

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

2010 SEP 16 AM 8:28

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:
Kerber Creek Site
Saguache County, Colorado

ADMINISTRATIVE ORDER ON
CONSENT FOR REMOVAL ACTION

Trout Unlimited, Inc.

U.S. EPA Region 8
CERCLA Docket No. **CERCLA-08-2010-0006**

Good Samaritan

Proceeding Under Sections 104, 106, 107,
and 122 of the Comprehensive
Environmental Response, Compensation,
and Liability Act, as amended, 42 U.S.C. §§
104, 106, 107, and 9622

TABLE OF CONTENTS

I. Jurisdiction and General Provisions.....3
II. Parties Bound.....4
III. Definitions.....4
IV. Findings of Fact.....5
V. Conclusions of Law and Determinations.....6
VI. Agreement.....7
VII. Designation of Contractor, Project Coordinator, and On-Scene Coordinator.....7
VIII. Work to be Performed.....8
IX. Site Access.....10
X. Record Retention, Documentation, and Availability of Information.....10
XI. Compliance with Other Laws.....11
XII. Emergency Response and Notification of Releases.....11
XIII. Authority of the EPA On-Scene Coordinator.....12
XIV. Payment of Oversight Costs.....12
XV. Dispute Resolution.....14
XVI. Force Majeure.....14
XVII. United States Covenant Not to Sue.....14
XVIII. United States Reservation of Rights.....15
XIX. Trout Unlimited’s Covenant Not to Sue.....16
XX. Other Claims.....16
XXI. Contribution.....17
XXII. Financial Responsibility.....18
XXIII. Notice of Completion.....18
XXIV. Public Comment.....18
XXV. Integration / Appendices.....18
XXVI. Certifications.....19

I. JURISDICTION AND GENERAL PROVISIONS

1. This Good Samaritan Settlement Agreement and Order on Consent for Removal Action (the "Settlement Agreement") is entered into voluntarily by the EPA and Trout Unlimited, Inc. (Trout Unlimited). This Settlement Agreement provides for the performance of a removal action by Trout Unlimited in connection with the Property located in Saguache County, Colorado. This Settlement Agreement requires Trout Unlimited to conduct the removal action described herein to abate the actual or threatened release of hazardous substances, pollutants, or contaminants at or from the Site.

2. This Settlement Agreement is issued pursuant to the authority vested in the President of the United States by Sections 104, 106, 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606, 9607 and 9622, as amended (CERCLA), and delegated to the Administrator of the United States Environmental Protection Agency (EPA) by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, and further delegated to the undersigned Regional official, and the authority of the Attorney General of the United States to compromise and settle claims of the United States.

3. EPA has notified the State of Colorado of this action.

4. Trout Unlimited's participation in this Settlement Agreement shall not constitute or be construed as an admission of liability, nor of EPA's findings or determinations contained in this Settlement Agreement, except in a proceeding to enforce the terms of this Settlement Agreement. Trout Unlimited agrees to comply with and be bound by the terms of this Settlement Agreement. Trout Unlimited further agrees that it will not contest the basis or validity of this Settlement Agreement or its terms.

5. EPA and Trout Unlimited agree that Trout Unlimited's performance of the Work at the Property in accordance with this Settlement Agreement will constitute "rendering care or advice" at the Site in accordance with Section 107(d)(1) of CERCLA, 42 U.S.C § 9607(d)(1). In view of the nature and extent of the Work to be performed, however, and the risk of claims being asserted against Trout Unlimited for costs or damages notwithstanding Section 107(d)(1) as a consequence of Trout Unlimited's activities at the Site pursuant to this Settlement Agreement, one of the purposes of this Settlement Agreement is to resolve, subject to the reservations and limitations contained in Section XVIII (United States Reservation of Rights), any potential liability of Trout Unlimited under CERCLA for the Existing Contamination at the Site.

6. The resolution of this potential liability, in exchange for Trout Unlimited's performance of the Work, is in the public interest.

II. PARTIES BOUND

7. This Settlement Agreement applies to and is binding upon EPA and upon Trout Unlimited. Trout Unlimited shall ensure that its contractor, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Trout Unlimited shall be responsible for any noncompliance with this Settlement Agreement.

