

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. *12-cv-01563-MSK*

UNITED STATES OF AMERICA

Plaintiff,

v.

ENSTAR LLC

Defendant.

CONSENT DECREE

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I. BACKGROUND

A. Plaintiff, the United States of America (“United States”), on behalf of the United States Department of Agriculture, Forest Service (“Forest Service”), filed a complaint pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9607, against Defendant Enstar LLC (“Defendant”) seeking reimbursement of response costs incurred or to be incurred by the Forest Service for response actions taken at or in connection with releases or threatened releases of hazardous substances at the Butterfly and Burrell Mine Site. The Site is located on lands under the jurisdiction, custody and control of the Forest Service within the established boundaries of the White River National Forest in the State of Colorado.

B. On September 6, 2011, following completion of the EE/CA, the Forest Service issued a Removal Action Approval Memorandum for a Non-Time Critical Removal Action at the Site.

C. Defendant does not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint. The Forest Service does not admit any liability to Defendant arising out of the transactions or occurrences that could be alleged in any counterclaim in this action.

D. The United States and Defendant agree, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid further prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, with the consent of the Parties to this Decree, it is hereby ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 6973(a), 9606, 9607, and 9613(b). This Court also has personal jurisdiction over Defendant. Venue is proper in this District pursuant to 42 U.S.C.

§ 9613(b) and 28 U.S.C. § 1391(b) and (c). Solely for the purposes of this Consent Decree and the underlying complaint, Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Defendant consents to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and Defendant and its respective successors and assigns. Any change in organization or status of Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Defendant's responsibilities under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree 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 Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandum" shall mean the Action Memorandum for the Site dated September 6, 2011, all future modifications or amendments thereto, and all documents prepared to implement the Action Memorandum attached as Appendix B.

b. "Butterfly and Burrell Mine Site Special Account" shall mean the account established by the Forest Service, pursuant to 16 U.S.C. § 579c, for the retention and use of amounts recovered in connection with the Site to conduct or finance response actions at the Site.

c. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § § 9601, *et seq.*

d. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto.

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

f. "Defendant" shall mean Enstar LLC, a Delaware limited liability company.

g. "Effective Date" shall have the definition provided in Section XIV.

h. "Forest Service" shall mean the United States Department of Agriculture, Forest Service, and any successor departments, agencies or instrumentalities.

i. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

j. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

k. "Parties" shall mean the United States and Defendant.

l. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

m. "Site" shall mean the Butterfly and Burrell Mines Site located in the White River National Forest, approximately fourteen miles from the Town of Meeker, Colorado. The Site includes all mine workings, surface and underground, waste dumps and other disturbed areas at both the Butterfly and Burrell Mines. The Site is located in Sections 25 and 26, Township 2 North, Range 92 West of the Sixth Principal Meridian in Rio Blanco County, Colorado. The entire Site is on lands under the jurisdiction, custody, and control of the Forest Service. A map showing the general location of mine features within the Site is attached as Appendix A.

n. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities, which includes without limitation the Forest Service.

o. "U.S. Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs after the Effective Date in developing or reviewing plans, reports, and other deliverables pursuant to the Action Memorandum, in implementing or overseeing the Work, or in negotiating, implementing or overseeing, this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, and laboratory costs.

p. "U.S. Past Response Costs" shall mean all costs, not previously reimbursed by Defendant, including, but not limited to, direct and indirect costs, that the United States incurs or pays at or in connection with the Site through the Effective Date, plus Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

q. "Work" shall mean all Site activities performed prior to the Effective Date and to be performed to implement the Action Memorandum, attached hereto as Appendix B.

V. PAYMENT OF RESPONSE COSTS BY DEFENDANT

4. Within 45 days of the Effective Date of this Consent Decree, Defendant shall pay \$2,475,000 to the Forest Service in reimbursement of U.S. Future Response Costs and U.S. Past Response Costs incurred or to be incurred by the United States at the Site. This settlement payment shall be deposited in the Butterfly and Burrell Mine Site Special Account to be retained and used at or in connection with the Site.

5. Within 45 days of the Effective Date of this Consent Decree, Defendant shall pay \$11,440 to the USDA Office of the General Counsel in reimbursement of response costs incurred or to be incurred by the United States for enforcement activities at the Site. This settlement payment shall be deposited in the Hazardous Materials Management Account at the USDA National Finance Center.

