

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

In re: Gold King Mine Release in San Juan
County, Colorado on August 5, 2015

No. 1:18-md-02824-WJ

This Document Relates to:

No. 1:16-cv-00465-WJ-LF

No. 1:16-cv-00931-WJ-LF

**CONSENT DECREE BETWEEN THE STATE OF NEW MEXICO, THE NAVAJO
NATION, SUNNYSIDE GOLD CORPORATION, KINROSS GOLD U.S.A., INC., AND
KINROSS GOLD CORPORATION**

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This Consent Decree is made and entered into by and between the State of New Mexico, and the New Mexico Environment Department (collectively “NM Plaintiffs”), and the New Mexico Office of the Natural Resources Trustee (“ONRT”) (NM Plaintiffs and ONRT collectively “New Mexico”), and the Navajo Nation (“Navajo Nation” as further defined below), on the one hand, and Sunnyside Gold Corporation (“SGC”), Kinross Gold Corporation (“KGC”), and Kinross Gold U.S.A., Inc. (“KGUSA”), on the other hand (collectively, the “Mining Defendants”).

I. BACKGROUND

A. NM Plaintiffs have made claims under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (“CERCLA”) against the Mining Defendants in the following litigation: *In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015* (1:18-md-02824 (D.N.M.)) and *State of New Mexico v. USEPA, et al.* (1:16-cv-00465 (D.N.M.)) (“NM Litigation”) consolidated with 1:16-cv-00931 (D.N.M.), which litigation arose from the release that occurred on August 5, 2015 at the Gold King Mine (“Gold King Blowout” as further defined below).

B. Navajo Nation has similarly made claims under CERCLA against the Mining Defendants in the following litigation: *In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015* (1:18-md-02824 (D.N.M.)) and *Navajo Nation v. USEPA, et al.* (1:16-cv-00931 (D.N.M.)) (“NN Litigation”) consolidated with 1:16-cv-00465 (D.N.M.), which litigation also arose from the Gold King Blowout (such litigation, together with the NM Litigation, the “Litigation”)

C. The above-described CERCLA claims by NM Plaintiffs and Navajo Nation are under Sections 107(a) and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9607(a), and 9613(g)(2), in

connection with the release or threatened release of hazardous substances as alleged in the Litigation.

D. SGC has made counterclaims under CERCLA for cost recovery and contribution against NM Plaintiffs in the NM Litigation.

E. New Mexico and the Mining Defendants have entered into a Settlement Agreement dated January 7, 2021 with respect to the NM Litigation (“NM Settlement Agreement”), and such NM Settlement Agreement provides that New Mexico and the Mining Defendants will enter into a consent decree with respect to those CERCLA Response Cost and Natural Resource Damages claims resolved by the NM Settlement Agreement, and that the Navajo Nation will also be a party to such consent decree upon the request of the Mining Defendants. The NM Settlement Agreement also provides that the Court will retain jurisdiction to resolve any disputes between New Mexico and the Mining Defendants, subject to the terms therein.

F. Navajo Nation and the Mining Defendants have entered into a Settlement Agreement dated December 31, 2020 with respect to the NN Litigation (“NN Settlement Agreement”), and such NN Settlement Agreement provides that Navajo Nation and the Mining Defendants will enter into a consent decree with respect to CERCLA Response Costs, and that New Mexico will also be a party to such consent decree upon the request of the Mining Defendants. The NN Settlement Agreement also provides that the Court will retain jurisdiction to resolve any disputes between Navajo Nation and the Mining Defendants, subject to the terms therein.

G. This Consent Decree is the consent decree provided for in the NM Settlement Agreement and the NN Settlement Agreement.

H. The Mining Defendants do not admit any liability to New Mexico or Navajo

Nation arising out of the transactions or occurrences alleged in the NM Litigation and the NN Litigation. New Mexico does not admit any liability to the Mining Defendants in the NM Litigation. The form of this Consent Decree is unique to the specific circumstances involved, and is not precedent for any other consent decree.

I. New Mexico, Navajo Nation, and Mining Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that this Consent Decree in connection with settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, 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. §§ 9607 and 9613(b). Solely for the purposes of this Consent Decree, Mining Defendants waive all objections and defenses that any of them may have to subject matter jurisdiction of, personal jurisdiction of, or venue in this Court.

