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RE: **Notice of Endangerment and Intent to Sue under Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act.**

Dear Sirs or Madams:

On behalf of our client, the State of New Mexico (“New Mexico”), we hereby give notice of its intent to sue the United States Environmental Protection Agency (“EPA”), the United States Bureau of Land Management (“BLM”), the State of Colorado (“Colorado”), Environmental Restoration LLC (“Environmental Restoration”), San Juan Corporation, Todd Hennis, Sunnyside Gold, Inc. (“Sunnyside”), and Kinross Gold Corporation (“Kinross”) (collectively, “Defendants”) for violating 42 U.S.C. § 6972(a)(1)(B) of the federal Resource Conservation and Recovery Act (“RCRA”) by creating an imminent and substantial endangerment to the health of New Mexico’s citizens and the environment of the Animas and San Juan Rivers in New Mexico. The State intends to file a citizen suit on or after the 90th day

from the date of this Notice, in accordance with 42 U.S.C. § 6972(b)(2)(A). New Mexico has actively sought to avoid litigation, but the State's efforts to move forward in a productive manner outside of the courtroom have been met with resistance at every turn. For example, the New Mexico Secretary of Environment has traveled to Washington, D.C. twice over the past three months in order to secure EPA's support for an essential, independent monitoring plan for the entire watershed impacted by the August 5, 2015 blowout. Rather than agreeing to work with the downstream communities who were not responsible for the blowout and support an independent monitoring plan for the entire watershed, EPA has chosen to move forward with the State of Colorado to support its own woefully inadequate monitoring plan, which fails to address critical environmental and public health issues, and only serves to limit liability. Absent a genuine commitment to protect and restore the communities impacted by the historic mine waste contamination of the Animas and San Juan Rivers, epitomized by the August 5, 2015 Gold King Mine blowout, New Mexico must now embark on a different path to ensure its citizens are protected.

This Notice focuses on historic mining operations and past and present reclamation activities at the Sunnyside and Gold King Mines, among others, in San Juan County, Colorado, which resulted in tremendous contamination of the Animas and San Juan Rivers and culminated in the catastrophic blowout of the Gold King Mine on August 5, 2015. That event released more than three million gallons of toxic mine sludge and wastewater into the Animas and San Juan Rivers, creating an imminent and substantial endangerment to the health of New Mexico's people and natural resources. Although the scope and severity of the contamination and its long-term impact on the Animas and San Juan Rivers' ecosystems will require further investigation, what is already apparent is that heavy metals from the highly acidic discharge—such as arsenic, lead, cadmium, copper, mercury, and zinc—have fallen out and settled into the riverbeds creating continuing sources for future impacts and discharges of hazardous materials. Recent sampling of the Animas and San Juan Rivers' surface waters and sediments has revealed the presence of many, if not all, of these wastes. A list of the wastes currently found in the rivers is attached as Exhibit A.

The State's goal in asserting this claim is the complete remediation of the contaminated rivers, the abatement and cessation of further releases of contamination from the Sunnyside and Gold King Mines and adjacent areas into the waters of New Mexico, and the prevention of future catastrophes like the August 5, 2015 Gold King Mine blowout. In its RCRA claim, the State will pursue injunctive relief, future costs and legal fees.

Introduction and Background

A historic and precious resource, the Animas River is a 126-mile-long river in the western United States, a tributary of the San Juan River, and part of the Colorado River System. The Animas River rises high in the San Juan Mountains of Colorado at the confluence of the West and North forks at the ghost town of Animas Forks and flows past the ghost towns of Eureka and Howardsville. At Silverton, the river flows into the Animas Canyon. From there,

the river flows south into New Mexico through the town of Aztec to its confluence with the San Juan River at Farmington.