6. All payments shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing the Site name, DOJ case number 90-11-3-10348, Agency Locator Code AGFS, and the civil action number. Payment shall be made in accordance with instructions to be provided by the Financial

Litigation Unit of the United States Attorney's Office for the District of Colorado following lodging of the Consent Decree. Any EFTs received at the U.S. DOJ lockbox bank after 11:00 a.m. (Eastern Time) will be credited on the next business day. If Defendant fails to make its payment under this Section within 45 days of the Effective Date of this Consent Decree, then Defendant shall pay Interest on the unpaid balance, commencing on the date that payment is due and accruing through the date of payment. At the time of payment, Defendant shall provide notice of such payment to the United States as provided for in Section XIII (Notices and Submissions) of this Consent Decree. Such notice shall reference the Site name, DOJ case number 90-11-3-10348, Agency Locator Code AGFS, and the civil action number.

VI. FAILURE TO COMPLY WITH CONSENT DECREE

7. Stipulated Penalties.

a. In addition to the Interest required by this Section, if Defendant fails to make its required payment when due, then Defendant also shall pay stipulated penalties to the United States of \$1,000 per day for each day that its payment is late. Stipulated penalties are due and payable to the United States Treasury within 45 days of the date of the demand for payment of the penalties by the United States.

b. Defendant shall pay stipulated penalties owing to the United States in the same manner set forth in Paragraph 6 above, and with the confirmation notice required for the payment of U.S. Past and Future Response Costs, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state the violation for which the penalties are being paid.

c. Penalties shall accrue as provided in this Paragraph regardless of whether the Forest Service has notified Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

8. If the United States brings an action to enforce this Consent Decree against Defendant and prevails, Defendant shall reimburse the United States for all costs of such action, including, but not limited to, costs of attorney time.

9. Payments made under this Section shall be in addition to any other remedies or sanctions available to the United States against Defendant by virtue of Defendant's failure to comply with the requirements of this Consent Decree.

10. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued to the United States pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Defendant from its payment obligation pursuant to Paragraph 4 and 5, or from performance of any other requirements of this Consent Decree applicable to Defendant.

11. Interest on Late Payments. If Defendant fails to make any payment under Section V (Payment of Response Costs by Defendant) by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

VII. COVENANTS NOT TO SUE BY THE UNITED STATES

12. In consideration of the payments that will be made by Defendant under the terms of this Consent Decree, and except as otherwise specifically provided in Section VIII (Reservations of Rights by the United States), the United States covenants not to sue or to take administrative action against Defendant pursuant to Sections 106, 107 and 113(f) (to the extent the United States has any claims against Defendant under Section 113(f) of CERCLA) of CERCLA, 42 U.S.C. §§ 9606, 9607, and 9613(f), for the Work and for recovery of U.S. Past Response Costs and U.S. Future Response Costs. This covenant not to sue shall take effect upon the receipt by the Forest Service of the payments required by Section V (Payment of Response Costs by Defendant) and any Interest or stipulated penalties due thereon under Paragraph 11 (Interest on Late Payments) or Paragraph 7 (Stipulated Penalties). This covenant not to sue is conditioned upon satisfactory performance by Defendant of its obligations under this Consent Decree. This covenant not to sue extends only to Defendant, including its members, its successors and assigns, and does not extend to any other person.

VIII. RESERVATION OF RIGHTS BY THE UNITED STATES

13. The United States reserves, and this Consent Decree is without prejudice to, all rights against Defendant with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiff in the preceding Paragraph. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Defendant, and this Consent Decree is without prejudice to, all rights with respect to:

- a. liability for failure of Defendant to meet a requirement of this Consent Decree;
- b. liability for costs incurred or to be incurred by the United States, at or in connection with the Site, that are not within the definition of U.S. Past Response Costs or U.S. Future Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606 other than for "matters addressed" under this Consent Decree;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

14. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions (as those terms are defined in CERCLA), at or in connection with the Site, as authorized by law.

IX. COVENANT NOT TO SUE BY DEFENDANT

15. Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the U.S. Past Response Costs, U.S. Future Response Costs, or the Work, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) based on CERCLA Sections 106(b)(2), 107, 111, 112, or 113, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of response actions at or in connection with the Work, including any claims under the United States Constitution, the Colorado Constitution, the Tucker Act, 42 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claims against the United States under CERCLA Sections 107 or 113 relating to the Work.

16. These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 13.b, c, or e, but only to the same extent and for the same matters, transactions, or occurrences as are raised in the claim of the United States against Defendant.

17. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

X. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

18. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of either Party, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2). The Parties intend that neither this Decree nor its contents shall constitute evidence in any proceeding of any liability or obligation whatsoever of Defendant, except that it may be used by the United States or Defendant in any action brought to enforce or interpret this Decree and the rights and obligations of the Parties hereunder.

19. The Parties agree, and by entering this Consent Decree this Court finds, that this settlement constitutes a judicially-approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2) and that Defendant is entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), or as may otherwise be provided by law, for “matters addressed” in this Consent Decree. For purposes of this Paragraph, “matters addressed” shall mean (a) the Work; (b) U.S. Past Response Costs; and (c) U.S. Future Response Costs.

20. Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

21. Defendant shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify the United States in writing within 10 days of service of the complaint on them. In addition, Defendant shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

22. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section VII (Covenants Not To Sue By the United States).

XI. ACCESS TO INFORMATION

23. Defendant shall provide to the Forest Service, upon request, copies of all non-privileged and non-confidential documents and information within its possession or control or that of its contractors or agents relating to the Site, including, but not limited to, sampling,

analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

24. With regard to confidential business information and privileged documents:

a. Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with applicable law, including but not limited to Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by the Forest Service will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to the Forest Service, or if the Forest Service has notified Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Defendant.

b. Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege in lieu of providing documents, it shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name, title, affiliation (e.g., company or firm), and address of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant.

c. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other similar documents or information evidencing conditions at or around the Site.

XII. RETENTION OF RECORDS

25. The Forest Service shall notify Defendant it has completed the Work within 120 days of completing the Work. Until 5 years after Defendant's receipt of the Forest Service's

notification that it has completed the Work, Defendant shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or liability of any person for response actions conducted and to be conducted at the Site, regardless of any retention policy to the contrary.

26. At the conclusion of this document retention period, Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the Forest Service, Defendant shall deliver any such records or documents to the Forest Service. Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name, title, affiliation (e.g., company or firm), and address of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant. However, no document, report or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that it is privileged.

27. Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the filing of suit against it regarding the Site, and that it has fully complied with any and all Forest Service requests for information pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e).

XIII. NOTICES AND SUBMISSIONS

28. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions

shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, the Forest Service, and Defendant, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
Re: DJ # 90-11-3-07803/1

– and –

As to the Forest Service:

Brian Lloyd
Regional Environmental Engineer
Rocky Mountain Region, Region 2
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USDA Office of the General Counsel
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As to Defendant:

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Fax (303) 893-1379

Cord Harris
Strategy Manager - Remediation Management
BP America
4 Centerpointe Drive
La Palma, California 90623
Office (714) 670-3903

XIV. EFFECTIVE DATE

29. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or, if the Court instead issues an order approving the Consent Decree, the date such order is recorded on the Court docket.

XV. RETENTION OF JURISDICTION

30. The Court shall retain jurisdiction over this case for the purpose of resolving disputes arising under this Consent Decree or entering orders modifying this Decree, or effectuating or enforcing compliance with the terms of this Decree.

XVI. INTEGRATION/APPENDICES

31. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree. A map of the Site is attached to this Consent Decree as Appendix A and incorporated into this Consent Decree. The Action Memorandum is attached to this Consent Decree as Appendix B and incorporated into this Consent Decree.

XVII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

32. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to the entry of this Consent Decree without further notice.

33. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

34. Upon entry of this Consent Decree, the Forest Service shall withdraw the Unilateral Administrative Order issued to Enstar LLC on December 23, 2011, and said Order shall have no legal effect.

XVIII. SIGNATORIES/SERVICE

35. The undersigned representatives of Defendant and the Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division of the United States Department of Justice, or their delegates certify that each is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

36. Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified Defendant in writing that it no longer supports entry of the Consent Decree.

37. Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XIX. FINAL JUDGMENT

38. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ___ DAY OF _____, 2012

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Enstar LLC.

FOR THE UNITED STATES OF AMERICA

Dated: 6/8/12

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

Dated: 6/10/12

CARA MROCZEK
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
601 D. Street, NW
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 514-1447
Fax: (202) 616-6583

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Enstar LLC.

Dated: 5/14/2012

for

DANIEL J. JIRON
Regional Forester
Rocky Mountain Region
Forest Service
740 Simms Street
Golden, Colorado 80401

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Enstar LLC.

FOR ENSTAR LLC

Dated: 4/25/2012



PATRICK L. KING
Vice President
Enstar LLC
Helios Plaza 6.391A
201 Helios Way
Houston, Texas 77079
United States