III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which 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 Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Effective Date" means the date upon which EPA issues written notice to the Trout Unlimited that EPA has fully executed the Settlement Agreement after review of and response to any public comments received.

b. "Existing Contamination" means any hazardous substances, pollutants or contaminants present or existing on or under the Property as of the Effective Date; any hazardous substances, pollutants or contaminants that migrated from the Property prior to the Effective Date; and any hazardous substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the Effective Date.

c. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, and the costs incurred pursuant to Paragraph 37 (emergency response). Respondent shall not be liable for any Future Response Costs over \$8,000.

d. "Orphan Mine Site" means an abandoned, inactive hardrock mine or primary metal processing mill site for which, despite reasonable and diligent efforts, no financially viable party (except, for purposes of this Settlement Agreement, the owner of the site who did not cause, contribute to, or exacerbate the Existing Contamination) is potentially liable to perform or pay for, or has been required to perform or pay for, environmental cleanup actions under applicable law.

e. "Parties" means EPA and Trout Unlimited.

f. "Property" means that portion of the Site, encompassing approximately 18.91 acres, which is described in the Project Implementation Plan, attached hereto as Exhibit 1.

g. "Site" means the Kerber Creek Site located in the Rio Grande Basin near Villa Grove, Saguache County, Colorado and depicted generally on the Kerber Creek Site Location and Hydrologic Unit Map, Attachment 1 to the Project Implementation Plan, Exhibit 1. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located along the approximately 17 miles of Kerber Creek stretching from the Bonanza town site, below the Forest Service boundary, and extending to the town of Villa Grove.

h. "Work" means all activities Trout Unlimited is required to perform under this Settlement Agreement, except those required by Section X (Record Retention, Documentation, And Availability of Information).

IV. FINDINGS OF FACT

9. Trout Unlimited is a nonprofit corporation organized under the laws of the state of Michigan. Trout Unlimited's stated mission is to conserve, protect, and restore North America's cold water fisheries and their watersheds. Trout Unlimited is voluntarily agreeing, pursuant to this Settlement Agreement, to perform a removal action at this Orphan Mine Site.

10. Trout Unlimited will implement this project using funds received under a contract with the Restoration and Protection Unit, Water Quality Control Division, Colorado Department of Public Health and Environment (CDPHE), executed May 21, 2009 (Contract), attached hereto as Exhibit 2. The Contract provides for funding of \$413,000, originally obtained through a cooperative agreement between CDPHE and EPA Region 8 under the Nonpoint Source Program. These funds will not be used to pay oversight costs under this Agreement.

11. Pursuant to Section XXVI, Trout Unlimited certifies that it is not an owner or operator, generator, or transporter, or otherwise a liable party for this Site pursuant to CERCLA §§ 106 and 107. Trout Unlimited also certifies that it is not a past or current owner of the Property, and that it does not intend to acquire ownership of the Property.

12. Kerber Creek is a perennial tributary of San Luis Creek which in turn empties into the Rio Grande Closed Basin. The Site is located near Villa Grove, Colorado and is an Orphan Mine Site. Mine tailings were discharged into Kerber Creek by pre-1930s milling from several mills in the Bonanza Mining District and were transported and redeposited downstream. Waste rock from the development of the mines and tailings are still present along Kerber Creek and affect stream channel conditions over a distance of 17 miles. Waters in several stretches of the stream do not meet standards for cadmium, silver, lead, copper, zinc, and pH.

13. As authorized by the Wyden Amendment, 16 USC § 1011(a), and the National Environmental Policy Act, 42 USC § 4321, *et seq.*, the Department of the Interior, Bureau of Land Management, has prepared an Environmental Assessment concerning the Kerber Creek Restoration Project. The Environmental Assessment, executed on August 13, 2007, considers the risks posed by cadmium, silver, copper, lead, zinc, and pH in Kerber Creek and evaluates actions to address those risks.

14. The Environmental Assessment, attached hereto as Exhibit 3, is the equivalent of an engineering evaluation/cost analysis, 40 CFR § 300.415, and has been approved by EPA. EPA's removal decision for the Site is embodied in an Action Memorandum, executed on February 25, 2010. The Action Memorandum as attached hereto as Exhibit 4.

15. This Settlement Agreement addresses only the portions of the Project Implementation Plan, Exhibit 1, to be implemented by Trout Unlimited on private land.