The ancestral Puebloan site of Aztec Ruins National Monument is situated along the river in the present day town of Aztec and for much of its course the river runs through native Ute and Navajo lands. Numerous irrigation ditches serve the surrounding farmland along the river. The Animas also serves as habitat to resident and migratory bald eagles which arrive in winter months. The river is a freestone fishery home to rainbow and brown trout, carp, and catfish. Recreational fishing on the Animas is available year-round. Insect hatches of aquatic diptera and mayflies occur in the winter and spring months. In late spring, summer, and through autumn the Animas sees caddisfly and mayfly hatches, as well as terrestrial insects such as grasshoppers.

The San Juan River has its source along the southern slopes of Colorado's San Juan Mountains and flows southwesterly into the state of New Mexico. The river drains an arid region, and along its length is often the only significant source of fresh water. The San Juan provides fine fishing grounds in its warm, slow, muddy waters. One four-mile stretch just below the Navajo Dam in northwest New Mexico, is known as the "Miracle Mile"—one of the most hallowed fishing waters in North America. Its rich waters spawn with abundant flora, creating a fecund environment for insects, which in turn support one of the most prolific trout populations in any large river.

On August 5, 2015, an Environmental Restoration crew, supervised by EPA and Colorado Division of Reclamation, Mining and Safety ("DRMS") officials, used an excavator to dig away rock and debris that were blocking an entrance portal at the Gold King Mine in San Juan County, Colorado. Groundwater had been seeping into the mine for decades, and the aforementioned Defendants knew that the water in the mines was acidic, backed up hundreds of vertical feet into the portal and the Gold King mine workings, and was laced with heavy metals and other mine waste. Despite knowledge of the hazardous waste, with all its concomitant dangers, they kept digging—until the greatly weakened portal burst open, unleashing a toxic torrent that flowed through Cement Creek, into the Animas and San Juan Rivers, and ultimately into Lake Powell, damaging priceless natural resources and critical public services along the way. Compounding the catastrophe, EPA and DRMS officials waited an entire day before notifying public officials and citizens in downstream states.

All told, the August 5, 2015 Gold King Mine blowout released more than three million gallons of acidic mine wastewater into the San Juan and Animas Rivers. The water and sediment chemistry released to date shows that the discharge was highly acidic and contained dangerous heavy metals, including arsenic, cadmium, copper, lead, mercury, and zinc, at actionable levels. Many of these pollutants have now fallen out of the water column and settled into the Animas and San Juan Rivers' sediments, posing long-term human health and environmental risks. The contamination threatens the health of the New Mexican public—particularly, nearby residents, farmers and ranchers, as well as recreational users. The contamination endangers fish, invertebrates, and plants that inhabit the Animas and San Juan Rivers, their tributaries,

sediments, and adjacent upland areas. And the contamination jeopardizes many other precious natural resources that are part of the broader riverine ecosystems in New Mexico.

The August 5, 2015 Gold King Mine blowout epitomizes a far greater problem: the ongoing public nuisance posed by the countless abandoned or shuttered mines surrounding Cement Creek, Colorado, that for decades have and continue to discharge acid mine waste and heavy metals into surface waters like the Animas River that enter and pollute New Mexico. Groundwater conditions in the upper reaches of Cement Creek have been significantly altered by extensive underground mine workings, the extension of the American Tunnel to the Sunnyside Mine, and the plugging of the American Tunnel and other mine adits. As a result, heavy metals have for years leached, and continue to leach, into the Animas River, degrading New Mexico's waters, and damaging its natural resources, residents, and economy. The time to put an end to imminent and substantial endangerment to the human health and the environment of New Mexico is now.

Historic Mining Operations—Sunnyside and Gold King Mines

The Sunnyside and Gold King Mines are among hundreds of abandoned mines within the Upper Animas River watershed. The Sunnyside Mine—the largest and most prolific in the area—was discovered in 1873. It opened and closed many times in its history, and produced more than 7 million short tons of ore before operations permanently ended in 1991. It contains myriad underground workings ranging from 10,660 feet to just over 13,000 feet above sea level. It also includes two haulage and drainage tunnels—the Terry Tunnel and the American Tunnel. The American Tunnel lies roughly 800 feet directly below the Gold King Mine.

