

UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8,
AND
STATE OF COLORADO

IN THE MATTER OF:)
)
Nelson Tunnel/Commodore Waste)
Rock Superfund Site)
Mineral County, Colorado)
)
Commodore Mining Company, Del)
Monte Mining Company, Kanawha Mines,)
LLC, SETTLING PARTIES,)
Mineral County, Colorado, PURCHASER)
_____)

ADMINISTRATIVE SETTLEMENT
AGREEMENT
U.S. EPA Region 8
CERCLA Docket No. 08-2024-0001

PROCEEDING UNDER
CERCLA,
42 U.S.C. §§ 9601-9675

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I. JURISDICTION

1. This Administrative Settlement Agreement (“Settlement”) is entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to the undersigned Department of Justice official. The Environmental Protection Agency (EPA) is proceeding under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authority vested in the President and delegated to the Administrator of EPA and further delegated to the undersigned Region official, including the authority in section 122(h)(1) of CERCLA, which authority has been delegated to the Regional Administrators of EPA by EPA Delegation No. 14-14-D (Cost Recovery Non-Judicial Agreements and Administrative Consent Orders). These authorities were further redelegated by the Regional Administrator of EPA Region 8 by EPA Delegation No. 14-14-D (Cost Recovery Non-Judicial Agreements and Administrative Consent Orders) and then further redelegated by the Assistant Regional Administrator to Region 8’s Associate Regional Counsel for Enforcement.
2. This Settlement is made and entered into by the United States on behalf of EPA, the State of Colorado (“State”), Commodore Mining Company, Del Monte Mining Company, Kanawha Mines, LLC, and Mineral County, Colorado (collectively the “Parties”). Commodore Mining Company, Del Monte Mining Company, and Kanawha Mines, LLC are collectively referred to as “Settling Parties.” Mineral County, Colorado is referred to as “Purchaser.” Settling Parties and Purchaser consent to and will not contest the authority of the United States or the State to enter into this Settlement or to implement or enforce its terms.

II. BACKGROUND

3. This Settlement concerns the Nelson Tunnel/Commodore Waste Rock Superfund Site (“Site”) located in Mineral County, Colorado. EPA and the State allege that the Site is a facility as defined by section 101(9) of CERCLA.
4. In response to the release or threatened release of hazardous substances at or from the Site, EPA and the State undertook response actions at the Site pursuant to section 104 of CERCLA and will undertake additional response actions in the future.
5. In performing response actions at the Site, EPA and the State have incurred response costs and will incur additional response costs in the future.
6. EPA and the State allege that Settling Parties are responsible parties pursuant to section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred and to be incurred at the Site.
7. EPA has reviewed the Financial Information submitted by Settling Parties to determine whether Settling Parties are financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, EPA has determined that Settling Parties have limited financial ability to pay for response costs incurred and to be incurred at the Site.

8. Purchaser represents that it is a bona fide prospective purchaser (BFPP) as defined by sections 101(40) and 107(r)(1) of CERCLA, that it has and will continue to comply with sections 101(40) and 107(r) during its ownership of the Transferred Properties, and thus qualifies for the protection from liability under CERCLA set forth in section 107(r)(1) of CERCLA with respect to the Transferred Properties. Purchaser agrees to undertake all actions required by this Settlement.
9. This Settlement provides that Settling Parties will Transfer certain mining claims to Purchaser, which will in turn support Purchaser's efforts to preserve the important historical structures on these mining claims. The Parties acknowledge that this Settlement is structured to support Purchaser's efforts to stabilize and preserve the historical structures.
10. The Parties recognize that this Settlement has been negotiated in good faith and that this Settlement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Parties and Purchaser in accordance with this Settlement do not constitute an admission of any liability. Settling Parties and Purchaser do not admit and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement, the validity of the facts or allegations contained in this Section.

III. PARTIES BOUND

11. This Settlement shall be binding upon the United States and the State, and upon Settling Parties and Purchaser and their successors. Any change in ownership or corporate or other legal status of Settling Parties or Purchaser, including but not limited to any transfer of assets or real or personal property, shall in no way alter Settling Parties' or Purchaser's responsibilities under this Settlement, except as provided in Paragraphs 27 and 28 of the Property Requirements Section, respectively. Settling Parties' and Purchaser's responsibilities under this Settlement cannot be assigned except under a modification executed in accordance with Section XXIII (Modification).
12. Settling Parties and Purchaser shall provide notice of this Settlement to officers, directors, employees, agents, contractors, subcontractors, or any person representing Settling Parties or Purchaser with respect to the Site. Settling Parties and Purchaser are responsible for ensuring that such persons act in accordance with the terms of this Settlement.

IV. STATEMENT OF PURPOSE

13. Settling Parties and Purchaser agree to undertake all obligations required of each of them by this Settlement. In exchange, this Settlement resolves Settling Parties' alleged civil liability for the Site as provided in the covenants not to sue in Section XIV, subject to the limitations and reservations contained in Sections XIV and XV. In exchange, this Settlement also resolves Purchaser's potential CERCLA liability in accordance with the covenants not to sue in Section XIV, subject to the limitations and reservations contained in Section XIV and XV. The Parties recognize that this Settlement is fair, reasonable, in the public interest, and consistent with CERCLA.

V. DEFINITIONS

14. Unless otherwise expressly provided in this Settlement, terms used in this Settlement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement or its appendices, the following definitions shall apply:

“Affected Property” means all real property at the Site and any other real property, owned or controlled by Settling Parties or Purchaser, where EPA or the State determine, at any time, that access or land, water, or other resource use restrictions are needed to implement response actions at the Site, pursuant to their authorities under section 104 of CERCLA, 42 U.S.C. § 9604, including, but not limited to, the properties identified in Appendix A, List of Affected Properties.

“BFPP” means a bona fide prospective purchaser as described in section 101(40) of CERCLA, 42 U.S.C. § 9601(40).

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

“Commodore Waste Rock Pile” means Operable Unit 1 of the Site, which is the waste rock pile located in the West Willow Creek drainage near the portals of two adits commonly referred to as the Nelson Tunnel and the Commodore No. 5.

“County Ordinance” means Mineral County Ordinance No. 23-01 for the Regulation of Land Use, Development and Activities Upon Certain Property Within Unincorporated Mineral County Containing Mine Waste Source Areas Where Residual Mine Wastes and/or Engineered Components Exist, Specifically Including the Nelson Tunnel/Commodore Waste Rock Superfund Site, enacted pursuant to the Colorado Environmental Covenants Law, C.R.S. § 25-15-320(3)(b), attached as Appendix B.

“Day” or “day” mean a calendar day. In computing any period of time under this Settlement, where the last day would fall on a Saturday, Sunday, or federal or State holiday, the period shall run until the close of business of the next working day.

“DOJ” means the United States Department of Justice.

“Effective Date” means the effective date of this Settlement as provided by Section XXVII.

“EPA” means the U.S. Environmental Protection Agency.