16. The actual or threatened release of one or more hazardous substances from the facility may present an imminent and substantial endangerment to public health or welfare or the environment.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

17. Based on the Findings of Fact set forth above, EPA has determined that:

a. Kerber Creek is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. Cadmium, copper, lead, silver, zinc, and low pH are "hazardous substances, pollutants or contaminants" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Trout Unlimited is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance, pollutant or contaminant from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

e. The Work required by this Settlement Agreement is necessary to protect the public health, welfare, or the environment, and if carried out in compliance with the terms of this Settlement Agreement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

f. The Environmental Assessment prepared by BLM meets the requirements for an engineering evaluation/cost analysis under 40 CFR § 300.415.

g. As set forth in the Administrative Record, considering the exigencies of the situation and the limited scope of the removal action to be conducted, EPA has determined that attainment of water quality standards under the Federal Water Pollution Control Act, 33 U.S.C. 1251, et seq., in Kerber Creek as a result of the Work is not practicable as provided in 40 C.F.R. § 300.415(j). Given that attainment of water quality standards as a result of the Work is not practicable, Trout Unlimited will comply with all provisions of the Project Implementation Plan, Exhibit 1, that address water quality issues in order to ensure environmental improvement at the Property.

VI. AGREEMENT

18. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations for this Site, and in consideration and exchange for the United States' covenant not to sue in Section XVII, it is hereby ordered and agreed that Trout Unlimited shall comply with the provisions of this Administrative Order on Consent for Removal Action and its attachments, including but not limited to, performance of the actions specified in Section VIII.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

19. EPA has designated Steven Way as its On-Scene Coordinator (OSC). Trout Unlimited shall direct all submissions required by this Settlement Agreement to:

Steven Way, 8EPR-SA
Site Assessment & Emergency Response Program
EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

20. Trout Unlimited shall perform the Work required by this Settlement Agreement or retain contractors and/or subcontractors to perform the Work. Trout Unlimited's contractors and any subcontractors must be approved by EPA prior to the commencement of any Work under this Settlement Agreement. Trout Unlimited shall notify EPA of the names and qualifications of such contractor(s) or subcontractor(s) not more than thirty (30) business days after the Effective Date.

21. Not more than thirty (30) days after the Effective Date, Trout Unlimited shall designate a Project Coordinator who shall be responsible for administration of all Trout Unlimited's actions required by the Settlement Agreement. Trout Unlimited shall submit the designated Project Coordinator's name, address, telephone number, and qualifications to EPA at the time of designation. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site Work. Receipt by Trout Unlimited's Project Coordinator

of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Trout Unlimited.

22. EPA shall have the right to change its designation of OSC. Trout Unlimited shall have the right to change its designated Project Coordinator. Trout Unlimited's initial notification of its intention to change its Project Coordinator designation may be orally made but it shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

23. Trout Unlimited shall, at a minimum, perform the following activities as more fully described in the Project Implementation Plan, which has been approved by EPA and is attached hereto as Exhibit 1: develop a watershed plan, remove tailings with elevated concentrations of metals from the streamside, perform phytostabilization, revegetate sites, stabilize stream banks, and monitor sinuosity, width, depth, density of macroinvertebrates and fishery, upland vegetative cover, stability of stream banks, concentration of metals, and habitat trends, all with respect to Kerber Creek.

24. Project Implementation Plan and Implementation. The OSC may make minor modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual agreement of the Parties. The Project Implementation Plan, Exhibit 1, the schedule, and any subsequent modifications shall be fully enforceable under this Settlement Agreement. Trout Unlimited shall notify EPA at least 48 hours prior to performing any on-Site Work pursuant to the EPA-approved Project Implementation Plan, Exhibit 1.

25. Health and Safety Plan. The Attached Health and Safety Plan, Exhibit 5, prepared in accordance with EPA's current Standard Operating Safety Guide, has been approved by EPA, is incorporated by reference, and provides for protection of the public health and safety during performance of on-Site Work under this Settlement Agreement.