Production at the Gold King Mine began in 1896. It too was a prominent producer until operations ceased in 1922. Like the Sunnyside, the mine consists of numerous workings on seven levels, extending from 11,440 feet to 12,300 feet above sea level. Initially, the mine could be accessed through a portal at Level 1 (12,160 ft.). The Lower Gold King (portal elevation of 10,617 ft.) was originally driven as an exploratory tunnel reaching 6,233 feet into the mountainside. In 1959, it was renamed the American Tunnel, and was further extended in 1960 and 1961 to drain the Sunnyside Mine workings.

Reclamation Activities at the Sunnyside and Gold King Mines

When the last bucket of ore was hauled out of the Sunnyside mine in 1991, acid minewaste drainage flowing from the American Tunnel was polluting Cement Creek. Sunnyside Gold, owner of the Sunnyside Mine, started a remediation program to reduce acid minewaste drainage and reclaim surface lands impacted by the waste. Sunnyside Gold also sold properties, including the Gold King Mine, to other entities that hoped to restart mining activities in the area. Sunnyside Gold installed a facility at Gladstone to treat the acid minewaste discharging from the American Tunnel, which had swelled to about 1,700 gallons per minute (“gpm”).

In May 1996, Sunnyside Gold and the Colorado Department of Public Health and Environment executed a consent decree to end Sunnyside Gold's perpetual treatment of the acid minewaste discharge from the American Tunnel. An essential feature of their agreement required Sunnyside Gold to undertake reclamation of other acid minewaste discharge sources in the area (*i.e.*, other abandoned or shuttered mines) to offset the residual discharges from the American Tunnel. With reclamation work underway, Sunnyside Gold began installing hydraulic bulkheads in the American Tunnel. These bulkheads would plug the acid minewaste seepage from the American Tunnel and purportedly allow the regional groundwater table to return to its natural, pre-mining level. Unfortunately, the plugging of the American Tunnel would be a catastrophic decision.

The valve on the American Tunnel bulkhead was closed in October 1996. The next year, more bulkheads were installed in the Sunnyside Mine. As a result, discharges from the American Tunnel decreased from 1,700 gpm to about 100 gpm. But in 2000, acid minewaste drainage began to discharge from the nearby Mogul Mine—likely due to increased groundwater levels caused by the plugging of the Sunnyside Mine with bulkheads. By 2002, significant acid minewaste drainage also was discharging from the nearby Red and Bonita Mine and the Gold King Mine Level 7 adit. Acid minewaste drainage flows from the Red and Bonita Mine increased from a minor amount to 300 gpm, while flows at the Gold King Mine Level 7 adit peaked at 314 gpm. In 2003, instead of addressing the interconnectivity of the mines and rising acid wastewater levels within the mines—the source of the problem—Sunnyside Gold installed more bulkheads at the Mogul Mine, thereby increasing the volume and pressure of the acid minewaste reservoir trapped within the mine workings.

In 2002, Gold King Mines Corporation (“GKMC”) struck a deal with Sunnyside Gold for GKMC to take over the treatment plant at Gladstone. Sunnyside also transferred its discharge permit, issued by Colorado, for certain acid minewaste discharges from the American Tunnel to GKMC. Unfortunately for the Animas and San Juan Rivers, GKMC filed for bankruptcy in 2005. After protracted legal proceedings, GKMC stopped running the water treatment system. In 2007, DRMS imposed a forfeiture of GKMC's reclamation bond. Although the current mine owner, San Juan Corporation, removed a road block at the mine site to permit agency access, San Juan Corporation neglected to, and continues to neglect to, maintain the property, including the Gold King Mine, its bulkheads, and its acid minewaste discharges. In 2008, DRMS rerouted the Gold King Mine acid minewaste drainage flow into a lined channel, but this eventually breached. In its prescient project summary of 2008, DRMS acknowledges that acid minewaste could build up in the Gold King Mine behind collapsed material at the Gold King Mine Level 7 adit, and eventually cause a blowout—the exact catastrophe that happened on August 5, 2015.