“EPA Hazardous Substance Superfund” means the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“Existing Contamination” means:

- a. any hazardous substances, pollutants or contaminants present or existing on or under the Transferred Properties prior to or as of the Effective Date;

- b. any hazardous substances, pollutants or contaminants that migrated from the Transferred Properties prior to the Effective Date; and
- c. any hazardous substances, pollutants or contaminants present or existing at the Site as of the Effective Date that migrate onto, under or from the Transferred Properties after the Effective Date.

“Financial Information” means those financial documents identified in Appendix C, List of Financial Information.

“Historic Structures” means those structures located within and around the Nelson Tunnel/Commodore Waste Rock Superfund Site as described in Appendix D, Colorado Division of Reclamation and Mine Safety Structural Evaluation Report.

“National Contingency Plan” or “NCP” mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Ore Sorting House” means the ore house that is located adjacent to the Nelson Tunnel/Commodore Waste Rock Superfund Site on County Road 503 and described in Appendix D, Colorado Division of Reclamation and Mine Safety Structural Evaluation Report.

“Paragraph” or “¶” mean a portion of this Settlement identified by an Arabic numeral or an upper- or lower-case letter.

“Parties” means the United States, the State of Colorado, Settling Parties, and Purchaser.

“Purchaser” means Mineral County, Colorado.

“RCRA” means the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).

“Section” means a portion of this Settlement identified by a Roman numeral.

“Settlement” means this Administrative Settlement Agreement and any attached appendices. In the event of conflict between this Settlement and any appendix, the Settlement shall control.

“Settling Parties” means Commodore Mining Company, Del Monte Mining Company, and Kanawha Mines, LLC.

“Site” means the Nelson Tunnel/Commodore Waste Rock Superfund Site, which was placed on the National Priorities List on September 3, 2008, see 42 U.S.C. § 9605 and 73 Fed. Reg. 51,368 (Sept. 3, 2008). The Site is located in the San Juan Mountains about 1.5 miles north of the statutory town of Creede in Mineral County, Colorado and generally shown on the map included in Appendix E.

“Six Claim Properties” means a subset of the Transferred Properties, specifically the Sunol, Arian, Malissa, Silent Friend, Pueblo Chief, and Silver King mining claim properties, as described in Appendix F.

“State” means the State of Colorado by and through the Colorado Department of Public Health and Environment.

“Transfer” means to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“Transferee” means the party to whom a Transfer is made.

“Transferred Properties” means those properties owned by Commodore Mining Company and Del Monte Mining Company that are to be Transferred to Purchaser and described in Appendix H.

“United States” means the United States of America and each department, agency, and instrumentality of the United States, including EPA and the United States Forest Service.

“United States Forest Service” means the United States Forest Service and its successor departments, agencies, or instrumentalities.

“Waste Material” means (a) any “hazardous substance” under section 101(14) of CERCLA; (b) any pollutant or contaminant under section 101(33) of CERCLA; (c) any “solid waste” under section 1004(27) of RCRA or under section 101(6) of the Colorado Solid Waste Disposal Sites and Facilities Act, C.R.S. §§ 30-20-100 to 1417.

“Work” means all obligations of Settling Parties and Purchaser under Sections VI (Transferred Properties), VII (Property Requirements), and VIII (Indemnification and Insurance).

VI. TRANSFERRED PROPERTIES

15. **Transfer of Properties by Settling Parties to Purchaser.** Within 10 days of the Effective Date, Settling Parties shall Transfer full ownership of the Transferred Properties, as described in Appendix H, to Purchaser.
16. **Raising Funds for the Historical Structures.** Within 30 days of Purchaser acquiring the Transferred Properties, Purchaser shall commence best efforts to raise funds to stabilize and preserve the Historical Structures pursuant to Paragraph 18. Best efforts may include the Transfer of the Six Claim Properties, as identified in Appendix F, through the following, as appropriate: (i) entering into a listing agreement, for the purpose of marketing the property, with a real estate broker, dealer, or agent licensed in the State of Colorado who customarily deals with real property similar to the Six Claim Properties; (ii) advertising the Six Claim Properties in appropriate publications; (iii) listing the Six Claim Properties with appropriate real estate listing services; (iv) maintaining the Six Claim Properties in a condition suitable for showing to prospective parties; and (v) providing access to the Six Claim Properties, at reasonable times, to real estate

brokers, dealers or agents and prospective parties. If EPA requests, Purchaser shall provide EPA with any documentation regarding its best efforts.

17. Net Proceeds of Transferred Properties

- a. For purposes of this Paragraph, “net proceeds” means all consideration received by Purchaser from the Transfer of any of the Transferred Properties, not including: (i) any reasonable closing costs paid regarding the Transfer; (ii) any reasonable broker’s fees regarding the Transfer; and (iii) any State and/or municipal transfer taxes regarding the Transfer.
- b. **Use of Net Proceeds.** The net proceeds Purchaser receives, shall only be used to finance or reimburse Purchaser for direct costs associated with any activities performed on the Historic Structures pursuant to an approved Work Plan under Paragraph 18. Net proceeds may not be used (i) for indirect costs associated with activities on the Historic Structures or (ii) for costs associated with fulfilling any other obligation under this Settlement, including any activities under Paragraph 16. For purposes of this Paragraph, “indirect costs” means Purchaser’s internal costs, including its salaries, travel, and other internal administrative costs associated with the activities proposed or performed at the Historic Structures. Any such net proceeds shall first be used toward the stabilization and maintenance of the Ore Sorting House, unless other Historic Structures are in imminent danger of being lost or seriously damaged, in which case Purchaser shall include a justification for using the net proceeds for activities on the other Historic Structure(s) in its Work Plan, submitted pursuant to Paragraph 18.
- c. **Accounting for Net Proceeds.** Purchaser shall maintain documentation calculating the net proceeds and all documentation regarding the values used in the calculation, including: (i) copies of all documents to be executed regarding the Transfer; (ii) documentation of the amounts of closing costs to be paid; (iii) documentation of any broker’s fees regarding the Transfer; and (iv) documentation of the amounts of State and/or municipal transfer taxes to be paid regarding the Transfer of the Transferred Property. Purchaser shall place and maintain any net proceeds received from the Transfer of the Transferred Properties into an interest-bearing account dedicated solely for use in accordance with Paragraph 17.b and subject to meaningful financial controls to prevent funds from being expended on any other activity. Purchaser shall, upon request by EPA, provide documentation related to the information and accounting required under this Paragraph.

VII. PROPERTY REQUIREMENTS

18. **Work Plan for Activities on Historic Structures.** Any activities Purchaser proposes to conduct or have conducted on the Historic Structures shall be outlined in a Work Plan that is submitted to and approved in writing by EPA and the State prior to the start of any work on the Historic Structures. Recognizing the often time-sensitive nature of the field season associated with the Site, EPA and the State will respond to Purchaser no later than fifteen (15) days after submission of any Work Plan.