Dated: 4-25-12



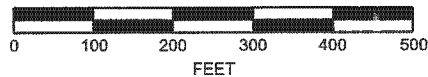
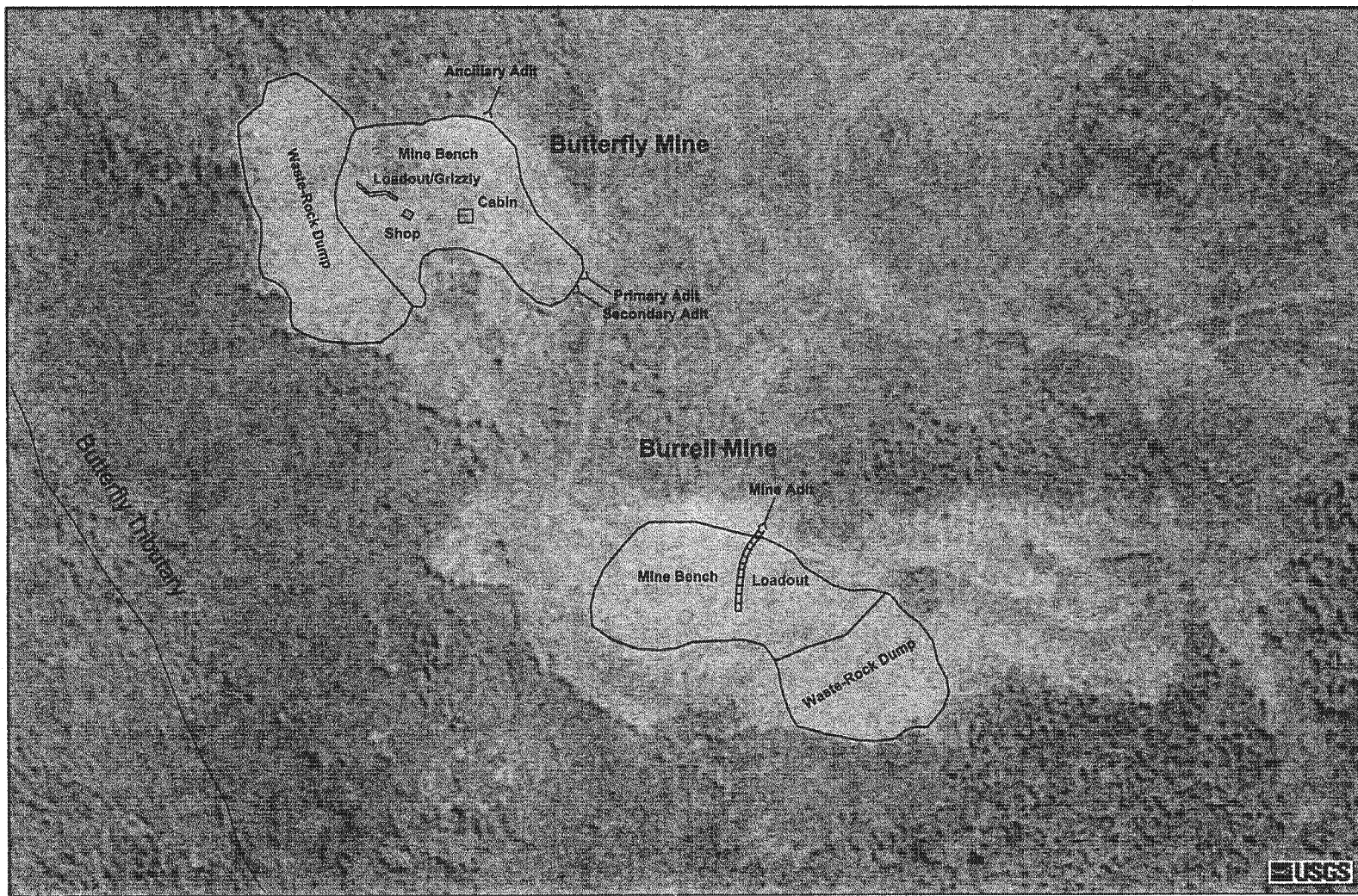
JAMES L. LUCARI, ESQ.
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Naperville, IL 60563

Dated: 4/26/2012



WILLIAM J. DUFFY, ESQ.
Davis Graham & Stubbs LLP
1550 Seventeenth St., Suite 500
Denver, Colorado 80202

APPENDIX A



**Figure 2.3: Site Features
Butterfly and Burrell Mines
Rio Blanco County, CO**

APPENDIX B

ACTION MEMORANDUM
FOR A NON TIME-CRITICAL REMOVAL ACTION FOR THE
BUTTERFLY AND BURRELL URANIUM MINES
WHITE RIVER NATIONAL FOREST
AUGUST 2011



I. PURPOSE

The purpose of this Action Memorandum is to select and document approval of the proposed non time-critical removal action at the Butterfly and Burrell Uranium Mines (Site) located in the Coal Creek Watershed, White River National Forest (WRNF) near Meeker, Rio Blanco County, Colorado. The site lies entirely on National Forest System (NFS) lands.

The primary objective of the non-time critical removal action is to reduce the impacts of Contaminants of Concerns (CoCs) as a result of uranium mining from mine benches and waste rock on human health and the environment. The CoCs investigated include arsenic, antimony, calcium, chromium, copper, iron, magnesium, mercury, molybdenum, nickel, potassium, selenium, silver, sodium, uranium, and vanadium. Radiological concerns include gross alpha, gross beta, radium 226, radium 228, thorium 228, thorium 230, and thorium 232. Conditions at the Site present and imminent and substantial endangerment to human health and the environment.

