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Ignacia Moreno, Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
PO Box 7611
Washington D.C., 20044-7611

March 22, 2012

RE: United States v. Bradley Mining Company, et. al. D.J. Ref. 90-11-3-07593

Dear Attorney General Moreno,

Thank you for the opportunity to comment on the above referenced decree. Our comments provide facts indicating the proposed decree is "inadequate" as defined in Section XXIII paragraph 79. We recommend that the U.S. Government withdraw or withhold its consent, or amend the proposed decree based on the following:

Although the decree serves the purpose of requiring Bradley Mining to reimburse the U.S. for the cost of CERCLA action, and to reimburse the Elem Tribe (Elem) for the loss of 100+ years of health and wellbeing, it fails to reimburse the public or Elem for the unmitigated loss of cultural resources caused by the Environmental Protection Agency's (EPA) non-compliance with the National Historic Preservation Act (NHPA Sec. 106) and Executive Order 11593 during their CERCLA cleanup.

In addition to the cost of the CERCLA action (covered by the decree), EPA's non-compliance with NHPA caused between \$35 and \$56 million¹ in damage to cultural resources (archaeological sites) within the boundaries of the Elem reservation.

It is recommended that the decree be revised to either reimburse the public and Elem through the purchase of in-kind cultural resources to replace those destroyed by the EPA CERCLA action², or to remove the stipulation preventing Elem from bringing suit against the U.S. to obtain a legal remedy for the damage done.

Background

For 6 years, the (EPA) has been involved in toxic cleanup work at the Sulphur Bank Site³. Part of this work included removing mine tailings placed on the reservation as fill by the Bureau of Indian Affairs (BIA) during a 1971 construction project.

During 10 years of pre-project planning, EPA failed to comply with Section 106 of

¹ Figure based on past court enforcement of the Archaeological Resource Protection Act (ARPA)

² As provided for in 40 CFR 300.170

³ Which includes the Elem Indian Colony Reservation.

the NHPA as required of all Federal agencies involved in any Federal undertaking⁴.

EPA's non-compliance was discovered on July 26th, 2006⁵ and has been confirmed by the California State Office of Historic Preservation⁶ and the Advisory Council on Historic Preservation⁷. The violation resulted in flawed project designs that caused the destruction of 7,000+ cubic meters of cultural site soils during the cleanup process. This disturbance went on for one month prior to the discovery of non-compliance (see <http://www.wolfcreekarcheology.com/EPADamage.htm>)

Though it is impossible to place a monetary value on a community's cultural history, the Archaeological Resource Protection Act (ARPA) provides legal remedies when individuals disturb cultural resources on Federal land. Courts have held that defendants must reimburse the public at a rate equal to the scientific cost of excavation and analysis of the disturbed areas. At a conservative cost of \$5,000 to \$8,000 per cubic meter, EPA's damage would be between \$35 and \$56 million.

Although the decree requires Bradley Mining to turn over lands to Elem as reimbursement for 100+ years of poor health and requires Bradley Mining to turn over lands and funds to the Federal Government to help pay the cost of toxic cleanup, the decree fails to mention EPA's non-compliance that led to the destruction of cultural resources held in trust for Elem and the public. The decree is silent concerning reimbursement to the public or Elem for this damage. Yet the decree asks Elem to give up their right to sue the Federal Government for this violation and loss of their cultural history.

Based on the above facts and Section XXIII (paragraph 79) of the proposed Decree, we respectfully request that the Department of Justice hold that the Decree is "inappropriate, improper, or inadequate" as currently written.

Respectfully Submitted,



John Parker, Ph.D., RPA

CC: Jon Wactor (Representing Bradley Mining), Nathan Brown II (Elem Tribal Chair), Brian J. Cleary (Elem Attorney), Jim Brown III (Elem Tribal Historian), Milford Wayne Donaldson (Chair, Advisory Council on Historic Preservation), Jenan Saunders (California Historic Preservation Officer), Larry Bradfish (Asst. Council, EPA Region IX), Jane Diamond (Superfund Division, EPA Region IX), Paul Cirino (Attorney, DOJ Environment & Natural Resource Div.), Robert Mullaney (Senior Council, DOJ Environment & Natural Resource Div., Environmental Enforcement), Mike Thompson (U.S. Congress), Barbara Boxer & Dianne Feinstein (U.S. Senators)

⁴ This compliance is also required by EPA's internal regulations 40 CFR 300.5

⁵ When the Elem Tribe contacted an archaeologist to identify bones unearthed by the EPA.

⁶ Per email 7-26-2006

⁷ Letters dated 10-18-2006 and 12-11-2007