III. PARTIES BOUND

2. This Consent Decree is binding upon New Mexico and Navajo Nation, and upon Mining Defendants and their respective successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, will in no way alter the status or responsibilities of Mining Defendants under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided in this Consent Decree, terms used in this

Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA will have the meaning assigned to them in CERCLA or in such regulations. All other words will be assigned their normal meaning. Whenever terms listed below are used in this Consent Decree, the following definitions will apply:

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675;

“Consent Decree” means this Consent Decree;

“Court” means the United States District Court for the District of New Mexico presiding over the Litigation;

“Day” means a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal or State holiday, the period will run until the close of business of the next working day;

“Effective Date” means 30 days from the date that this Court enters the Consent Decree, unless an appeal of the entry of judgment is filed during the 30-day period; if an appeal is taken, the Effective Date means the date on which the Court’s judgment is affirmed;

“EPA” means the U.S. Environmental Protection Agency and its successor departments, agencies, or instrumentalities;

“Future Response Costs” means all Response Costs after the Effective Date of this Consent Decree that New Mexico and/or Navajo Nation incurs arising from the release or threatened release of hazardous substances as alleged in the Litigation;

“Gold King Blowout” means the incident on August 5, 2015 at the Gold King Mine, when an estimated three million gallons of water, approximately, exited the Gold King Mine Level 7 adit and ultimately flowed into the Animas River and downstream waterways, which is referenced in the Litigation;

“KGC” has the meaning ascribed in the initial paragraph in this Consent Decree;

“KGUSA” has the meaning ascribed in the initial paragraph in this Consent Decree;

“Litigation” has the meaning ascribed in Paragraph I.B.;

“Mining Defendants” has the meaning ascribed in the initial paragraph in this Consent Decree;

“Mining Defendants’ Related Parties” means: (i) Mining Defendants’ successors and assigns but only to the extent that the liability of such person or entity is based on the liability of Mining Defendants; (ii) Mining Defendants’ former or current officers, directors and employees, but only to the extent that the liability of any such person is based on acts and/or omissions which occurred in the scope of the person’s employment or capacity as an officer, director, and employee; (iii) affiliates of Mining Defendants (“Mining Defendants’ Affiliates”); and (iv) Mining Defendants’ Affiliates’ successors and assigns, but only to the extent that the liability of such person or entity is based on the liability of Mining Defendants’ Affiliates;

“Natural Resource Damages” means damages for purposes of CERCLA § 107(f)(1) and § 107(a)(4)(C) to “Natural Resources” as defined in CERCLA § 101(16), including those that may be recovered by a Natural Resource Trustee pursuant to 43 C.F.R. § 11.15;

“Natural Resource Trustee” means the official(s) or person(s) designated as natural resource trustee(s) with authority over Natural Resource Damages under 42 U.S.C. § 107(f); 33 U.S.C. § 2706, or other applicable federal or state or tribal law, including the ONRT with respect to the State of New Mexico, and the applicable Natural Resource Trustee for Navajo Nation;

“Navajo Nation” means the Navajo Nation including in its capacities as sovereign, including each department, agency, and instrumentality of the Navajo Nation, as *parens patriae*, and as landowner, and it shall also mean the Natural Resource Trustee for the Navajo Nation;

“New Mexico” has the meaning ascribed in the initial paragraph in this Consent

Decree;

“NM Litigation” has the meaning ascribed in Paragraph I.A.;

“NM Plaintiffs” has the meaning ascribed in the initial paragraph in this Consent

Decree;

“NM Settlement Agreement” has the meaning ascribed in Paragraph I.E.;

“NN Litigation” has the meaning ascribed in Paragraph I.B.;

“NN Settlement Agreement” has the meaning ascribed in Paragraph I.F.;

“ONRT” has the meaning ascribed in the initial paragraph in this Consent Decree;

“Paragraph” means a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter;

“Parties” means New Mexico, Navajo Nation, and the Mining Defendants;

“Past Response Costs” means all Response Costs , including but not limited to direct and indirect costs, and enforcement costs that New Mexico or Navajo Nation, as applicable, have paid or incurred through the Effective Date of this Consent Decree, plus accrued interest on all such costs through such date, that New Mexico and/or Navajo Nation incurred arising from the release or threatened release of hazardous substances as alleged in the Litigation;

“Response Costs” means all costs of response, within the meaning of Sections 107(a)(4)(A), 107(a)(4)(B) 101(25) of CERCLA, (42 U.S.C. §§ 9607(a)(4)(A), 9607(a)(4)(B), 9601(25)), including, but not limited to, direct and indirect costs, and enforcement costs, that New Mexico and/or Navajo Nation incurred or incurs arising from the release or threatened release of hazardous substances as alleged in the Litigation.