26. Quality Assurance and Sampling

a. All sampling and analyses performed pursuant to this Settlement Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control (QA/QC), data validation, and chain of custody procedures. Trout Unlimited shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate provisions of EPA guidance. Trout Unlimited shall follow the following documents, as appropriate, as guidance for QA/QC and sampling: "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures," "OSWER Directive Number 9360.4-01"; and "Environmental Response

Team Standard Operating Procedures,” “OSWER Directive Numbers 9360.4-02 through 9360.4-08.”

b. Upon request by EPA, Trout Unlimited shall allow EPA or its authorized representatives to take split and/or duplicate samples of any samples collected by Trout Unlimited while performing the Work. Trout Unlimited shall notify EPA not less than fourteen (14) days in advance of any sample collection activity. EPA shall have the right to take any additional samples that it deems necessary.

c. EPA acknowledges that Trout Unlimited will not have control over the Site after completion of the Work. Prior to commencement of Work, Trout Unlimited will obtain an agreement for long-term Site controls with the BLM and partners of the BSG and submit that agreement to EPA for approval.

27. Reporting. Trout Unlimited shall submit a written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement every 10th day of the month following the first full month after the Effective Date until submission of the Final Report pursuant to Paragraph 28 unless otherwise directed in writing by the OSC. These reports, which may be submitted via email to the designated EPA contact, shall describe all significant developments during the reporting period, including the actions performed and any problems encountered, analytical data received during the reporting period; and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems; and planned resolutions of past or anticipated problems.

28. Final Report. Not more than thirty (30) days after completion of all Work required under this Settlement Agreement, Trout Unlimited shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Settlement Agreement. The final report shall conform, at a minimum, to the requirements set forth in 40 CFR § 300.165 of the NCP entitled "OSC Reports." The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement Agreement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the Work (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete.

29. Off-Site Shipments. All hazardous substances, pollutants or contaminants removed off-Site pursuant to this Settlement Agreement for treatment, storage, or disposal shall be treated, stored, or disposed of at a facility in compliance with, as determined by EPA, 42 U.S.C. Section 9621(d)(3), and the off-site provisions found at 40 CFR § 300.440, and all applicable laws and regulations. Trout Unlimited will provide EPA with prior notification of any out-of-state waste shipments.

IX. SITE ACCESS

30. Trout Unlimited represents that the property where access is needed to implement this Settlement Agreement is owned or controlled by the BLM and partners from the BSG. Trout Unlimited has already received written permission from the aforementioned parties to enter and perform the Work. Trout Unlimited shall not commence the Work until all parties have also granted written permission for EPA and its representatives to enter the property.

31. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations. If at any point after the Effective Date of this Settlement Agreement, but before the commencement of Work, the BLM or partners from the BSG rescind their permission they granted to enter the property and perform Work, Trout Unlimited shall use its best efforts to maintain all necessary access agreements for Trout Unlimited, as well as for the United States on behalf of the EPA and its representatives (including contractors), for the purpose of conducting any activity related to this Settlement Agreement. Trout Unlimited shall immediately notify EPA if after using its best efforts it is unable to maintain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Trout Unlimited shall describe in writing its efforts to maintain access. EPA may then assist Trout Unlimited in gaining access, to the extent necessary to effectuate the Work described herein, using such means as EPA deems appropriate.

X. RECORD RETENTION, DOCUMENTATION, AND AVAILABILITY OF INFORMATION

32. Trout Unlimited shall preserve all documents and information relating to the Work, or relating to the hazardous substances, pollutants or contaminants found on or released from the Site, and submit them to EPA upon completion of the Work.

33. Trout Unlimited may assert a business confidentiality claim pursuant to 40 CFR § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Settlement Agreement, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). Analytical and other data specified in Section 104(e)(7)(F) of CERCLA shall not be claimed as confidential by Trout Unlimited. EPA shall disclose information covered by a business confidentiality claim only to the extent permitted by, and by means of the

procedures set forth at, 40 CFR Part 2 Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Trout Unlimited.

XI. COMPLIANCE WITH OTHER LAWS

34. Trout Unlimited shall perform all actions required pursuant to this Settlement Agreement in accordance with all applicable local, state, and federal laws and regulations except as provided in CERCLA § 121(e) and 40 CFR §§ 300.400(e) and 300.415(j). In accordance with 40 CFR § 300.415(j), all on-Site actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (ARARs) under federal environmental or state environmental or facility siting laws.

35. As set forth in Paragraph 17(g) and documented in the Administrative Record, EPA has determined that attainment of water quality standards under the Federal Water Pollution Control Act, 33 U.S.C. 1251, et seq., as a result of the Work is not practicable. 40 CFR § 300.415(j). Trout Unlimited will comply with all provisions of the Project Implementation Plan, Exhibit 1, that address water quality issues in order to ensure environmental improvement at the Property.