The intent of the proposed remedy is to abate the release of hazardous substances and minimize continued degradation of surface water in the Coal Creek Watershed as a result of continued leaching of the CoCs from the site, and to make improvements in the watershed. The Removal Action is being taken pursuant to the USDA Forest Service's Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA; 42 U.S.C. 9604) authority and Executive Orders 12580 and 13016 for lands under the custody, jurisdiction, or control of the USDA Forest Service. The Action Memorandum authorizes the non time-critical removal action in accordance with the National Contingency Plan (NCP) (40 CFR 300) and USDA Forest Service policy and procedures.

It is important to note that this Action Memorandum is a brief summary of the information generated for this Site. The 2005 Site Assessment and the 2011 Engineering Evaluation and Cost Analysis (EE/CA) include the full documentation of sampling results, environmental threats posed by the Site, removal alternatives and associated costs. These documents are available by contacting Olivia Garcia, On-Scene Coordinator (970-945-3220), White River National Forest Supervisor's Office, Glenwood Springs, Colorado.

II. SITE CONDITIONS AND BACKGROUND

A. Site Description

1. Removal site evaluation

Au' Authum Ki, Inc (AAK) conducted a Site Assessment of the Butterfly and Burrell Mines in 2005 to assess potential human and ecological receptor threats posed by waste rock drainage and radiological and gamma exposure. The goal of the 2005 Site Assessment was to assess the extent and nature of the metals, inorganics, and radiological constituents of the waste rock, as well as to assess the hazards associated with gamma radiation and radon levels.

Sampling activities during the assessment included subsurface soil and surface water samples collected at the Site. Water samples collected from a pool of water within the Butterfly Mine, along Butterfly Tributary downgradient of the Butterfly Mine, along Coal Creek both upstream and downstream of the confluence with drainage from the



Butterfly and Burrell Mines, and from a perennial tributary of Coal Creek were used to establish background levels.

In addition, a radon investigation was conducted at both the Butterfly and Burrell Mine sites. Radon levels at the two mine sites were measured by placing an alpha-track detector within the primary portal at each mine, as well as placing detectors in the Butterfly Mine cabin (since removed) and in a background area in between the two mine sites. Gamma exposure rates at the two mine sites were measured by using a Ludlum Model 19 micro-R survey meter to collect static measurements at specific locations at the two mine sites.

Results of the 2005 Site Assessment may be found in the Site Assessment itself and in Section 2.3 of the EE/CA.

2. Physical Location

The Coal Creek Watershed is located in the White River National Forest on the western slope of the Continental Divide; approximately 14 miles northeast of the town of Meeker in Rio Blanco County, Colorado (see Figures 2-1 and 2-3 from the EE/CA, attached). The Coal Creek Watershed is a tributary within the overall White River Watershed. Both mines drain into Coal Creek, which drains into the White River approximately 13 miles downstream of the Sites, approximately 4.5 miles east of the town of Meeker.

3. Site Characteristics

The Butterfly and Burrell Mines are abandoned mine lands located on National Forest System lands managed by the Blanco Ranger District. Both of these mine sites are located in mountainous topography at an elevation of approximately 8,900 feet with high walls behind a flat bench area and waste rock dump.

Both mines experience an alpine environment consisting of a cool, wet climate. Because of heavy snowpack, the sites are generally accessible from June through September. Weather in October is variable, with freezing temperatures and snow common. Snow typically lasts through late May.

Butterfly Mine Location and Physical Setting

The Butterfly Mine site is located in the Coal Creek drainage on a southwest-facing slope approximately 14 miles northeast of the town of Meeker, Colorado. The mine site faces southwest, away from the slope. A southwest-facing high wall cut into the side of the slope is immediately behind a 63,000-square-foot, relatively flat "bench" area. Approximately 55,000 square feet of waste rock is on the slope to the southwest of the bench area. Three adits make up the Butterfly Mine: the primary, secondary, and ancillary, of which only the primary remains open.

Burrell Mine Location and Physical Setting

The Burrell Mine site is located approximately 0.15 mile to the southeast of the Butterfly Mine site on a south-facing slope in the Coal Creek drainage. The mine site faces south, away from the slope. A south-facing high wall cut into the side of the slope is immediately behind a 57,000-square-foot, relatively flat "bench" area.



Approximately 35,000 square feet of mine waste rock is on the slope to the south of the bench area. The Burrell Mine has one mine adit that was backfilled during the 2010 remedial activity. Runoff from the Burrell Mine area drains approximately 1,800 feet south to Coal Creek.