“Section” means a portion of this Consent Decree identified by a Roman numeral;

“SGC” has the meaning ascribed in the initial paragraph in this Consent Decree;

“Site” means for purposes of this Consent Decree the Bonita Peak Mining District

Superfund Site in San Juan County, Colorado, EPA Docket ID No. EPA-HQ-OLEM-2016-0152, as published in the Federal Register on September 9, 2016, 81 Fed. Reg. 62397. The definition for this Site will be construed to include all areas of the Site ever defined or described by EPA for purposes of or in relation to the National Priorities List, 40 C.F.R. Part 300, including any further expansion of such Site as may in the future be determined by EPA, and shall include any lands of the state of New Mexico or Navajo Nation within the Site.

V. STATEMENT OF PURPOSE

4. By entering into this Consent Decree, the mutual objective of the Parties is to effectuate the provisions of the NM Settlement Agreement and the NN Settlement Agreement with respect to the consent decrees referenced therein, and for New Mexico and Mining Defendants to resolve their alleged and respective civil CERCLA liability, and the CERCLA liability of Mining Defendants' Related Parties, consistent with how such alleged liability is addressed in the NM Settlement Agreement and the NN Settlement Agreement, as provided in the covenants by New Mexico and Navajo Nation in Section VII, and as provided in the covenants by Mining Defendants in Section VIII, subject to the Reservation of Rights by the Parties in Section IX. With respect to such alleged liability, subject to the terms and conditions herein, this Consent Decree is intended to provide finality and the broadest protection afforded by law to the Mining Defendants and Mining Defendants' Related Parties.

VI. PAYMENTS

5. Payments by Mining Defendants. The Mining Defendants' payments for CERCLA claims have been or shall be paid as provided in the NM Settlement Agreement and the NN Settlement Agreement. The Mining Defendants shall pay: (a) to the NM Plaintiffs – Ten Million Dollars (\$10,000,000.00), broken into payments of: (1) Five Million Dollars (\$5,000,000.00) to the Office of Attorney General (This amount shall be expended for costs, as

approved by the Court, and/or in the sole discretion of the Attorney General to address harms to the State and its communities resulting from the release and to enhance the Office's law enforcement efforts to prevent and prosecute environmental contamination); and (2) Five Million Dollars (\$5,000,000.00) to the New Mexico Environment Department, which includes payment of \$1,000,000 to resolve the NM Plaintiffs' CERCLA Response Cost claims; (b) to ONRT - One Million Dollars (\$1,000,000.00) for Natural Resource Damages claims arising from the Gold King Blowout; and (c) to Navajo Nation - Ten Million Dollars (\$10,000,000), which includes payment of \$1,000,000.00 for the Navajo Nation's CERCLA claims resolved by the NN Settlement Agreement.

**VII. COVENANTS BY NEW MEXICO AND ACKNOWLEDGEMENT
BY NAVAJO NATION**

6. Covenants for Mining Defendants. Except as specifically provided in Paragraph 9 (General Reservations of New Mexico and Navajo Nation Rights), New Mexico covenants: (a) not to sue or to take administrative action against Mining Defendants or Mining Defendants' Related Parties pursuant to Sections 106, 107(a), and 113 of CERCLA, 42 U.S.C. §§ 9606, 9607(a), and 9613, or under New Mexico state law, to recover Past Response Costs and Future Response Costs incurred by New Mexico; and (b) not to sue or to take administrative action against Mining Defendants or Mining Defendants' Related Parties for those Natural Resource Damages settled and resolved in the NM Settlement Agreement.

7. Navajo Nation acknowledges and agrees that the NN Settlement Agreement together with this Consent Decree resolves the alleged civil CERCLA liability of the Mining Defendants and Mining Defendants' Related Parties for Navajo Nation's Response Costs.

VIII. COVENANTS BY MINING DEFENDANTS

8. Covenants by Mining Defendants. Except as specifically provided in Paragraph 11 (General Reservations of Mining Defendants' Rights), Mining Defendants covenant not to sue and agree not to assert any claims or causes of action against New Mexico or Navajo Nation for:

a. any claim pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, or state law or Navajo Nation law regarding Past Response Costs and Future Response Costs and this Consent Decree; or

b. any alleged response costs which Mining Defendants allege or may allege they have incurred, as alleged in their CERCLA claims against NM Plaintiffs in the NM Litigation.

