Enchanted Circle Chapter
Trout Unlimited
735 Via Manzana
Taos, New Mexico 87571

September 23, 2015

The Honorable Martin Heinrich
United States Senate
303 Hart Senate Office Building
Washington, DC 20510-3104

Re: United States and State of New Mexico v. Chevron Mining Inc., U.S. District Court (DNM), civil action no. 1:14cv-783 KBM/CG

Dear Senator Heinrich,

The Enchanted Circle Chapter of Trout Unlimited has long been involved with conservation projects on the Red River. In 2010, the Chapter joined the Red River Restoration Group in its efforts to bring together a coalition to understand and deal with the impacts to the Red River from the Chevron Molybdenum Mine Super Fund site. We have watched in dismay as the painfully slow legal process has unfolded over the years. Almost one year ago we joined many other groups in protesting the proposed consent decree (U.S. et. al. v. Chevron Mining, Inc. (Action No. 14 cv 783 KBM-SCY). It appears that our protests have fallen on deaf ears. We seek your assistance in averting a miscarriage of justice detrimental to the public interest.

The Plaintiffs' Motion to Enter Consent Decree ("the Motion) filed 09-03-2015 (see .pdf attachment) appears to be a hasty attempt to resolve this law suit without adequately addressing the profound past and ongoing environmental damages to public resources that have been repeatedly identified during the periods of public comment.

The background for this matter and the basis for our concerns are as follows:

Introduction:

a. Lodging of the Consent Decree (September 2014)

In September 2014, the United States Department of Justice lodged a proposed Consent Decree in federal district Court seeking court approval to settle all natural resource damages caused by the operation of the Questa molybdenum mine, referred to as the "Molycorp Site". Significant provisions of the decree provide:

1. Chevron Mining Inc. ("CMI") will be released from future claims related to damaged natural resources upon payment of approximately $4,000,000, of

which $2,500,000 will be earmarked for improvement to the Village of Questa Waste Water Treatment Plant;

2. CMI will be entitled to continue releases of toxic mine waste into the Red River, "indefinitely into the future" (proposed Consent Decree, page 8 at Recital R) ;
3. The natural resource "trustees" (federal and state agencies, defined as "DOI, USDA and ONRT") will conduct future public hearings in order to develop plans to spend the remaining $1,500,000 to remediate and compensate for damage to other natural resources, such as impacts to the Red River from decades of release of toxic waste into the River (but first, the "trustees" will deduct their future costs of consulting the public and developing a plan, Proposed Consent Decree at IV, 3, j; and Article IX at sections 15 & 16);
4. CMI will retain the right to pursue it's separate litigation against the United States challenging CMI's clean-up responsibilities (claimed to be on the order of $500 million) under the Superfund Record of Decision ("ROD"). (See proposed Consent Decree at Article XX, section 43)[1]; and
5. The proposed settlement is supposedly based upon an "administrative record" as "indexed" in Appendix B of the proposed Consent Decree, "Final as of February 2009".[2] (Proposed Consent Decree at IV, 3, a; and Article XV, 30).

Initially the public was given 30 days to comment on the proposed settlement. Many individuals and organizations objected to the short comment period, the lack of information supporting the proposed settlement and the lack of an "administrative record" accessible to the public. In response, two CD discs with the contents of the administrative record were sent to the Questa Public Library and the public was given an additional 30 days to comment.

Fourteen comment letters were submitted by individuals as well as by Taos County and Amigos Bravos. Comments questioned (a) the lack of factual support; (b) failure to conduct an impact analysis; (c) lack of public participation in the natural resource damage phase; and (d) insufficiency of the $1.5 million settlement amount to compensate for decades of severe damage to the natural resources of the Red River. When considered together, the public comments make a convincing case that the proposed settlement amount is arbitrary and capricious.[3]

b. Motion to Confirm Consent Decree:

Now, a year of silence later, the trustees have filed the Motion urging court confirmation of the Consent Decree settlement. The Motion is supported by 25 pages of arguments of lawyers and a 15 page "technical" memorandum labeled Exhibit A, dated August 2015, prepared by two U.S. Fish and Wildlife employees (Russell MacRae & Karen Cathey).

Argument:

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[1] So, the proposed settlement of natural resource damages in this action would require CMI to pay $1.5 million for decades of past and indefinite future releases of toxic substances into the Red River, but CMI retains it's lawsuit against the government, challenging its Superfund clean up responsibilities. "Unbelievable!"---you can't make this stuff up.

[2] When the proposed Consent Decree was lodged in federal court in 2014, not a single publicly accessible copy of the 2009 "administrative record" existed in Taos County.

[3] Copies of the public comment letters are attached to the Motion, labeled "Exhibit B".

a. The administrative record does not support the proposed settlement:

The recently filed technical memorandum (Exhibit A of the Motion) and the arguments of counsel make repeated assertions that are not reflected in the administrative record. Over and over it is asserted by the government that the trustees "analyzed", "assumed", "recognized", "used" , "decided", etc.