4. Release or threatened release into the environment of a hazardous substance, or pollutant or contaminant

The sampling and analyses conducted to date by AAK in the 2005 Site Assessment indicate the presence of several hazardous substances at the Site. The mine features at the Site are mine benches and waste rock dumps. The primary source of contamination consists of the exposed Butterfly mine bench 63,000 square feet (1.4 acres) and associated waste rock dump 55,000 square feet (1.3 acres); and the Burrell mine bench 57,000 square feet (1.3 acres) and associated waste rock dump 35,000 square feet (0.8 acres) containing radium-226, radium-228, thorium-228, thorium-230, thorium-232, arsenic, uranium, and vanadium, the primary CoCs. Because the mine waste dumps do not support plant life, they continue to be vulnerable to erosion. Wind and water erosion of these uncovered and uncontrolled waste materials has led to migration of contaminants into air, soil, and sediment. It has resulted in potential inhalation, ingestion, and dermal contact exposure pathways which may pose an imminent and substantial endangerment to human health and the environment. Some of the waste materials have eroded into the tributary below the Butterfly Mine.

5. NPL status

The Butterfly and Burrell Mines are not NPL sites nor have they been proposed for listing.

6. Maps, Pictures, Other Graphic Representations

Two location maps from the EE/CA are attached. Additional detailed maps of the Site may be found as in the EE/CA.

B. Other Actions to Date

1. Previous actions

In 2008, the USFS removed debris and solid waste from the site and performed an asbestos removal within the existing buildings. In 2009, work included demolishing two structures and a cabin as well as removing additional debris. In 2010, the USFS performed additional work at the sites, including closure of the Butterfly's secondary and ancillary adit and some site grading to direct surface runoff away from the waste rock piles. In partnership with the State of Colorado, Division of Reclamation, Mining and Safety Program, a total of nine mine features (adits) were closed, including the installation of four bat-friendly gates.

2. Current actions

No current actions are underway.



C. Federal, State, and Local Authorities' Roles

1. Federal, State and local actions to date

The assessment and planning for Removal Action at the Site has been a cooperative effort between the USFS and the Colorado Division of Reclamation, Mining, and Safety (CDRMS). The USFS is the lead agency for the Removal Action, and CDRMS has contributed funding for adit safety closures as well as contributing funding for design and review of the final engineering plans.

2. Potential for Continued State/Local Response

The Colorado Division of Reclamation, Mining, and Safety continues to partner with the USFS in the adit safety closures and engineering plans. Other State and local authorities do not have the authority or resources to conduct a Removal Action; however they will continue to be involved in site activities.

III. THREATS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES

The conditions at the Site represent a release, and potential release of CERCLA hazardous substances threatening the public health or welfare and the environment, and meet the criteria for initiating a Removal Action under 40 CFR Section 300.415 (b)(2) of the NCP. All of the factors from § 300.415 (b)(2) of the NCP were considered, with the following forming the basis for the USFS determination of the threat present at the site and the appropriate action to be taken:

(i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants: Given the uncontrolled nature of the site, a high potential exists for direct exposure of people to the COCs on the mine benches and waste rock piles. Contaminants of Concern associated with the waste piles can affect human health/wildlife through inhalation of dust or ingestion of solids or water.

(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface that may migrate: Direct contact with waste material at ground surface is a primary concern at the sites. Run-off and erosion at the site increases leaching and mobilization of metals to surface waters downgradient from the waste dumps.

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released: The Site is subject to harsh winters with a pronounced spring snowmelt. Snow melt and periodic summer thunderstorms have a high potential to actively erode the waste dumps, continue to leach CoCs out of waste rock, and contribute to the mass loading in Coal Creek.



IV. ENDANGERMENT DETERMINATION

Actual or threatened releases of hazardous substances, pollutants and contaminants from the Site, if not addressed by implementing the response action described in this Action Memorandum, may present an imminent and substantial endangerment to public health, welfare or the environment.

The EE/CA outlined the streamlined risk approach used to evaluate the human health risk (HHR). This approach considered EPA regulation and guidance and the bounds of technical feasibility. Important aspects of the approach included the following:

- The COC concentrations in soil samples were compared with BLM-developed Risk Management Criteria (RMC) to evaluate potential health risks posed by COCs to campers, all-terrain vehicle (ATV) drivers, workers, and surveyors.
- The COC concentrations in surface water samples were compared with BLM-developed RMC to evaluate potential health risks posed to campers, ATV drivers, workers, and surveyors.
- Radon and gamma exposures around the Butterfly and Burrell Mines sites were compared with primary and secondary Maximum Contaminant Levels (MCLs) developed by the EPA.

A. Threats to the Public Health or Welfare

Because the Butterfly and Burrell Mine sites are located in an area accessible to campers, hunters, and anglers, COCs including radon and gamma, pose a risk to these users.

The HHR indicated that arsenic concentrations in the soil exceeded the RMC for a worker and for a camper. Elevated levels of arsenic in surface water concentrations near the Site may pose a risk for human consumption with levels exceeding EPA Ambient Water Quality Criteria.