19. **Site Security.** Purchaser shall provide annual security for the Site through weekly visits to the Site, unless EPA and the State notify Purchaser in writing that this is no longer needed.
20. **County Road 503 Maintenance.** Purchaser shall conduct year-round maintenance of County Road 503 from the City of Creede up to the Site to allow for EPA, the State, and their respective representatives, contractors, and subcontractors to access the Site by vehicle, unless EPA and the State notify Purchaser in writing that this is no longer needed.
21. **Staging of Response Equipment and Allowed Transfer of this Obligation.** Purchaser shall allow EPA, the State, and their respective representatives, contractors, and subcontractors to use Purchaser's Affected Property that comprises the Commodore Waste Rock Pile free of charge for purposes of any response activities at the Site, including as a staging area for response equipment, unless EPA and the State notify Purchaser that this obligation is no longer needed. If Purchaser Transfers such Affected Property before the remedy has achieved construction completion, Purchaser may Transfer its rights, obligations, and benefits of the Settlement with respect to such Affected Property to the Transferee, provided the United States, the State, and Purchaser so agree, and these parties modify this Settlement in writing, and subject to the following:
 - a. Any such Transfer by Purchaser of the rights, benefits, and obligations conferred upon Purchaser under this Settlement with respect to such Affected Property, shall require the prior written consent of the United States and the State in their sole discretion, and is not subject to judicial review.
 - b. The United States and the State expect the Transferee of any Transfer of the Affected Property comprising the Commodore Waste Rock Pile to avail itself of the protections afforded a "bona fide prospective purchaser" under 42 U.S.C. Section 9601(40) and 9607(r)(1) and will maintain its status as a "bona fide prospective purchaser" for the duration of its interest in the Commodore Waste Rock Pile.
 - c. Prior to or simultaneous with any Transfer of the rights, benefits, and obligations of Purchaser under this Settlement with respect to the Commodore Waste Rock Pile, the Transferee must consent in a written modification to this Settlement in accordance with Section XXIII (Modification) to be bound by specified terms, conditions, and obligations of this Settlement, which must include but are not limited to this Section VII, Section XIII (Certification by Purchaser), and Section XVIII (Effect of Settlement/Contribution), in order for the covenants not to sue in Section XIV to be available to Transferee. Such modification shall be in substantially the form attached as Appendix G. The covenants not to sue in Section XIV and the contribution protection under Section XVIII will be effective with respect to any Transferee upon counter signature by the United States and the State.

22. **Maintenance of the Transferred Properties.** So long as Purchaser owns any Transferred Property, Purchaser shall maintain and make necessary repairs to such Transferred Property.
23. **Agreements Regarding Access and Non-Interference.** Settling Parties and Purchaser shall, with respect to their Affected Property:
- a. Provide the United States, the State, parties who have entered or may enter into an agreement with the United States or the State for performance of response actions at the Site, and their representatives, contractors, and subcontractors with access at all reasonable times to their Affected Property to conduct any activity regarding the Settlement and relating to response actions at the Site including the following activities:
 - (1) Implementing the Work;
 - (2) Verifying any data or information submitted to the United States or the State;
 - (3) Conducting investigations regarding contamination at or near the Site;
 - (4) Obtaining samples;
 - (5) Assessing the need for, planning, implementing, or monitoring response actions;
 - (6) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Parties or its agents, consistent with Section XX (Records);
 - (7) Assessing Settling Parties' and Purchaser's compliance with the Settlement;
 - (8) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Settlement; and
 - (9) Implementing, monitoring, maintaining, reporting on, and enforcing any institutional controls or any land, water, or other resource use restrictions regarding the Affected Property.
 - b. Refrain from using their Affected Property in any manner that EPA determines will (i) pose an unacceptable risk to human health or to the environment due to exposure to Waste Material or (ii) interfere with or adversely affect the implementation, integrity, or protectiveness of response actions at the Site.
24. **Land, Water, or Other Resource Use Restrictions.** Settling Parties and Purchaser shall: (1) remain in compliance with any land use restrictions established in connection with any response action at their Affected Property; (2) implement, maintain, monitor, and

report on institutional controls; and (3) not impede the effectiveness or integrity of any institutional control employed at their Affected Property in connection with a response action. The following is a list of land, water, or other resource use restrictions currently applicable to Affected Property:

- a. Purchaser has enacted and will maintain the County Ordinance, which is attached as Appendix B. Purchaser has entered into an intergovernmental agreement with the State, which is attached as Appendix I.

25. Notice to Successors-in-Title

- a. Settling Parties and Purchaser shall, within 30 days after the Transfer of properties required under Paragraph 15, submit for EPA approval a notice to be filed regarding their respective Affected Property in the appropriate land records. The notice must: (1) include a proper legal description of the Affected Property; (2) provide notice to all successors-in-title: (i) that the Affected Property is part of, or related to, the Site; and that (ii) that Settling Parties and Purchaser have entered into an Administrative Settlement Agreement requiring compliance with the property requirements in this Section; and (iii) of the name, CERCLA docket number, and Effective Date of this Settlement. Settling Parties and Purchaser shall record the notice within 10 days after EPA's approval of the notice and submit to EPA, within 10 days thereafter, a certified copy of the recorded notice.
- b. Settling Parties and Purchaser shall, prior to entering into a contract to Transfer any of their respective Affected Property, or 60 days prior to Transferring any of their Affected Property, whichever is earlier:
 - (1) Notify the proposed Transferee that EPA performed a response action regarding the Site and that Settling Parties and Purchaser have entered into an Administrative Settlement Agreement requiring compliance with the property requirements in this Section (identifying the name, CERCLA docket number, and the Effective Date of this Settlement); and
 - (2) Notify EPA and the State of the name and address of the proposed Transferee and provide EPA and the State with a copy of the above notice that it provided to the proposed Transferee, and notify EPA if Settling Parties or Purchaser seeks termination of its obligations in accordance with Paragraph 27 or Paragraph 28, respectively.

26. For so long as Settling Parties and Purchaser are owners or operators of any of the Affected Property, Settling Parties and Purchaser shall require that Transferees and other parties with rights to use any of their respective Affected Property provide access and cooperation to EPA and the State, their authorized officers, employees, representatives, and all other persons performing response actions under EPA or State oversight. Settling Parties and Purchaser shall require that Transferees and other parties with rights to use any of their respective Affected Property implement and comply with any land use restrictions and institutional controls, including the County Ordinance, on the Affected

Property in connection with any response action, and not contest EPA's and the State's authority to enforce any land use restrictions and institutional controls on any of their respective Affected Property.

