



MEMORANDUM

TO: UCFRB Advisory Council Members, Public

FROM: NRDP

DATE: July 23, 2019

SUBJECT: UCFRB Aquatic and Terrestrial Resources Restoration Plans: Allocation of up to \$4.0 million from the SSTOU/SBC Remediation Fund into the UCFRB Aquatic and Terrestrial Reserves, and Allocation of up to \$8.0 million of the 2016 SSTOU/SBC Excess Remediation Funds in the UCFRB Aquatic and Terrestrial reserves to the NRDP Parrot Tailings Waste Removal Fund.

1. Purpose and Background

The Final Upper Clark Fork River Basin Interim Restoration Process Plan (Process Plan), 2012, sets forth the process for development of the resource-specific restoration plans that determine the expenditure of UCFRB Restoration Funds. The Process Plan requires a revision to the UCFRB Aquatic and Terrestrial Resources Restoration Plans (Restoration Plans) for the allocation of Streamside Tailings Operable Unit (SSTOU) excess funds once the Department of Environmental Quality (DEQ) has completed the major remediation construction activities.¹

In 2016, \$16.5 million excess from the SSTOU/SBC Remediation Fund was transferred into the UCFRB Restoration Fund, with \$8.5 million allocated to the Butte Area One Restoration Plan Amendment – Parrot Tailings Waste Removal (2016 BAO Parrot Amendment), and \$8.0 million used to reimburse the Aquatic and Terrestrial Resources funds for the Silver Bow Creek Greenway project \$8.0 million set-aside, consistent with Section 7.1 of the Process Plan. NRDP/the Trustee deferred developing an allocation specific to the expenditure of the \$8.0 million excess remediation funds until more information was available concerning the BPSOU Consent Decree.

In July 2019, DEQ tentatively determined that an additional amount of \$4.0 million from the SSTOU/SBC Remediation Fund would not be required for Future Response Costs (including operations and maintenance) at the SSTOU, and consequently could be available for transfer into the UCFRB Restoration Fund. DEQ's determination will be submitted to EPA for approval in August of 2019. If approved by EPA, this revision would authorize the transfer of up to \$4.0 million into the UCFRB Aquatic and Terrestrial Reserves, consistent with the Process Plan.

¹ SST OU Consent Decree paragraph 15.e states, "Any funds, including Earnings, in the SST OU Account which the United States and the State determine, pursuant to the [Site Specific Memorandum of Agreement], are not required for Future Response Costs and implementation of any modification of the ROD incurred by EPA or the State (including reasonable estimates for O&M) for the SST OU shall be transferred to the State's Upper Clark Fork River Basin Restoration Fund, established pursuant to paragraph 16 of the State CD."

By this memorandum the Governor, as the Trustee of the State's natural resources, proposes to allocate up to \$8.0 million of the UCFRB Restoration Fund, Aquatic and Terrestrial Reserves, to the NRDP Parrot Tailings Removal Fund. The allocation to this project is consistent with the Long-Range Plan Guidance Plan, and the Process Plan. Specifically, Section 7.3 of the Process Plan provides:

SSTOU/SBC Excess Funds Reserve

Consistent with the Long Range Guidance Plan, should there be any unexpended money in the SSTOU/SBC Remediation Fund, that excess will be transferred to the general UCFRB Restoration Fund and allocated to a reserve fund for specific projects to be determined based on the overall status of the restoration of resources and services within the Upper Clark Fork River drainage at and above Deer Lodge, with the Cottonwood Creek drainage being the northern boundary, including the Silver Bow Creek and Warm Springs Creek drainages. Future distribution from this reserve of restoration funds should be designated for additional unfunded restoration of aquatic and terrestrial resources in these upstream areas, keeping in mind the allocation priorities set forth in the Long Range Guidance Plan and, particularly, the Aquatic and Terrestrial Prioritization Plans, and the recognition that the UCFRB areas at and upstream of Deer Lodge are the most severely injured.

This allocation is proceeding concurrently with proposed actions pertaining to the Butte Area One (BAO) Restoration Plan (2012) (as amended by the 2016 BAO Parrot Amendment), and to the Butte Groundwater Restoration Plan (2014). Those other actions propose to reallocate (in the case of the 2016 BAO Parrot Amendment), and allocate (in the case of the BSB Groundwater Plan), certain funds from those plans to the NRDP Parrot Tailings Removal Fund in order to assist with the implementation of the 2016 BAO Parrot Amendment. Together, these actions will allow for the transfer of up to a total of \$18.5 million to the NRDP Parrot Tailings Removal Fund to allow for the completion of the Parrot Tailings Waste Removal Project.