In 2009, DRMS closed all four portals at the Gold King Mine. Notably, DRMS's project summary states that the closure does not provide adequate drainage and creates the potential for a blowout. EPA's activities in the area started in 2011, beginning work at the Red and Bonita Mine, which was spewing large quantities of zinc and other heavy metals and mine waste into Cement Creek. Over the next few years, EPA cleaned out and evaluated the Red and Bonita

Mine, with DRMS providing technical advice and assistance. EPA and DRMS installed a hydraulic bulkhead at the Red and Bonita mine completing work in the summer of 2015. The valve on the bulkhead was left open, however, because EPA and DRMS believed that closing the valve would affect the massive acidic minewaste pool at the neighboring Gold King Mine.

Final Events Leading Up to the August 5, 2015 Blowout

In 2014, DRMS asked EPA to reopen and stabilize the Gold King Mine Level 7 adit. The drainage system at the mine portal had not been maintained or monitored by anyone since its installation in 2009. On September 11, 2014, the metal grating and portions of two pipes installed in 2009 were excavated and removed. Work stopped, however, when EPA, DRMS, and others observed that, in addition to the seepage from the base of the fill, more seepage was flowing from higher up on the face of the backfill—a clear indication that the dammed level of acid minewaste water was significantly higher than anticipated. Although a small settling pond was installed at the base of the waste-rock dump to remove sediment from the acid minewaste water, it was not large enough to treat and settle what was believed to be at least six feet of impounded water throughout some unknown length of the adit. Thus, work stopped and the project was abandoned until the following year. The heavy metals and acidic mine wastewater continued to leach into the groundwater and nearby surface waters, of course.

In July 2015, EPA returned to the Gold King Mine and began assembling a manifold piping system that could filter the acid minewaste water expected to be pumped out of the mine. On August 4, 2015, DRMS was onsite and viewed conditions at the adit. EPA began excavation to examine conditions close to the mine opening, similar to the work that had been done in 2014. Once again, EPA and DRMS observed conditions similar to what had been seen the previous year—minewaste water seeping out at an elevation approximately six feet above the floor of the adit: yet another clear indication that significant volume of minewaste water lay immediately behind the berm. Nonetheless, instead of abandoning the project as they had done in 2014, EPA, DRMS, and Environmental Restoration contractors discussed a plan to open the adit.

On the morning of August 5, 2015, additional DRMS personnel joined EPA personnel to assess conditions at the Gold King Mine Level 7 adit. At this time, DRMS and EPA purportedly believed the water inside the adit was below the crown (top) of the adit. Again, despite the associated dangers and proper safety protocols, DRMS and EPA agreed to proceed with opening the adit. DRMS thereafter left the site, and Environmental Resources began digging at the caved in mouth of the adit.

As the excavator continued to dig on August 5, 2015, the operator reported hitting a “spring.” The operator stopped, the excavator was removed, and EPA examined the conditions at the adit. Almost immediately, the spring began spurting two feet into the air. Within approximately three minutes the flow rapidly increased, culminating in a blowout, and eventually releasing at least three million gallons of mine sludge and wastewater into Cement Creek, flowing into the Animas River, and thereafter the San Juan River.

The Acid Mine Wastes Disposed of by Defendants are an Imminent and Substantial Endangerment to Human Health and the Environment

Each Defendant identified in this Notice has either owned, operated or controlled the Gold King or Sunnyside mines and their associated facilities, and have contributed or are contributing to the contamination of the Animas and San Juan Rivers in New Mexico. Each bears responsibility for creating conditions that pose an imminent and substantial endangerment to the public health and the environment in New Mexico, all in violation of RCRA.