IX. RESERVATIONS OF RIGHTS BY PARTIES

9. General Reservations of New Mexico and Navajo Nation Rights. New Mexico and Navajo Nation reserve, and this Consent Decree is without prejudice to, all rights against Mining Defendants and Mining Defendants' Related Parties, and this Consent Decree is without prejudice to, with respect to all matters not expressly included within Paragraph 6 (Covenants for Mining Defendants) or Paragraph 7. Notwithstanding any other provision of this Consent Decree, New Mexico and Navajo Nation reserve, and this Consent Decree is without prejudice to, all rights against Mining Defendants and Mining Defendants' Related Parties, with respect to:

a. liability for failure of Mining Defendants to meet a requirement of this Consent Decree;

b. criminal liability; and

c. claims and rights of New Mexico and Navajo Nation reserved under the NM

Settlement Agreement and the NN Settlement Agreement;

10. Notwithstanding any other provision of this Consent Decree, NM Plaintiffs and Navajo Nation specifically reserve the ability and right to assert claims and defenses against any parties in the Litigation other than the Parties.

11. General Reservations of Mining Defendants' Rights. The Mining Defendants reserve, and this Consent Decree is without prejudice to, all rights against New Mexico and Navajo Nation with respect to all matters not expressly included within Paragraph 8 (Covenants by Mining Defendants). Notwithstanding any other provision of this Consent Decree, the Mining Defendants reserve, and this Consent Decree is without prejudice to, all rights against New Mexico and Navajo Nation with respect to:

- a. liability for failure of New Mexico or Navajo Nation to meet a requirement of this Consent Decree; and
- b. claims and rights of the Mining Defendants reserved under the NM Settlement Agreement and the NN Settlement Agreement.

12. Notwithstanding any other provision of this Consent Decree, the Mining Defendants specifically reserve the ability and right to assert claims and defenses against any parties in the Litigation other than the Parties.

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

13. Except as provided in Paragraphs 4, 6, 7, 14 and 15 as applicable to Mining Defendants' Related Parties, nothing in this Consent Decree will be construed to create any rights in, or grant any cause of action to, any person or entity not a Party to this Consent Decree. Except as provided in Section VIII (Covenants by Mining Defendants), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action

that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party. Nothing in this Consent Decree diminishes the right of New Mexico or Navajo Nation, 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); provided, however, that nothing in this Paragraph 13 affects: (a) the enforceability of the covenants by New Mexico set forth in Paragraph 6 (Covenants for Mining Defendants), (b) New Mexico's and Navajo Nation's reserved rights set forth in Paragraph 9 (General Reservations of New Mexico and Navajo Nation Rights) and Paragraph 10, or (c) the Mining Defendants' reserved rights set forth in Paragraph 11 (General Reservations of Mining Defendants' Rights) and Paragraph 12.

14. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially-approved settlement pursuant to which each Mining Defendant and Mining Defendants' Related Party, as of the Effective Date, resolved liability to New Mexico and Navajo Nation within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are any liability of Mining Defendants and Mining Defendants' Related Parties for Past Response Costs and Future Response Costs of New Mexico and Navajo Nation. The contribution protection set forth in this Paragraph is intended to provide the broadest protection afforded by CERCLA or state law or Navajo Nation tribal law or otherwise for "matters addressed" in this Consent Decree.

15. The Parties further agree, and by entering this Consent Decree this Court

finds, that the NM Litigation and the NN Litigation filed by New Mexico and Navajo Nation are civil actions within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which each Mining Defendant, and each Mining Defendants' Related Party, has, as of the Effective Date, resolved liability to New Mexico and Navajo Nation within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

XI. NOTICES

16. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it will 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. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the Consent Decree regarding such Party.

As to NM Plaintiffs by email:

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Attorneys for Kinross Gold Corporation and
Kinross Gold U.S.A., Inc.
110 N. Guadalupe Street, Suite 1
Sante Fe, NM 87501

XII. RETENTION OF JURISDICTION

17. This Court will retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree. This Court will also retain jurisdiction over the NM Settlement Agreement and the NN Settlement Agreement, subject to the terms therein.

XIII. INTEGRATION

18. Together with the NM Settlement Agreement and the NN Settlement Agreement, this Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the matters in this Consent Decree.

XIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

19. This Consent Decree will be lodged with the Court for a period of at least 30 Days for public notice and comment.

20. Pursuant to Paragraph 14 “Further Assurances” of the NM Settlement Agreement and Paragraph 14 “Further Assurances” and Paragraph 5.B. “Certain CERCLA Provisions” of the NN Settlement Agreement, if for any reason this Court should decline to

approve this Consent Decree in the form presented, New Mexico and Navajo Nation and the Mining Defendants agree to reasonably cooperate with each other and to make additional filings as reasonably requested by the Mining Defendants to address the reason(s) provided by the Court in declining to approve. If subsequent Court approval of this Consent Decree is not obtained, the Parties agree to rely on the NM Settlement Agreement and the NN Settlement Agreement to govern their respective settlements, including any CERCLA-related provisions therein.

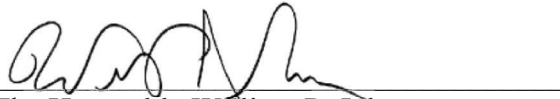
XV. SIGNATORIES

21. Each undersigned representative of a Mining Defendant and of New Mexico and Navajo Nation certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

XVI. FINAL JUDGMENT

22. Upon entry of this Consent Decree by the Court, this Consent Decree will constitute the final judgment between and among New Mexico, Navajo Nation, and the Mining Defendants with respect to the matters in this Consent Decree. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 30th DAY OF July, 2021.



The Honorable William P. Johnson
Chief United States District Judge

[SIGNATURE PAGES FOLLOW]

STATE OF NEW MEXICO ex rel. Hector Balderas, ATTORNEY GENERAL for the State of New Mexico

By: P. Cholla Khoury Digitally signed by P. Cholla Khoury
Date: 2021.04.27 17:01:48 -06'00'

Dated: _____

NEW MEXICO ENVIRONMENT DEPARTMENT

By:  Digitally signed by James Kenney
Date: 2021.04.28 13:06:43 -06'00'

Dated: _____

Approved as to form:

 04/29/2021

William J. Jackson
Kelley Drye & Warren LLP
Counsel for NM Plaintiffs

NEW MEXICO OFFICE OF THE NATURAL RESOURCES TRUSTEE

By: Maggie.HartStebbins Digitally signed by
Maggie.HartStebbins
Date: 2021.04.27 15:39:13 -06'00'

Dated: _____

Approved as to form:

William Grantham Digitally signed by William Grantham
Date: 2021.04.27 15:48:53 -06'00'

William Grantham
Assistant Attorney General
Counsel for ONRT

THE NAVAJO NATION:

(in all capacities set out in the definition of Navajo Nation in Section IV)

By: Doreen N. McPaul Digitally signed by Doreen N. McPaul
Date: 2021.05.05 08:42:05 -06'00'

Approved as to form:

Andrew Walsh Digitally signed by Andrew Walsh
Date: 2021.05.05 11:06:28 -07'00'

Andrew K. Walsh
Hueston Hennigan LLP
Counsel for Navajo Nation

SUNNYSIDE GOLD CORPORATION

By: _____

Dated: _____

Approved as to form:

Neil G. Westesen
Crowley Fleck, PLLP
Counsel for SGC

KINROSS GOLD CORPORATION

By: _____

Dated: _____

Approved as to form:

Bradford C. Berge
Holland & Hart LLP
Counsel for KGC and KGUSA

THE NAVAJO NATION:

(in all capacities set out in the definition of Navajo Nation in Section IV)

By: _____

Dated: _____

Approved as to form:

Andrew K. Walsh
Hueston Hennigan LLP
Counsel for Navajo Nation

SUNNYSIDE GOLD CORPORATION

By: Walt D. Felt

Dated: 4-28-21

Approved as to form:

Neil G. Westesen
Neil G. Westesen
Crowley Fleck, PLLP
Counsel for SGC

KINROSS GOLD CORPORATION

By: John Crowley

Dated: 04-28-2021

Approved as to form:

Bradford C. Berge
Bradford C. Berge
Holland & Hart LLP
Counsel for KGC and KGUSA

KINROSS GOLD U.S.A., INC.

By: Walter D. Felt

Dated: 4-28-21

Approved as to form:

Bradford C. Berge

Bradford C Berge
Holland & Hart LLP
Counsel for KGC and KGUSA