Radon and gamma exposures measured in surface water during the 2005 Site Assessment also pose human health risk. Gross beta and radium exceed the EPA MCLs.

B. Threats to the Environment

The streamlined approach was also used to evaluate the potential risk to ecological receptors at the Site. Information obtained during the 2005 Site Assessment was used to evaluate the ecological risk within the vicinity of the mine sites. Arsenic, cadmium, copper, lead and zinc are CoCs particularly for birds. Cadmium levels are of concern to Mule Deer, Elk, and White Tailed Deer.

Contaminants of Concern in surface water pose both acute and chronic ecological risk to freshwater aquatic life that exceed the 2005 Site Assessment surface water sampling results. Copper and mercury are CoCs for aquatic life.



Risk screening criteria for ecological receptors for radioactive elements were not developed by the EPA and thus were not available for evaluation. However, as is seen with the HHR for radioactive elements, a risk to ecological receptors exists.

V. PROPOSED ACTIONS AND ESTIMATED COSTS

A. Proposed Actions

The Butterfly and Burrell Mine sites share many of the same physical and geologic features including proximity to each other, similar site layout (high walls, bench, and waste rock dumps), water quality, radiological concentrations, and discharge pathways; therefore, the same removal action alternatives developed are applicable for both sites with the exception of the adit at Butterfly. The removal action alternatives developed and evaluated in the EE/CA are as follows:

Alternative 1—No Action

Leave mine sites as they currently are, with unrestricted access to the site.

Alternative 2—Full Restoration

Excavate the entire waste rock pile, and restore sites to as much as practicable to pre-mining conditions, which is about a 3:1 (horizontal:vertical) slope. The native slope may be steeper at the Burrell Mine.

Alternative 3—Partial Restoration

Partially excavate and flatten the waste rock dump to a slope of about 2:1, and use this material to backfill and flatten high wall to achieve a 2:1 slope.

Alternative 4—Terrace High Wall and Grade Site

Cut terraces into the soil and weathered rock along the top of the highwall down to point where the highwall becomes vertical and is composed of competent rock. Bedrock faces of the highwall will not be terraced. Grading of waste rock dump and bench area will be performed in order to construct stormwater controls.

Alternative 5—Engineering Controls

This alternative has no significant excavation of the waste rock dumps or the high wall. Control surface water onsite and perform some minor grading of dumps to construct stormwater controls.

For Alternatives 2 through 5, erosion control of the highwall will be partially or fully mitigated by site grading. These alternatives also have some form of stormwater control in order to minimize offsite migration of sediment. Each alternative, except for Alternative 1, also reduces human health and ecological risks to varying degrees by limiting access to and use of the bench area through signage and physical barriers.



From an effectiveness standpoint, Alternative 2 (Full Restoration) was the most comprehensive and could meet the required criteria in a timely fashion and with the greatest reduction in human and ecological risk, although it is the most expensive.

Alternatives 3 (Partial Restoration), 4 (Terrace High Wall), and 5 (Engineering Controls and Grade Dump) meet the required criteria. All were technically and administratively feasible with no shortage of materials and service, although each of these alternatives included slopes steeper than natural slopes, and at least a portion of the bench area remained open.

From a total present-worth cost perspective, Alternative 5 (Engineering Controls and Grade Dump) was the most cost-effective for both mines. Capital costs were significantly less than the other alternatives. All four alternatives included similar long-term operation and maintenance (O&M) requirements.

1. Proposed action description

Alternative 3 is the recommended alternative based on evaluation of the effectiveness, implementability, and cost of all the alternatives.

Alternative 3 consists of moving selected waste rock material from the dump onto the bench and highwall area for both the Butterfly Mine and the Burrell Mine. The resulting slope on the highwall and bench area would be more stable than the current steep slopes. The slope will start at the top of the vertical section of the high wall and continue at a 2:1 slope to the floor of the bench. Approximately 16,700 cy and 9,100 cy of waste rock would be excavated from the Butterfly and Burrell dump areas, respectively, to construct the new slope. Prior to constructing the slope, the one open adit at Butterfly will be backfilled or otherwise sealed.

Swales, check dams, and berms will be constructed across and around the perimeter of the newly constructed slope and the remaining waste rock dump to control surface water drainage and to prevent erosion until native grasses take root. Silt fencing will be placed at the bottom of the waste rock dump area to contain any sediment that may wash down the side prior to reaching the Coal Creek.

The remaining flat bench area (approximately 50,530 square feet at the Butterfly Mine and 57,060 square feet at the Burrell Mine) will be potholed and roughed up to encourage revegetation and to discourage humans from setting up camp sites. Boulders and timbers will be added to the bench area to further discourage camping. Access to the mine sites will be further limited by roughing up the access road and randomly placing boulders at the entrance to the mine sites. Waste rock left in the dump will be graded, and topsoil or soil amendments will be added to the surface.