XII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

36. In the event of any action or occurrence during performance of the Work which causes or threatens a release of a hazardous substance from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Trout Unlimited shall immediately take all appropriate action. Trout Unlimited shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Trout Unlimited shall also immediately notify the OSC or, in the event of his/her unavailability, shall notify the Emergency Response Branch of the incident or Site conditions.

37. In addition, in the event of any release of a hazardous substance from the Site resulting from the actions conducted pursuant to this Settlement Agreement, Trout Unlimited shall immediately notify EPA's OSC at 303-312-6723 and the National Response Center at telephone number (800) 424-8802. Trout Unlimited shall submit a written report to EPA within seven (7) days after such release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. EPA reserves the right to take appropriate response action to mitigate the risk of or potential impact from a threatened or actual release.

XIII. AUTHORITY OF THE EPA ON-SCENE COORDINATOR

38. The OSC shall be responsible for overseeing Trout Unlimited's implementation of this Settlement Agreement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct the Work, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of the Work unless specifically directed by the OSC.

XIV. PAYMENT OF OVERSIGHT COSTS

39. Payments for Future Response Costs.

a. Trout Unlimited shall not be liable for any oversight costs, including Future Response Costs, above \$8,000. On a periodic basis, EPA will send Trout Unlimited a bill requiring payment that includes a SCORPIOS report, which includes direct and indirect costs incurred by EPA and its contractors. Trout Unlimited shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 41 of this Order.

b. Trout Unlimited shall make all payments required by this Paragraph by a certified or cashier's check or checks or by wire transfer(s) made payable to "EPA Hazardous Substance Superfund" and shall include their name and address and the EPA Site/Spill ID number 08CW. Trout Unlimited shall send the payment(s) as indicated below:

For certified or cashier's checks, payment must be received by 11:00 AM Eastern Time for same day credit and should be forwarded to one of the following addresses:

Regular Mail:

US Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

Federal Express, DHL, etc.:

U.S. Bank
Government Lockbox 979076
US EPA Superfund Payments
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
314-418-1028

For wire transfers, payment must be sent directly to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York
ABA = 021030004
Account Number: 68010727

c. At the time of payment, Trout Unlimited shall send notice that payment has been made to William Ross, Enforcement Specialist, ENF-RC, and to Martha Walker, CFO, 8TMS-F, 1595 Wynkoop Street, Denver, CO 80202.

d. The total amount to be paid by Trout Unlimited pursuant to Paragraph 39(a) shall be deposited in the Kerber Creek Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. Trout Unlimited will not use Nonpoint Source Funds to pay oversight costs.

40. In the event that the payments for Future Response Costs are not made within 30 days of Trout Unlimited's receipt of a bill, Trout Unlimited shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Trout Unlimited's failure to make timely payments under this Section.

41. Trout Unlimited may dispute all or part of a bill for Future Response Costs submitted under this Order, if Trout Unlimited alleges that EPA has made an accounting error, or if Trout Unlimited alleges that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Trout Unlimited shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 39 on or before the due date. Within the same time period, Trout Unlimited shall pay the full amount of the contested costs into an interest-bearing escrow account. Trout Unlimited shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 39(c) above. Trout Unlimited shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within 30 days after the dispute is resolved.

XV. DISPUTE RESOLUTION

42. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally. To the extent needed, Parties will agree on the selection of a neutral to guide discussions and negotiations consistent with generally accepted mediation/dispute resolution practice. If the Parties are unable to reach an agreement regarding the dispute within a reasonable period, an EPA management official at the Associate Regional Administrator level [or equivalent] or higher will review the dispute and will issue a written decision. EPA's decision shall be incorporated into and become an enforceable part of the Settlement Agreement.

XVI. FORCE MAJEURE

43. Trout Unlimited agrees to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a force majeure. For purposes of this Settlement Agreement, a force majeure is defined as any event arising from causes beyond the control of Trout Unlimited, or of any entity controlled by Trout Unlimited, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Trout Unlimited's best efforts to fulfill the obligation. Force majeure does not include financial inability to complete the Work or increased cost of performance.

44. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Settlement Agreement that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Trout Unlimited in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify Trout Unlimited in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

XVII. UNITED STATES COVENANT NOT TO SUE

45. In consideration of the actions that will be performed and the payments that will be made by Trout Unlimited under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, the United States covenants not to sue or to take administrative action against Trout Unlimited pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Trout Unlimited of all obligations under this Settlement Agreement, including,

but not limited to, payment of Oversight Costs, pursuant to Section XIV. This covenant not to sue extends only to Trout Unlimited and does not extend to any other person.

XVIII. UNITED STATES RESERVATION OF RIGHTS

46. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking any legal or equitable relief necessary to enforce the terms of this Settlement Agreement.

47. The covenant not to sue set forth in Section XVII above does not pertain to any matters other than those expressly identified therein. The scope of the reservations in this Section is premised on the voluntary nature and narrow scope of the actions to be undertaken pursuant to this Order, the fact that Trout Unlimited does not currently own the Property, and on Trout Unlimited's certification that it does not intend to own such Property in the future. The United States reserves, and this Settlement Agreement is without prejudice to, all rights against Trout Unlimited with respect to the following:

a. liability resulting from exacerbation of Existing Contamination due to willful, intentional or grossly negligent conduct by Trout Unlimited, its successors, contractors, subcontractors, assignees, lessees or sublessees, except to the extent that the conditions constituting or contributing to the exacerbation were disclosed to EPA, or were readily observable by EPA, prior to issuance of the Notice of Completion;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources caused by any violation by Trout Unlimited of this Settlement Agreement, and for the cost of any natural damage assessments necessitated by any such violation of the Settlement Agreement by Trout Unlimited;

d. liability for violations of federal law or regulations; and

e. liability for releases of hazardous substances within or outside the Site caused by Trout Unlimited's activities not within the scope of this Settlement Agreement.

48. Work Takeover.

a. In the event EPA determines that Trout Unlimited has ceased implementation of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the

environment, EPA will notify CDPHE. Upon such notice, CDPHE may take appropriate action as provided for at Paragraphs 18, 19, 20, and 21 of the Contract. CDPHE's actions may include offering an opportunity to cure any work deficiency, withholding of payment until work is completed, requiring that deficiencies be remedied, requiring personnel changes, withholding payments for portions of work, suspending performance, terminating the contract, or stopping work under the contract.

b. CDPHE will notify EPA's CWA Section 319 Project Officer as required under Section 1 (Reporting) of the Cooperative agreement and 40 CFR 31.40(d) if it takes any of the actions mentioned in the previous subparagraph.

c. Trout Unlimited may invoke dispute resolution set forth in Section XV to dispute EPA's determination that Work under this Order is unsatisfactory.

XIX. TROUT UNLIMITED'S COVENANT NOT TO SUE

49. Except as otherwise specifically provided in this Settlement Agreement, Trout Unlimited covenants not to sue or assert any claim or cause of action against the United States, or its contractors or employees, with respect to the Work, this Settlement Agreement, or Existing Contamination, including but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law.

XX. OTHER CLAIMS

50. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Trout Unlimited. The United States or EPA shall not be deemed a party to any contract entered into by Trout Unlimited or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement. Except as expressly provided in Section XVII (Covenant Not To Sue), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Trout Unlimited or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or the common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) and 9607(a).

51. This Settlement Agreement does not constitute a preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2). Trout Unlimited waive(s) any claim to payment under Sections 106(b), 111, and 112 of CERCLA, 42 U.S.C. § 9606(b), 9611, and 9612, against the United States or the Hazardous Substance Superfund arising out of any action performed under this Settlement Agreement.

52. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right of judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

53. Trout Unlimited is carrying out this agreement for its own benefit and waives all claims for compensation for services rendered to EPA for activities it performs in furtherance of this Settlement Agreement.

XXI. CONTRIBUTION

54. In the event of a suit or claim for contribution brought against Trout Unlimited notwithstanding the provisions of Section 107(d)(1) of CERCLA, 42 U.S.C. § 9607(d)(1), with respect to Existing Contamination (including any claim based on the contention that Trout Unlimited is not a person rendering care, assistance, or advice pursuant to Section 107(d)(1), or is no longer entitled to protection from liability pursuant to CERCLA Section 107(d)(1)) as a result of response actions taken in compliance with this Settlement Agreement or at the direction of the OSC), the Parties agree that this Settlement Agreement shall then constitute an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Trout Unlimited would be entitled, from the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as otherwise provided by law, for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or by any other person with respect to Existing Contamination.