27. Upon sale or other conveyance of any of the Affected Property, other than the Transfer of properties required under Paragraph 15, Settling Parties shall require that each Transferee or other holder of any interest in any of their respective Affected Property shall comply with Section XX (Records) and Paragraphs 23 through 27, 29 and 30 of this Section VII (Property Requirements) and not contest EPA's and the State's authority to enforce any land use restrictions and institutional controls on any of their respective Affected Property. After demonstration to EPA that a Transferee or other holder of any interest in any of the Affected Property agrees to comply with the requirements of this ¶ 27, EPA will notify Settling Parties that its obligations under this Settlement, except obligations under Section XX (Records), are terminated with respect to any of that Affected Property.
28. Upon sale or other conveyance of any of the Affected Property, other than the Transfer of properties required under Paragraph 15, Purchaser shall require that each Transferee or other holder of any interest in any of their respective Affected Property shall comply with Section XX (Records) and Paragraphs 21 through 26 and 28 through 30 of this Section VII (Property Requirements) and not contest EPA's and the State's authority to enforce any land use restrictions and institutional controls on any of their respective Affected Property.
 - a. Prior to Transfer, Purchaser shall secure access from Transferee, for any applicable Affected Property, to allow continued performance by Purchaser of the obligations under Paragraph 18 (Work Plan for Activities on Historic Structures), Paragraph 19 (Site Security), and Paragraph 20 (County Road 503 Maintenance).
 - b. After demonstration to EPA that Purchaser has obtained agreement from a Transferee or other holder of any interest in any of the Affected Property to comply with the requirements of this Paragraph 28 and, where required, has entered an access agreement for an applicable Affected Property, EPA will notify Purchaser that its obligations under this Settlement, except obligations under Paragraph 17 (Net Proceeds of Transferred Properties), Paragraph 18 (Work Plan for Activities on Historic Structures), Paragraph 19 (Site Security), Paragraph 20 (County Road 503 Maintenance), Paragraph 21 (Staging of Response Equipment and Allowed Transfer of this Obligation), and Section XX (Records), are terminated with respect to any of that Affected Property. The obligations under Paragraph 21 (Staging of Response Equipment and Allowed Transfer of this Obligation) may only be terminated with respect to any Affected Property if Purchaser obtains a written agreement from Transferee to assume this obligation pursuant to Paragraph 21.
29. Settling Parties and Purchaser shall provide a copy of this Settlement to any current lessee, sublessee, and other party with rights to use any portion of their respective Affected Property.

30. Notwithstanding any provision of this Settlement, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land, water, resource use restrictions and institutional controls, including enforcement authorities related thereto, under CERCLA, RCRA, the Colorado Environmental Covenants Law, Colorado Revised Statutes sections 25-15-317 to 327, and any other applicable statute or regulations.

VIII. INDEMNIFICATION AND INSURANCE

31. Indemnification

- a. The United States and the State do not assume any liability by entering into this Settlement or by virtue of any designation of Purchaser as EPA's or the State's authorized representative under section 104(e)(1) of CERCLA. Purchaser shall indemnify and save and hold harmless the United States and the State, and their officials, agents, employees, contractors, subcontractors, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Purchaser, its officers, directors, employees, agents, contractors, or subcontractors, and any persons acting on Purchaser's behalf or under its designation of Purchaser as EPA's or the State's authorized representative under section 104(e)(1) of CERCLA. Further, Purchaser agrees to pay the United States and the State all costs they incur, including attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Purchaser, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities under this Settlement. The United States and the State shall not be held out as a party to any contract entered into by or on behalf of Purchaser in carrying out activities under this Settlement. Purchaser and any such contractor may not be considered an agent of the United States or the State.
- b. The United States or the State shall give Purchaser notice of any claim for which the United States or the State plans to seek indemnification under this Paragraph 31, and shall consult with Purchaser prior to settling such claim.

32. Purchaser covenants not to sue and shall not assert any claim or cause of action against the United States or the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between Purchaser and any person for performance of Work or other activities on or relating to the Site, including claims on account of construction delays. In addition, Purchaser shall indemnify and save and hold the United States and the State harmless with respect to any claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Purchaser and any person for performance of work on or relating to the Site, including claims on account of construction delays.

33. **Insurance.** Purchaser shall keep the Transferred Properties insured against loss from casualty and liability. Purchaser also shall secure, by no later than 15 days before commencing activities under an approved Work Plan pursuant Paragraph 18, the following insurance: (a) commercial general liability insurance with limits of liability of \$1 million per occurrence; (b) automobile liability insurance with limits of liability of \$1 million per accident; and (c) umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits. The insurance policy must name EPA and the State as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Purchaser under this Settlement. Purchaser shall maintain this insurance until completion of activities pursuant to any Work Plan under Paragraph 18. In addition, for the duration of this Settlement, Purchaser shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing under an approved Work Plan on behalf of Purchaser in furtherance of this Settlement. Prior to commencement of any activities under an approved Work Plan, Purchaser shall provide to EPA certificates of such insurance and a copy of each insurance policy. Purchaser shall resubmit such certificates and copies of policies each year on the anniversary of the date a Work Plan was approved until completion of the activities pursuant to the Work Plan. If Purchaser demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering all of the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Purchaser need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Purchaser shall ensure that all submittals to EPA under this Paragraph identify the Nelson Tunnel/Commodore Waste Rock Superfund Site, Creede, Colorado, and the CERCLA docket number for this action.

IX. FORCE MAJEURE

34. "Force Majeure," for purposes of this Settlement, means any event arising from causes beyond the control of Purchaser, of any entity controlled by Purchaser, or of Purchaser's contractors that delays or prevents the performance of any obligation under this Settlement despite Purchaser's best efforts to fulfill the obligation. Given the need to protect public health and welfare and the environment, the requirement that Purchaser exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. "Force majeure" does not include financial inability to complete the Work, or increased cost of performance.
35. If any event occurs for which Purchaser will or may claim a force majeure, Purchaser shall notify EPA's RPM and the State Project Manager by email. The deadline for the initial notice is 5 days after the date Purchaser first knew or should have known that the event would likely delay performance. Purchaser shall be deemed to know of any circumstance of which any contractor of, subcontractor of, or entity controlled by Purchaser knew or should have known. Within 3 days thereafter, Purchaser shall send a

further notice to EPA that includes: (a) a description of the event and its effect on Purchasers' completion of the requirements of the Settlement; (b) a description of all actions taken or to be taken to prevent or minimize the delay; (c) the proposed extension of time for Purchaser to complete the requirements of the Settlement; (d) a statement as to whether, in the opinion of Purchaser, such event may cause or contribute to an endangerment to public health or welfare or the environment; and (e) all available proof supporting its claim of force majeure. Failure to comply with the notice requirements herein regarding an event precludes Purchaser from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under ¶ 34 and whether Purchaser has exercised best efforts under ¶ 34, EPA may, in its unreviewable discretion, excuse in writing Purchaser's failure to submit timely or complete notices under this Paragraph.

36. EPA will notify Purchaser of its determination whether Purchaser is entitled to relief under ¶ 34, and, if so, the duration of the extension of time for performance of the obligations affected by the force majeure. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. Purchaser may initiate dispute resolution under Section X regarding EPA's determination within 15 days after receipt of the determination. In any such proceeding, Purchaser has the burden of proving that it is entitled to relief under ¶ 34 and that its proposed extension was or will be warranted under the circumstances.
37. The failure by EPA or the State to timely complete any activity under this Settlement is not a violation of the Settlement, provided, however, that if such failure prevents Purchaser from meeting one or more deadlines under this Settlement, Purchaser may seek relief under this Section.

