo and CMA 121st National Western Mining Conference (February 2019); Letter from Stephen Day, SRK Consulting, to Larry Perino, SGC (February 19, 2019).

*“[w]ater quality is today better than CDPHE’s Target, and meets the Citizens Superfund Workgroup priority of improving water quality to levels documented in 1999-2003.”*¹²

The Consent Decree and Legal Liability. Since SGC’s mining and reclamation improved Animas River water quality, SGC has no factual or equitable liability for any remaining water quality issues. Because SGC has no factual or equitable liability, SGC has no legal liability under the common law. SGC also has no legal liability under any statutory scheme, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹³, since SGC completed the Consent Decree, improved water quality, and was released from further obligations. The Consent Decree operates as a complete bar to any liability under CERCLA. CERCLA provides the government with immense coercive power to compel actions without proving liability. However, CERCLA was enacted to “ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.”¹⁴ Under CERCLA, at the end of the day, innocent nonliable parties who are coerced into spending monies are entitled to recover their expenditures.

I hope that the foregoing is useful and assists in answering questions that you may have had about the Consent Decree. I would be pleased to make any documents referenced in this letter available to the CAG, and note that many can be found at www.sgcreclamation.com.

Sincerely,



Kevin Roach
Director, Reclamation Operations

¹² *SGC Mining and Reclamation – Evaluating Animas River Water Quality at A-72*, SME Annual Conference & Expo and CMA 121st National Western Mining Conference (February 2019).

¹³ CERCLA, referred to as “Superfund Cloudcuckooland” by Judge Richard Posner, sometimes results in liability when there is no liability under the common law.

¹⁴ *Burlington Northern and Santa Fe Railway Company v. United States*, 556 U.S. 599, 602 (2009).