However, nowhere in the more than 40 pages of combined "argument" and "technical" memorandum is there a single citation to where in the administrative record such trustee actions are documented. If the trustees "analyzed", "assumed", "recognized", "used" and "decided", the extent, nature and compensatory damages to restore or remediate natural resources, where are those actions reflected in the record? The answer is that the trustees kept no minutes or other written record of their collective actions.

One can only infer from consultant reports that the trustees looked at a lot of alternatives between 2003 and 2006 and that sometime in late 2006 pulled a settlement figure out of the air. Then, in May 2007, consultants produced a 2 page memo with some cost estimates for 5 projects that would fit into the settlement amount.[4]

Significantly, only one of the 5 projects selected in the May 2007 consultant cost estimate memo to justify the agreed settlement amount would have addressed Red River habitat (labeled the "Fish Hatchery Passage" project). And that project is now moot. During the nine year delay in finalizing settlement (2006-2015 and counting) the Department of Game & Fish eliminated the hatchery passage issue on the Red River as part of a much larger project accomplished using State Habitat Stamp revenues provided by citizen hunting and fishing licenses.

In the "technical response to comments" prepared by government biologists MacRae and Cathey, the 5 "cost estimate" projects now are referred to as "hypothetical" or "proxy projects", not actual projects. (Motion Exhibit A, page 9). So apparently, we are to accept that currently unplanned and unidentified future projects can remediate natural resource damages based on the 2007 cost estimates of these "hypothetical proxy" projects.

b. Trustees' flawed "analysis" of impact is equivalent to no analysis:

In fact, the only trustee action that can definitely be inferred from the administrative record is the apparent "decision" to "analyze" only natural resource damage impacts downstream of Columbine Creek and above the fish hatchery. Among other problems, this "decision" excludes 2 and one-half miles of Red River adjacent to

[4] This "cost estimate" memo dated 5/22/2007, appears at pages 77 and 78 of the Motion. It should be noted that this memo is dated a full 6 months after the administrative record indicates that a settlement was reached (see administrative record consultant Powerpoint presentation for trustee meeting of November 9, 2006 (not attached to the Motion). The Powerpoint lists "Agreed Upon Restoration Projects" and states the "Timeline" to "lodge consent decree" is "February 1, 2007".

Thus, in 2006 a settlement had been reached and timeline for lodging the Consent Decree agreed upon. Yet, the Consent Decree was not lodged with the court until September 2014, a full 7 and one-half years later. During this entire period of delay, the trustees concealed from the public the fact that settlement had been agreed to. Thus, all portions of the "administrative record" relating to natural resource damages and potential remediation of injury to the Red River fishery and invertebrate population were unavailable to the public until October of 2014, a month after the proposed Consent Decree was lodged with the court.

the mine and waste rock piles. This arbitrary "decision" decreases the assumed extent of mining impact by one third (from 15 miles of River in the trustees' 2003 Pre-assessment Screen to 10 and one-half miles).

This assumption also defies reality. This "decision" excludes from the impact "analysis" the absolute epicenter of toxic releases from the mine into the Red River. The deeply incised waste rock piles that extend for more than 2 miles upstream of the Columbine Creek confluence with the Red River are the direct source of most of the mine's toxic discharges into the Red River. There is no evidence in the record to support exclusion of impacts upstream of the Columbine Creek/Red River confluence and neither lawyer argument nor "technical" backfilling by the fish and wildlife biologists in Exhibit A explain the unexplainable.

Further, there is no evidence in the record to exclude the downstream portion of the Red River (from the hatchery to it's confluence with the Rio Grande). The "superfund" process revealed evidence of years of massive toxic water discharge from the tailings ponds into groundwater above the lower Red River. A comment letter from noted outdoors guide Taylor Streit attests to the difference in the fishery of the Rio Grande above and below the Red River confluence. See comment letter of Taylor Streit dated November 9, 2014.

The government's "technical" report (Exhibit A) goes into great detail as how a calculation of habitat impacts and "service loss" could be calculated. However, the calculation discussion is based on ignoring the area of highest impact --- the Red River upstream of the Columbine Creek confluence and downstream of the hatchery. The government's technical habitat impact calculation reminds one of the old adage "garbage in, garbage out".

c. Trustee Conclusions are entitled to no judicial deference due to their Failure to follow Code of Federal Procedure regulations:

The Trustees failed to follow the Code of Federal Procedure regulations for assessing damages to resources. These failures were detailed in comment letters. Among the failings pointed out were: (1) lack of public participation[5]; (2) no written record of Trustee decisions or Trustee analysis of resource damage; and (3) despite spending 3.4 million in studies, the Trustees failed to develop a plan to remediate natural resource damages.

As a result-----the administrative record reveals a settlement figure picked out of thin air[6] with no adopted plan as to how the money will be spent, nor damaged resources remediated. Because the regulations were not followed, the settlement proposal is not entitled to judicial deference. 43 Code of Federal Regulations, sections 11.10, 11.11 & 11.91.

d. The proposed settlement is unreasonable on its face due to delay:

[5] At page 37 of the government's motion the statement is made that "The Trustee agencies solicited . . . input from . . . Amigos Bravos [and others, mostly trustee agencies]. According to Amigos Bravos, its offers of assistance have been ignored. (see comment letters of Amigos Bravos. It should be noted that in its comments of November 25, 2014, Amigos Bravos asked the government to provide "any record of public participation" in the natural resource damages assessment process. Per usual, the request has been ignored.