X. DISPUTE RESOLUTION

38. Unless otherwise provided in this Settlement, Settling Parties and Purchaser must use the dispute resolution procedures of this Section to resolve any dispute arising under this Settlement.
39. A dispute will be considered to have arisen when one or more parties sends EPA and the State a timely written notice of dispute ("Notice of Dispute"). A notice is timely if sent within 30 days after receipt of the EPA notice or determination giving rise to the dispute or within 15 days in the case of a force majeure determination. Disputes arising under this Settlement must in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations may not exceed 90 days after the dispute arises, unless EPA otherwise agrees. If the parties to the dispute cannot resolve the dispute by informal negotiations, the position advanced by EPA is binding unless the party to the dispute initiates formal dispute resolution under ¶ 40. By agreement of the parties to the dispute, mediation may be used during this informal negotiation period to assist the parties to the dispute in reaching a voluntary resolution or narrowing of the matters in dispute.

40. Formal Dispute Resolution

- a. **Statements of Position.** Settling Parties or Purchaser may initiate formal dispute resolution by submitting to EPA, within 7 days after the conclusion of informal dispute resolution under ¶ 39, an initial Statement of Position regarding the matter in dispute. EPA's responsive Statement of Position is due within 20 days after receipt of the initial Statement of Position. All Statements of Position must include supporting factual data, analysis, opinion, and other documentation. A reply, if any, is due within 10 days after receipt of the response. If appropriate, EPA may extend the deadlines for filing statements of position for up to 15 days and may allow the submission of supplemental statements of position.
- b. **Formal Decision.** The Director of the Superfund & Emergency Management Division, EPA Region 8, will issue a formal decision resolving the dispute ("Formal Decision") based on the statements of position and any replies and supplemental statements of position. The Formal Decision is binding on the party to the dispute and shall be incorporated into and become an enforceable part of this Settlement.

41. The initiation of dispute resolution procedures under this Section does not extend, postpone, or affect in any way any requirement of this Settlement, except as EPA agrees. Stipulated penalties with respect to the disputed matter will continue to accrue, but payment is stayed pending resolution of the dispute, as provided in Paragraph 42.c.

XI. FAILURE TO COMPLY WITH SETTLEMENT

42. Stipulated Penalty

- a. If Settling Parties fail to Transfer the Transferred Properties as required by Paragraph 15 (Transfer of Properties by Settling Parties to Purchaser), Settling Parties shall be in violation of this Settlement and shall pay to EPA, as a stipulated penalty, \$100.00 per day that such action is late.
- b. All penalties, including any interest, accruing under this Section shall be due and payable to EPA within 30 days after Settling Parties' receipt from EPA of a demand for payment of the penalties. Settling Parties shall make all payments under this Section at <https://www.pay.gov> using the link for "EPA Miscellaneous Payment Cincinnati Finance Center," including the Site Name, docket number, and Site/Spill ID Number 08MB, and indicate in the comment field that the payment is for stipulated penalties. Settling Parties shall send to EPA, in accordance with Section XXI (Notices and Submissions), a notice of this payment including these references.
- c. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment but need only be paid upon demand. All penalties shall begin to accrue on the day after performance is due and shall continue to accrue through the final day of completion of the activity. Any late payment, must also include an additional

amount for interest accrued from date of receipt of the demand through the date of payment. Interest in this Section means interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund, as provided under section 107(a) of CERCLA, compounded annually on October 1 of each year. The applicable rate of interest is the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. As of the date EPA signs this Settlement, rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

- d. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Settlement. Settling Parties' payment of stipulated penalties shall not excuse Settling Parties from performance of any other requirements of this Settlement.

43. Enforcement

- a. Nothing in this Settlement limits the authority of the United States to seek any remedy otherwise provided by law for Settling Parties' failure to pay stipulated penalties or interest.
- b. Nothing in this Settlement limits the authority of the United States or the State to seek any other remedies or sanctions available by virtue of Settling Parties' or Purchaser's failure to comply with any term or condition of this Settlement or of the statutes and regulations upon which it is based, including actions pursuant to section 122(h) of CERCLA, 42 U.S.C. § 9622(h)(3).
- c. If the United States or the State brings an action to enforce this Settlement against Settling Parties, Settling Parties shall reimburse the United States and the State for all costs of such action, including but not limited to costs of attorney time.
- d. If the United States or the State bring an action to enforce this Settlement against Purchaser, Purchaser shall reimburse the United States and the State for all costs of such action, including but not limited to costs of attorney time.
- e. The Parties agree that the United States District Court for the District of Colorado ("Court") will have jurisdiction, including under section 113(b) of CERCLA for any judicial enforcement action brought with respect to this Settlement.
- f. Notwithstanding ¶¶ 46 and 49 of this Settlement, if Settling Parties or Purchaser fail to comply with the terms of this Settlement, the United States or the State may file a lawsuit for breach of this Settlement, or any provision thereof, in the Court. In any such action, Settling Parties and Purchaser consent to and agree not to contest the exercise of personal jurisdiction over it by the Court. Settling Parties and Purchaser further acknowledge that venue in the Court is appropriate and agree not to raise any challenge on this basis.
- g. If the United States or the State file a civil action as contemplated by ¶ 43.e, to remedy breach of this Settlement, the United States or the State may seek, and the

Court may grant as relief, the following: a) an order mandating specific performance of any term or provision in this Settlement, without regard to whether monetary relief would be adequate; and b) any additional relief that may be authorized by law or equity.

XII. CERTIFICATION BY SETTLING PARTIES

44. Settling Parties certify that, to the best of their knowledge and belief, after thorough inquiry, they have:
- a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information (including records, reports, documents and other information in electronic form) (other than identical copies) relating to their potential liability regarding the Site since notification of potential liability by the United States or the State and that they have fully complied with any and all EPA and State requests for information regarding the Site and Settling Parties' financial circumstances, including but not limited to insurance and indemnity information, pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), Section 3007 of RCRA, 42 U.S.C. § 6927, and state law;
 - b. submitted to EPA financial information that fairly, accurately, and materially sets forth their financial circumstances, and that those circumstances have not materially changed between the time the financial information was submitted to EPA and the time Settling Parties execute this Settlement Agreement; and
 - c. fully disclosed any information regarding the existence of any insurance policies or indemnity agreements that may cover claims relating to cleanup of the Site, and submitted to EPA upon request such insurance policies, indemnity agreements, and information.

XIII. CERTIFICATION BY PURCHASER

45. Purchaser certifies to the best of its knowledge and belief that after thorough inquiry and as of the date of Purchaser's signature: (a) it will become a BFPP as defined by section 101(40) of CERCLA upon acquisition of the Transferred Properties; (b) it has fully and accurately disclosed to EPA all information known to Purchaser and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site; and (c) it has not altered, mutilated, discarded, destroyed or otherwise disposed of any documents and electronically stored information relating to the Site.

XIV. COVENANTS BY UNITED STATES, EPA, AND THE STATE

46. **Covenants by the United States and the State for Purchaser.** Subject to Section XV, the United States covenants not to sue or to take administrative action against Purchaser under sections 106 and 107(a) of CERCLA for Existing Contamination and the Work,

and the State covenants not to sue or take administrative action against Purchaser pursuant to section 107(a) of CERCLA for Existing Contamination and the Work.