Once the final contours are achieved, the top 12 inches of the remaining waste rock or native soils will be amended with biochar or other organic amendment. A minimum 6-inch layer of topsoil will then be spread over the amended material to provide a suitable material for seeding. The purpose of the biochar or other organic amendment is to add long-lasting organics to the granular waste rock or native soils to support root depth and growth of native species. The purpose of the topsoil is to add a fine-grained soil to support the seeding efforts and to sustain vegetation. For cost purposes, it was



assumed the soil would be imported from the Meeker area and spread on top of the amended waste rock. The site will be seeded with USFS-approved seed mixture.

Annual site inspections for at least 3 years after implementation of the removal action would be required to assess the condition of soil cover and success of revegetation.

2. Contribution to remedial performance

While no remedial action is anticipated for the Site, the proposed Removal Actions described are consistent with the overall objectives for the area and implementation of these Removal Actions will prevent human contact with and exposure to the CoCs and reduce impacts to Coal Creek.

3. Description of alternative technologies

Selected alternative technologies are described in Section 5 of the Final EE/CA. The descriptions presented in the EE/CA provide an overview of their technical application and approach used in the development and assembly of the removal action alternatives.

4. EE/CA

An EE/CA was prepared by CH2MHill in August 2011 for the USFS to evaluate removal alternatives, and was prepared in accordance with the criteria established under the CERCLA, sections of the National Oil and Hazardous Substance Pollution Contingency Plan (NCP) applicable to non-time critical removal actions. The EE/CA is also consistent with the USEPA guidance document, Conducting Non-Time Critical Removal Actions under CERCLA.

5. Applicable or Relevant and Appropriate Requirements (ARARs)

Removal actions at the Site will comply with all of the substantive provisions of Federal and State ARARS to the extent practical considering the exigencies of the situation. USEPA notification and State of Colorado involvement was obtained through the ARARs process (as described in the Forest Service Guide to CERCLA and consistent with the NCP at 40 CFR 300.400(g) and 515(h)(2)). No federal, state, or local permit shall be required for any removal action occurring on-site pursuant to 40 CFR 300.400(e)(1) (as codified at 42 U.S.C. 9621(e)(1)).

A list of ARARs associated with the Site may be found in the Section 3.2 of the EE/CA.

6. Project Schedule

Depending on various conditions, construction activities are scheduled to begin in the late spring/summer of 2012 and should be completed in one season. Three years of site inspections will determine the effectiveness of the selected removal alternative.

B. Estimated Costs

The detailed cost estimate shown below may be found in Appendix B of the EE/CA. The proposed removal action has already been partially funded by the USFS/CDRMS.



Preferred Alternative 3	Butterfly Mine	\$1,138,063
Preferred Alternative 3	Burrell Mine	\$ 967,745
Total Construction Costs:		\$2,105,808

Maintenance Costs for 3 years \$60,000

VI. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

If no action is taken to remove and/or control the identified waste and isolate them from the public and environment, the site will continue to degrade and present a risk to public health, welfare, and the environment. Furthermore, CoCs will continue to migrate off site and impact the water quality in Coal Creek.

VII. ENFORCEMENT

The USDA Forest Service will be authorizing and implementing the removal actions for the Site which is located entirely on NFS land. Pursuant to its delegated CERCLA authorities, the Forest Service has identified ENSTAR LLC, whose sole member is ARCO Unimar Holdings LLC, as a potentially responsible party (PRP) at the Site. The Forest Service will make every effort to have ENSTAR LLC perform the necessary response action promptly and properly in accordance with the National Contingency Plan (NCP).

Olivia Garcia, White River National Forest, is the designated On Scene Coordinator and contact person for this action. She can be reached at 970-945-3220.



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BLANCO RANGER DISTRICT

#1383 P.002/002

IX. RECOMMENDATION

This decision document selects the non-time critical removal action for the Butterfly and Burrell Uranium Mines located near Meeker Colorado, developed in accordance with CERCLA as amended, and not inconsistent with the NCP. This decision is based on the administrative record for the sites.

Conditions at the sites meet the NCP 5300.415(b)(7) criteria for a Removal, and I recommend your approval to document Removal. The total project budget is estimated to be \$2,105,808.

Approval

for

Mary Morgan, Regional Engineer
USDA Forest Service, Region 2

Date:

9/6/11

Disapproval

Mary Morgan, Regional Engineer
USDA Forest Service, Region 2

Date:

USFS Recommendation and Concurrence

8-30-11

Concur: Scott Fitzwilliams, Forest Supervisor

30 Aug 2011

Concur: Ken Coffin, District Ranger

8-30-2011

Recommended: Olivia Garcia, On-Scene Coordinator