[6] See footnote 4, above.

The proposed natural resource damage settlement figure was arrived at in closed doors meetings in 2006. The settlement was not publicly disclosed for more than 8 years. Despite an additional year of delay, the proposal makes no adjustment to the 2006 settlement figure despite 9 years of bureaucratic delays that were apparently incurred at the behest of CMI.

e. Most of the $4 million settlement amount does not address natural resource damages:

The proposed $4million settlement figure is an illusion. The consent decree muddies up the fact that $2.5 million of the proposed $4 million is earmarked for improvements to the Questa sewer treatment plant----a "remedy" that has nothing to do with natural resource damages caused by the mine.[7] This means that less than $1.5 million (after deduction of "future costs" of developing a remediation plan), will be available to compensate for and remediate more than 35 years of damage to fishery, recreation and other public resources of the Red River corridor.

f. No account is made for the mine's indefinite future right to pollute the River:

The proposed decree expressly condones the mine's continuing pollution of the Red River for an indeterminate period. (See proposed Consent Decree, page 8, recital R.) The government now argues that the "Trustees conservatively assumed" (without citation to the administrative record) that unabated mining pollution of the River would continue "unabated" until 2100---85 years from now. (Motion at p. 31). Where is this "assumption" by the trustees documented in the administrative record? How was this right of indefinite future releases factored into the $1.5 million settlement amount for resource damage? We are aware of nothing in the administrative record documenting any compensation for the allowance of continuing pollution.

g. The $1.5 million settlement figure is arbitrary and contrary to public interest:

As noted above, $2.5 million of the purported natural resource damages settlement is earmarked for improvements to the Village of Questa Waste Water Treatment Plant. This money fails to address any resource damages caused by mining. There is really no explanation anywhere in the administrative record as to why such funds for the Treatment Plant are included in the current resource damage settlement.

The natural resource damage issue centers on the $1.5 million intended to address remediation of mining impacts. In this regard, it should be noted that the government has been reimbursed $3.4 million for "past costs" of consultants and staff ". . . in assessing Natural Resources . . ." injuries, and remediation. (See proposed Consent Decree at Art. IV, recital r; and Art. VI, section 5). In addition, the proposed Consent Decree calls for further payment to the trustees of $207,233 to cover additional "past costs" of assessing natural resource damages. (Consent Decree at Art. VI, section 6, et. seq.).

[7] The government refers to the Waste Water Treatment Plant funds as addressing remediation of "groundwater resources". (Proposed Consent Decree at Art. VI, section 6(c)). There is no evidence in the administrative record tying problems with the Village's Waste Water Treatment Plant to natural resource injuries caused by mining activities. It is puzzling as to why the $2.5 million is even a part of the resource damage settlement.

Thus, the trustees have expended and will be compensated a total $3.6 million for evaluating natural resource damages. Accordingly, under the proposed Consent Decree the government "costs" will be fully reimbursed despite the fact that such expenditures resulted in no adopted remediation plan for damage to the public's natural resources.

The government's motion asks the public to accept that $1.5 million, less future trustee costs, will be sufficient to remediate damaged natural resources. We are told that, even after the government deducts future costs of developing a plan, the May 2007, $1.5 million consultant cost estimate of "hypothetical proxy" projects will be enough to remediate decades of past and future toxic releases from the mine and tailings ponds into the Red River.

As stated in comment letters, the proposed Consent Decree turns the process for assessment of resource damages on its head. Instead of following the CFR regulations for assessment of resource damages, and then arriving at a figure that will remediate the quantified damages, the government has agreed to a settlement figure---with no plan as to how the money will be used. The process is arbitrary and there is no substantial evidence that supports the agreed settlement amount.

Conclusion:

For all the reasons stated above, the public has not been well served by the trustees. They have operated in secret, without any meaningful public input. They have ignored the Regulations (43 CFR) establishing procedures for the assessment and recovery of compensation for natural resource damages. Their "decisions", "analysis", and other alleged actions are not documented in the administrative record---but are now rationalized by lawyers and biologists without any reference to the administrative record. The trustees have incurred fully reimbursed "past costs" of more than $3.6 million without developing a natural resource remediation plan. In 2006, the trustees agreed to a natural resource damage settlement of $1.5 million based upon a consultant's estimate of what are now described as "hypothetical proxy" projects. No adjustments have been made to any cost estimates based upon delays of more than 8 years from the time that the settlement amount was agreed to.

We ask for your help in averting what may become just another sad chapter in the degradation of the public's interest in restoring natural resources damaged by extractive industry. The proposed Consent Decree should be rejected and the trustees directed to conduct a resource damage assessment according to the regulations (43 CFR, 1100, et. seq.). Such assessment should, as provided by the regulations, be conducted transparently with public participation of interested stakeholders.

Very truly yours,

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H. William Adkison, President
Enchanted Circle Chapter, Trout Unlimited

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William L. Owen, Chairman
Red River Oversight Technical Committee,
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