47. The covenants under Paragraph 46: (a) take effect upon the Effective Date; (b) are conditioned on (i) the satisfactory performance by Purchaser of the requirements of this Settlement; and (ii) the veracity of the information provided to EPA and the State by Purchaser relating to Purchaser's involvement with the Site and the certification made by Purchaser in Paragraph 45; and (c) do not extend to any other person.
48. Nothing in this Settlement constitutes a covenant not to sue or not to take action or otherwise limits the ability of the United States, EPA, or the State to seek or obtain further relief from Purchaser if the information provided to EPA or the State by Purchaser relating to Purchaser's involvement with the Site or the certification made by Purchaser in Paragraph 45 is false or in any material respect inaccurate.
49. **Covenants by EPA and the State for Settling Parties.** Subject to Section XV, EPA covenants not to sue or to take administrative action against Settling Parties pursuant to sections 106 and 107(a) of CERCLA for the Site and the Work, and the State covenants not to sue or take administrative action against Purchaser pursuant to section 107(a) of CERCLA for the Site and the Work.
50. With respect to present and future liability, these covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by Settling Parties of their obligations under this Settlement. The covenants for Settling Parties are also conditioned upon the veracity and completeness of the Financial Information and the Insurance Information provided to EPA and the State by Settling Parties and the financial, insurance, and indemnity certification made by Settling Parties in Paragraph 44. The covenants for Settling Parties extend only to Settling Parties and do not extend to any other person.

XV. RESERVATIONS OF RIGHTS BY UNITED STATES, EPA, AND THE STATE

51. Subject to ¶¶ 46 and 49, nothing in this Settlement limits any authority of the United States, EPA, or the State to take, direct, or order all appropriate action to protect public health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or to request a Court to order such action. Further, except as specifically provided in this Settlement, nothing in this Settlement shall prevent the United States or the State from seeking legal or equitable relief to enforce the terms of this Settlement or from taking other legal or equitable action as it deems appropriate and necessary.
52. **General Reservations of Rights by the United States and the State Relating to Purchaser.** Notwithstanding any other provision of this Settlement, the United States and the State reserve, and this Settlement is without prejudice to, all rights against Purchaser regarding the following:
 - a. liability for failure by Purchaser to meet a requirement of this Settlement;

- b. liability resulting from an act or omission that causes exacerbation of Existing Contamination by Purchaser, its successors, assigns, lessees, or sublessees;
 - c. liability resulting from the disposal, release, or threat of release of hazardous substances, pollutants or contaminants at or in connection with the Site after the Effective Date, not within the definition of Existing Contamination;
 - d. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site, except as provided in clause (c) of the definition of Existing Contamination;
 - e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and
 - f. criminal liability.
53. With respect to any claim or cause of action asserted by the United States or the State against Purchaser, Purchaser shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination and that Purchaser has complied with all the requirements of CERCLA §§ 101(40) and 107(r).
54. **General Reservations of Rights by EPA and the State Relating to Settling Parties.** Notwithstanding any other provision of this Settlement, EPA and the State reserve, and this Settlement is without prejudice to, all rights against Settling Parties regarding the following:
- a. liability for failure of Settling Parties to meet a requirement of this Settlement;
 - b. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
 - c. liability, based on the ownership or operation of the Site by Settling Parties when such ownership or operation commences after signature of this Settlement by Settling Parties;
 - d. liability based on Settling Parties' transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Settlement by Settling Parties;
 - e. liability arising from the past, present, or future disposal, release or threat of release of Waste Material outside of the Site; and
 - f. criminal liability.
55. Notwithstanding any other provision of this Settlement, EPA and the State also reserve, and this Settlement is without prejudice to, the right to reinstitute or reopen this action as to Settling Parties, or to commence a new action against Settling Parties seeking relief other than as provided in this Settlement, if the Financial Information provided by

Settling Parties, or the financial, insurance, or indemnity certification made by Settling Parties in Paragraph 44, is false or, in any material respect, inaccurate.

XVI. COVENANTS BY SETTLING PARTIES

56. Covenants by Settling Parties to the United States and the State.
- a. Subject to Paragraph 60 (Settling Parties' Reservations), Settling Parties covenant not to sue and shall not assert any claim or cause of action against the United States or the State under CERCLA, section 7002(a) of RCRA, 42 U.S.C. § 6972(a), the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, the State Constitution, State law, or at common law regarding the Site, the Work, and this Settlement.
 - b. Subject to Paragraph 60 (Settling Parties' Reservations), Settling Parties covenant not to seek reimbursement from the EPA Hazardous Substance Superfund through CERCLA or any other law for costs regarding the Work and the Site.
57. Settling Parties agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under sections 107(a) or 113 of CERCLA) that it may have for response costs relating to the Site against each other or any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Parties may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Parties.
58. **Covenants by Settling Parties to Purchaser.** Settling Parties covenant not to sue and agree not to assert any claims or causes of action against Purchaser, or its contractors or employees, with respect to the Transferred Properties, the Work, or the Site and this Settlement under CERCLA sections 107 or 113, 42 U.S.C. §§ 9607 or 9613, RCRA section 7002(a), 42 U.S.C. § 6972(a), or analogous state law.
59. Settling Party Kanawha Mines, LLC further covenants not to sue and assert any claims or causes of action against the United States or the State under the Fifth Amendment to the United States Constitution or Article Two, Section 15 of the Colorado Constitution regarding Kanawha Mines, LLC's interest in the Kanawha Ditch and Pipeline water right, Priority No. 1959-2 as identified in Appendix J.
60. **Settling Parties' Reservations.** The covenants in Paragraph 56 do not apply to any claim or cause of action brought, or order issued, after the Effective Date by the United States or the State to the extent such claim, cause of action, or order is within the scope of a reservation under Paragraph 54.a through e.

XVII. COVENANTS BY PURCHASER

61. Covenants by Purchaser to the United States and the State
- a. Subject to Paragraph 63, Purchaser covenants not to sue and shall not assert any claim or cause of action against the United States or the State under CERCLA,

section 7002(a) of RCRA, the Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, the State Constitution, State law, or at common law regarding Existing Contamination, the Work, and this Settlement.

- b. Subject to Paragraph 63, Purchaser covenants not to seek reimbursement from the EPA Hazardous Substance Superfund through CERCLA or any other law for the costs regarding the Existing Contamination, the cost of the Work, or any claim arising out of response actions at or in connection with the Site.
62. **Covenants by Purchaser to Settling Parties.** Purchaser covenants not to sue and agrees not to assert any claims or causes of action against the Settling Parties, or their contractors or employees, with respect to the Transferred Properties or the Site and this Settlement under CERCLA sections 107 or 113, 42 U.S.C. §§ 9607 or 9613, RCRA section 7002(a), 42 U.S.C. § 6972(a), or analogous state law.
63. Purchaser's Reservations.
- a. The covenants in Paragraph 61 do not apply to any claim or cause of action brought, or order issued, after the Effective Date by the United States to the extent such claim, cause of action, or order is within the scope of a reservation under Paragraph 52.a through 52.e.
 - b. Purchaser reserves, and this Settlement is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Purchaser's deliverables or activities.