55. In the event Trout Unlimited were 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 person rendering care, assistance, or advice or acting at the direction of an OSC pursuant to Section 107(d)(1), or to have lost its status as a person rendering care, assistance or advice or acting at the direction of an OSC pursuant to Section 107(d)(1) as a result of response actions taken in compliance with this Settlement Agreement or at the direction of the OSC, the Parties agree that this Settlement Agreement shall then constitute an administrative settlement within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Trout Unlimited has resolved its liability for all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or by any other person with respect to Existing Contamination.

56. Trout Unlimited agrees that with respect to any suit or claim brought by it for matters related to this Settlement Agreement it will notify the United States in writing no later than sixty (60) days prior to the initiation of such suit or claim.

57. Trout Unlimited also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Settlement Agreement it will notify in writing the United States within fifteen (15) days of service of the complaint on it.

58. Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any person not a party to this Settlement Agreement 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).

XXII. FINANCIAL RESPONSIBILITY

59. The Parties agree and acknowledge that, in the event Trout Unlimited fails to complete the Work in accordance with this Settlement Agreement, EPA will so inform CDPHE under the Memorandum of Understanding between CDPHE and EPA concerning the Kerber Creek Restoration Project.

XXIII. NOTICE OF COMPLETION

61. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Settlement Agreement, EPA will provide notice to Trout Unlimited. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Trout Unlimited, provide a list of the deficiencies, and require that Trout Unlimited modify the Project Implementation Plan, Exhibit 1, if appropriate in order to correct such deficiencies. Trout Unlimited shall implement the modified and approved Project Implementation Plan, Exhibit 1, and shall submit a modified Final Report in accordance with the EPA notice.

XXIV. PUBLIC COMMENT

62. This Settlement Agreement shall be subject to a thirty (30)-day public comment period, after which EPA may modify or withdraw its consent to this Settlement Agreement if comments received disclose facts or considerations which indicate that this Settlement Agreement is inappropriate, improper or inadequate.

XXV. INTEGRATION/APPENDICES

63. This Settlement Agreement [and its appendices] constitutes the final, complete and exclusive agreement and understanding between the Parties with respect to the matters addressed herein. The Parties acknowledge that there are no representations, agreements or understandings relating to the Settlement Agreement other than those expressly contained herein.

64. The following appendices are attached to and incorporated into this Settlement Agreement:

Exhibit 1 shall mean the Kerber Creek Restoration Project Implementation Plan.

Exhibit 2 shall mean the contract between the Restoration and Protection Unit, Water Quality Control Division, CDPHE, executed May 21, 2009 and Trout Unlimited.

Exhibit 3 shall mean the Environmental Assessment signed by the BLM on August 13, 2007.

Exhibit 4 shall mean the Action Memorandum executed by EPA on February 25, 2010.

Exhibit 5 shall mean the Health and Safety Plan.

XXVI. CERTIFICATIONS

65. By entering into this Settlement Agreement, Trout Unlimited hereby certifies that it is rendering care, assistance, or advice in accordance with the National Contingency Plan at the direction of an On-Scene Coordinator, by voluntarily agreeing to clean up Existing Contamination at an Orphan Mine Site, and further that it (a) is not a past owner or current owner of the Property and has no intention of purchasing the Property in the future; (b) is not potentially liable for the remediation of the Existing Contamination pursuant to Sections 106 or 107 of CERCLA; and (c) is not potentially liable under any other Federal, State or local law for the remediation of the Existing Contamination. If the United States determines that any information provided by Trout Unlimited in connection with this Settlement Agreement is not materially accurate and complete, or if Trout Unlimited becomes a Site owner or operator in the future, the Settlement Agreement, within the sole discretion of EPA, shall be null and void and EPA reserves all rights it may have.

66. The undersigned representative of Trout Unlimited certifies that it is fully authorized to enter into the terms and conditions of this Settlement Agreement and to bind the party it represents to this document.

AGREED this 8th day of August, 2010

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY: [Signature] August 4, 2010
Regional Administrator Date
Region VIII

UNITED STATES DEPARTMENT OF JUSTICE

BY: [Signature] 4/23/10
Assistant Attorney General Date
Environment and Natural Resources Division
U.S. Department of Justice

BY: [Signature] 3/22/10
Trout Unlimited, Inc. Date
[Title] President and CEO

EFFECTIVE DATE: September 16, 2010