Mine Owners/Operators. New Mexico will bring claims under 42 U.S.C. § 6972(a)(1)(B) against the owners/operators of the Gold King Mine—San Juan Corporation and its CEO Todd Hennis—and the owners/operators of the Sunnyside Mine—Sunnyside Gold Corporation and Kinross Gold Corporation—because they owned and/or controlled the mines at the time of the contamination and continue to own or control them now. In addition, New Mexico will bring claims against BLM because the Gold King Mine portal may be located on BLM land.

Mine Operators. New Mexico will bring claims under 42 U.S.C. § 6972(a)(1)(B) against Colorado and EPA because they were in charge of, determining and directing the activities at the Gold King Mine site on and before August 5, 2015 and were physically present and managing the work performed by Environmental Restoration at the time of the August 5, 2015 blowout. In addition, New Mexico will bring claims against Environmental Restoration because of its extensive management and direction of operations at the site and its direct role in causing the August 5, 2015 blowout.

The State of New Mexico's Intention to File Suit

Based upon the foregoing, and EPA's failure to meaningfully engage New Mexico or act to protect the people of New Mexico, New Mexico intends to sue the Defendants identified herein under the RCRA citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), for "contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." RCRA defines disposal as a "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). Many, if not all, of the solid or hazardous wastes released from the Gold King Mine have been detected in the recent sampling of the San Juan and Animas River's surface waters and sediments. *See Exhibit A.*

The identified Defendants are in violation of RCRA's imminent and substantial endangerment provision until they cease the discharge of pollutants from the Gold King and Sunnyside Mines and surrounding areas and fully remediate the contamination in the Animas and San Juan Rivers in New Mexico caused by acid minewaste discharges, including the August 5, 2015 blowout. At the close of the 90-day notice period, New Mexico intends to file a citizen

suit against the identified Defendants, in accordance with 42 U.S.C. § 6972(a)(1)(B). New Mexico will seek all available injunctive relief, future costs and attorneys' fees for the Defendants' creation of an imminent and substantial endangerment in violation of RCRA.

These claims are not exclusive. New Mexico sends this Notice without waiving or prejudicing its right to advance other and additional legal or factual claims, including any claim for relief pursuant to federal, state, or common law causes of action based upon information or facts that are now known or may become known in the future.

This Notice provides sufficient grounds for filing suit. During the 90-day RCRA notice period, New Mexico will be willing to discuss effective remedies for the violations identified in this letter. If you seek to avoid litigation, please begin discussions within 21 days of receiving this Notice so that a meeting can be arranged and settlement negotiations may be completed before the end of the notice period. If you desire to discuss these matters further, please do not hesitate to contact the undersigned. At the close of the 90-day notice period, unless substantial progress is made in remedying these violations, New Mexico will file its claims, including a citizen suit under 42 U.S.C. 6972(a)(1)(B).

Sincerely,



William J. Jackson

WJJ:rrw
Enclosure

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EXHIBIT A

POLLUTANTS IN SAN JUAN AND ANIMAS RIVERS SEDIMENTS AND SURFACE WATERS

OCTOBER 2015¹

	SEDIMENT	SURFACE WATER
METALS		
Aluminum	X	X
Antimony	X	X
Arsenic	X	X
Barium	X	X
Barium	X	X
Beryllium	X	X
Cadmium	X	X
Calcium	X	X
Chromium	X	X
Cobalt	X	X
Copper	X	X
Iron	X	X
Lead	X	X
Magnesium	X	X
Manganese	X	X
Mercury	X	X
Molybdenum	X	X
Nickel	X	X
Potassium	X	X
Selenium	X	X
Silver	X	X
Sodium	X	X
Thallium	X	X
Vanadium	X	X
Zinc	X	X

¹ Validated data (collected by EPA) for surface water samples collected along the Animas and San Juan Rivers and sediment samples taken at public water intakes along the Animas and San Juan Rivers. Data available at: <https://www.env.nm.gov/riverwatersafety/GoldKingData.html#SurfaceWater>.