XVIII. EFFECT OF SETTLEMENT/CONTRIBUTION

64. Except as provided in Section XVI (Covenants by Settling Parties) and Section XVII (Covenants by Purchaser), each of the Parties reserves any and all rights (including, but not limited to, under section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement diminishes the right of the United States or the State, pursuant to sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613 (f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to section 113(f)(2).

65. The EPA and Settling Parties agree that this Settlement: (a) constitutes an administrative settlement pursuant to which Settling Parties have, as of the Effective Date, resolved liability to the United States within the meaning of sections 113(f)(2), 113(f)(3)(B), and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2), 9613(f)(3)(B), and 9622(h)(4); and (b) Settling Parties are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by sections 113(f)(2) and 122(h)(4) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Settlement. The “matters addressed” in this Settlement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States, the State, or any other person. However, if the EPA or the State exercise rights under reservations in Paragraphs 50 (52.a) through (52.e), the “matters addressed” in this Settlement will no longer include those response costs or response actions that are within the scope of the exercised reservation.
66. If a suit or claim for contribution is brought against Purchaser, notwithstanding the provisions of section 107(r)(1) of CERCLA with respect to Existing Contamination (including any claim based on the contention that Purchaser is not a BFPP, or has lost its status as a BFPP as a result of response actions taken in compliance with this Settlement or at the direction of EPA’s OSC) or if Purchaser is found, in connection with any action or claim it may assert to recover costs incurred or to be incurred with respect to Existing Contamination, not to be a BFPP, or to have lost its status as a BFPP as a result of response actions taken in compliance with this Settlement or at the direction of EPA’s OSC, the United States and Purchaser agree that: (a) this Settlement constitutes an administrative settlement under which Purchaser has, as of the Effective Date, resolved liability to the United States within the meaning of sections 113(f)(2) and 113(f)(3)(B) of CERCLA; and (b) Purchaser is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Settlement. The “matters addressed” in this Settlement are all response actions taken or to be taken and all response costs incurred or to be incurred in connection with Existing Contamination by the United States, the State, or any other person. However, if the United States or the State exercise rights under reservations in Paragraphs 52.a through 52.e, the “matters addressed” in this Settlement will no longer include those response costs or response actions that are within the scope of the exercised reservation.
67. Settling Parties and Purchaser shall, with respect to any suit or claim brought by it for matters related to Settlement, notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Parties and Purchaser also shall, with respect to any suit or claim brought against it for matters related to this Settlement, notify EPA and DOJ in writing within 10 days after service of the complaint or claim upon Settling Parties. In addition, Settling Parties shall notify EPA and DOJ within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Settlement.
68. In any subsequent administrative or judicial proceeding against any Settling Party initiated by the United States or the State for injunctive relief, recovery of response costs,

or other relief relating to the Site, any such Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been addressed in this Settlement; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by EPA and the State set forth in Paragraph 49.

69. Effective upon signature of this Settlement by Settling Parties, Settling Parties agree that the time period commencing on the date of their signatures and ending on the date of any Section XI (Failure to Comply with Settlement) noncompliance shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the United States or the State related to the “matters addressed” as defined in Paragraph 65, and that, in any action brought by the United States or the State related to the “matters addressed,” Settling Parties will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to Settling Parties that it will not make this Settlement effective, the statute of limitations shall begin to run again commencing 90 days after the date such notice is sent by EPA.

XIX. RELEASE OF LIENS

70. Thirty days after the Transfer of properties required under Paragraph 15, EPA agrees to release any lien it has on the properties described in Appendix K, List of EPA Liens on Settling Parties’ Properties.

XX. RECORDS

71. Retention of Records and Information

- a. Settling Parties and Purchaser shall retain, and instruct their contractors and agents to retain, the following documents and electronically stored data (“Records”) until 10 years after the Effective Date (“Record Retention Period”):
- (1) All records regarding Existing Contamination or any release or threat of release of hazardous substances, pollutants or contaminants at or from the Site;
 - (2) All records regarding Settling Parties’ or Purchaser’s liability and the liability of any other person under CERCLA regarding the Site;
 - (3) All documents submitted to EPA or the State in accordance with this Settlement, including all underlying research and data; and
 - (4) All data developed by, or on behalf of, Settling Parties or Purchaser in the course of performing any Work.
- b. At the end of the Record Retention Period, Settling Parties and Purchaser shall each notify EPA that it has 90 days to request that party’s Records subject to this

Section. Settling Parties and Purchaser shall each retain and preserve their Records subject to this Section until 90 days after EPA's receipt of the notice. These record retention requirements apply regardless of any corporate or county record retention policy.

72. Settling Parties and Purchaser shall provide to EPA or the State, upon request, copies of all Records and information required to be retained under this Section. Settling Parties and Purchaser shall also comply, as required by law, with any authorized request for information or administrative subpoena issued by EPA or the State.
73. **Privileged and Protected Claims**
- a. Settling Parties and Purchaser may assert that all or part of a record requested by EPA or the State is privileged or protected as provided under federal law, in lieu of providing the record, provided that the asserting party complies with ¶ 73.b, and except as provided in ¶ 73.c.
 - b. If Settling Parties or Purchaser asserts a claim of privilege or protection, it shall provide EPA or the State with the following information regarding such record: title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a record, the asserting party shall provide the record to EPA or the State in redacted form to mask the privileged or protected portion only. Settling Parties and Purchaser shall retain all records that it claims to be privileged or protected until EPA or the State has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the party's favor.
 - c. Settling Parties and Purchaser shall not make any claim of privilege or protection regarding: (1) any data regarding the Site, including all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological or engineering data, or the portion of any other record that evidences conditions at or around the Site; or (2) the portion of any record that Settling Parties or Purchaser is required to create or generate in accordance with this Settlement.
74. **Confidential Business Information Claims.** Settling Parties and Purchaser are entitled to claim that all or part of a record submitted to EPA or the State under this Section is Confidential Business Information ("CBI") that is covered by section 104(e)(7) of CERCLA and 40 C.F.R. § 2.203(b). Settling Parties and Purchaser shall segregate all records or parts thereof submitted under this Settlement which it claims are CBI and label them as "claimed as confidential business information" or "claimed as CBI." Records that Settling Parties and Purchaser properly labels in accordance with the preceding sentence will be afforded the protections specified in 40 C.F.R. part 2, subpart B. If the records are not properly labeled when they are submitted to EPA or the State, or if EPA and the State notify the party that the records are not entitled to confidential treatment under the standards of section 104(e)(7) of CERCLA or 40 C.F.R. part 2, subpart B, the

public may be given access to such records without further notice to Settling Parties or Purchaser.

75. Notwithstanding any provision of this Settlement, EPA and the State retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XXI. NOTICES AND SUBMISSIONS

76. Any approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, waivers, and requests specified in this Settlement must be in writing unless otherwise specified. Whenever a notice is required to be given or a report or other document is required to be sent by one Party to another under this Settlement, it must be sent as specified below. All notices under this Section are effective upon receipt, unless otherwise specified. In the case of emailed notices, there is a rebuttable presumption that such notices are received on the same day that they are sent. Any Party may change the method, person, or address applicable to it by providing notice of such change to all Parties.

As to EPA:

Erin Agee
Senior Assistant Regional Counsel
Environmental Protection Agency, Region VIII
1595 Wynkoop Street
Denver, CO 80202
agee.erin@epa.gov

**As to DOJ:
(email preferred)**

EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, DC 20044-7611
Re: DJ # 90-11-3-10841/2
eesdcopy.enrd@usdoj.gov
Re: DJ # 90-11-3-10841/2

As to Colorado:

Jason King
Senior Assistant Attorney General
Colorado Department of Law
1300 Broadway, 7th Floor
Denver, CO 80203
jason.king@coag.gov

As to Settling Parties: Tyrus B. Poxson, II
51312 Kirby Drive
Chesterfield, MI 48047
tpoxson@gmail.com

As to Purchaser: County Administrator
1201 North Main Street
PO Box 70
Creede, CO 81130
countyadmin@mincocolo.com

XXII. INTEGRATION/APPENDICES

77. This Settlement and its appendices constitute the final, complete, and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Settlement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement. The following appendices are attached to and incorporated into this Settlement:

“Appendix A” is List of Affected Properties.

“Appendix B” is Mineral County Ordinance No. 23-01.

“Appendix C” is List of Financial Information.

“Appendix D” is the Structural Evaluation Report.

“Appendix E” is a map of the Site.

“Appendix F” is the Six Claim Properties.

“Appendix G” is the Sample Transfer Amendment.

“Appendix H” is the Transferred Properties.

“Appendix I” is the Intergovernmental Agreement.

“Appendix J” is the Kanawha Ditch and Pipeline Water Right.

“Appendix K” is List of EPA Liens on Settling Parties’ Properties.

XXIII. MODIFICATION

78. If EPA’s Remedial Project Manager (RPM) determines a modification to any approved deliverable submitted by Purchaser to EPA after the Effective Date is appropriate, the RPM may make such modification in writing or by oral direction. EPA will promptly memorialize in writing any oral modification, but the modification has as its effective date the date of the RPM’s oral direction, unless otherwise indicated.

79. Any other requirements of this Settlement may be modified by mutual agreement of the Parties, and any such modification has as its effective date the date of signature of all Parties. Any modification that does not affect the obligations of or the protections afforded to Settling Parties may be executed without the signature of Settling Parties. Any modification that does not affect the obligations of or the protections afforded Purchaser may be executed without the signature of Purchaser.
80. If Purchaser seeks permission to deviate from any approved deliverable, Purchaser shall submit a written request to the RPM outlining the proposed modification and its basis. Purchaser may not proceed with a requested modification under this Paragraph until receiving approval under ¶ 78.
81. No informal advice, guidance, suggestion, or comment by the RPM or other EPA or State representatives regarding any deliverable submitted by Purchaser shall relieve Purchaser of its obligation to obtain any formal approval required by this Settlement, or to comply with all requirements of this Settlement, unless it is formally modified.

XXIV. SIGNATORIES

82. Each undersigned representative of the United States and the State, and each undersigned representative of Settling Parties and Purchaser, certifies that the signatory is authorized to enter into the terms and conditions of this Settlement and to execute and legally bind Settling Parties and Purchaser to this Settlement.

XXV. DISCLAIMER

83. This Settlement is in no way a finding by EPA or the State as to the risks to human health and the environment that may be posed by contamination at any Affected Property or the Site, or a representation by EPA or the State that any Affected Property or the Site is fit for any particular purpose.

XXVI. PUBLIC COMMENT

84. This Settlement shall be subject to a public comment period of at least 30 days pursuant to section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with section 122(i)(3) of CERCLA, the United States may withdraw its consent or seek to modify this Settlement if comments received disclose facts or considerations that indicate that this Settlement is inappropriate, improper, or inadequate.

XXVII. EFFECTIVE DATE

85. The Effective Date of this Settlement shall be the date upon which EPA issues written notice to Settling Parties and Purchaser that the public comment period pursuant to Paragraph 84 has closed and the United States and the State have determined not to withdraw its consent or seek to modify this Settlement based on the comments received, if any.

Signature Page for Settlement Regarding Nelson Tunnel/Commodore Waste Rock
Superfund Site

IT IS SO AGREED:

U.S. ENVIRONMENTAL PROTECTION AGENCY:

CHRISTOPHER THOMPSON
Digitally signed by
CHRISTOPHER THOMPSON
Date: 2023.09.13 16:51:26
-0600

Christopher Thompson

Associate Regional Counsel for Enforcement, Region 8

BEN BIELENBERG
Digitally signed by BEN
BIELENBERG
Date: 2023.09.14
09:20:41 -0600

Ben Bielenberg

Acting Director

Superfund and Emergency Management Division

U.S. DEPARTMENT OF JUSTICE:

ELLEN MAHAN
Digitally signed by ELLEN MAHAN
Date: 2023.10.05 12:51:36 -04'00'

Ellen M. Mahan
Deputy Section Chief
U.S. Department of Justice
Environment and Natural Resources Division
Washington, D.C. 20044-7611

/s/ Jonah Brown

Jonah Brown
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611

STATE OF COLORADO:

Tracie White
Digitally signed by Tracie White
Date: 2023.09.13 14:11:34 -0600'

Tracie White
Division Director
Hazardous Materials and Waste Management Division
Colorado Department of Public Health and Environment

Jason King
Digitally signed by Jason King
Date: 2023.09.11 08:41:38 -0600'

Jason E. King
Senior Assistant Attorney General
Colorado Attorney General's Office

Signature Page for Settlement Regarding Nelson Tunnel/Commodore Waste Rock Superfund Site

COMMODORE MINING COMPANY:


Digitally signed by Tyrus B. Poxson, II
Date: 2023.09.09 11:02:08 -0400

Tyrus B. Poxson, II
President
51312 Kirby Drive
Chesterfield, MI 48047

Signature Page for Settlement Regarding Nelson Tunnel/Commodore Waste Rock Superfund Site

DEL MONTE MINING COMPANY:



Digitally signed by Tyrus B. Poxson, II
Date: 2023.09.09 11:02:40 -04'00'

Tyrus B. Poxson, II
President
51312 Kirby Drive
Chesterfield, MI 48047

Signature Page for Settlement Regarding Nelson Tunnel/Commodore Waste Rock Superfund Site

KANAWHA MINES, LLC:



Digitally signed by Tyrus B. Poxson, II
Date: 2023.09.09 11:02:58 -04'00'

Tyrus B. Poxson, II
President
51312 Kirby Drive
Chesterfield, MI 48047

Signature Page for Settlement Regarding Nelson Tunnel/Commodore Waste Rock Superfund Site

MINERAL COUNTY:

Jesse Albright Digitally signed by Jesse Albright
Date: 2023.09.11 08:24:52 -06'00'

Jesse Albright
Chairman of the Board of County Commissioners

Robert Scott Lamb Digitally signed by Robert Scott Lamb
Date: 2023.09.11 08:25:20 -06'00'

R. Scott Lamb
Mineral County Commissioner

Ramona Weber Digitally signed by Ramona Weber
Date: 2023.09.11 08:25:39 -06'00'

Ramona Weber
Mineral County Commissioner