Pursuant to these concurrent actions, the funds transferred from any of the above-referenced funds to the NRDP Parrot Tailings Removal Fund would be expended in the following sequence: (a) all of the existing (as of July 23, 2019) funds in the NRDP Parrot Tailings Removal Fund will first be expended; then (b) concurrently, 26% of any future Parrot Tailings Removal Project (Parrot Project) costs from the UCFRB Restoration Fund/Butte Groundwater Restoration; 31% of any future Parrot Project costs from the BAO Restoration Fund; and 43% of any future Parrot Project costs from the UCFRB Restoration Plan Reserves. These percentages are based on the contribution from each fund of the total \$18.5 million being proposed at this time through the three amendments.

It is anticipated that some of the funds transferred to the NRDP Parrot Tailings Removal Fund from the UCFRB Restoration Fund Reserves under this 2019 SSTOU/SBC Excess Remediation Funds Allocation could be reimbursed from proceeds of a future settlement between the State of Montana and Atlantic Richfield, if such a settlement is finalized through a BPSOU

consent decree, and pursuant to that consent decree, the funds are not required for the DEQ to complete the Blacktail Creek and Confluence portions of the BPSOU remedy.² The funds would be reimbursed from such a future settlement in the same proportions as the funds are expended. That is, 26% of any future settlement would reimburse the UCFRB Restoration Fund/Butte Groundwater Restoration; 31% from any future settlement would reimburse the BAO Restoration Fund; and 43% of any future settlement would reimburse the UCFRB Restoration Plan Reserves.

This allocation is necessary in order to continue with and complete the Parrot Project. It is proposed in view of the Environmental Protection Agency's April 2019 Proposed Plan, and the Remedial Elements Scope of Work that was released as "Draft Final for public distribution" on EPA's website in 2018. If the actions identified in those documents are changed in any material respect in/by the final BPSOU Consent Decree (if one is concluded), further amendment(s) to the BAO Restoration Plan (and other plans) may be necessary.

Under the federal Superfund law, natural resource damage (NRD) settlement funds can only be spent to restore, replace, or acquire the equivalent of injured natural resources, and natural resource trustees must complete a restoration plan and consider public input before NRD settlement funds can be spent.³ The restoration plan must specify how funds will be spent and include an evaluation of various restoration alternatives according to criteria specified in federal NRD regulations.⁴ The Butte Area One Restoration Plan, and the 2016 BAO Parrot Amendment, meet the above requirements.

The Parrot Project will help the State meet the goals of the Upper Clark Fork River Basin Aquatic and Terrestrial Resources Restoration Plans, the BAO Restoration Plan, and the Butte Silver-Bow Groundwater Restoration Plan.

The Parrot Project would also meet the criterion established for the SSTOU/SBC Remediation Excess funds that, "future distribution from this reserve of restoration funds should be designated for additional unfunded restoration of aquatic and terrestrial resources in these upstream areas, keeping in mind the allocation priorities set forth in the Long Range Guidance Plan and, particularly, the Aquatic and Terrestrial Prioritization Plans, and the recognition that the UCFRB areas at and upstream of Deer Lodge are the most severely injured."

2. Review and Approval Processes and Public Participation

This allocation, along with the concurrent actions referenced above, will be presented by NRDP at a joint meeting of the UCFRB AC and the BNRC to be held on August 5, 2019 at 1:00 p.m. at the Butte Archives.

The UCFRB AC's consideration and comment concerning this proposed amendment will be considered along with public input; there will not be a separate meeting for the UCFRB AC to consider the proposed revision. Public comment on this proposed allocation can be submitted in writing during a public comment period scheduled for July 23, 2019 through August 22, 2019.

² The State retains and reserves all rights and authorities, consistent with state and federal law and all final consent decrees.

³ 42 U.S.C. §9607 and §9611

⁴ 43 CFR §11.82

Written comments may be submitted to NRDP at nrdp@mt.gov, or my mail (postmarked on or before August 22, 2019) to: NRDP, 1720 9th Avenue, Helena, MT 59620-1425.

Following consideration of public input, the Trustee will make the final decision on this 2019 SSTOU/SBC Excess Remediation Funds Allocation.

The process set out in this allocation differs from the review and recommendation process set forth in the Process Plan and the Restoration Plans. The Trustee is satisfied that the basis of and need for the Parrot Project has already been considered by the UCFRB AC in prior Restoration Plan amendments, and in the 2016 BAO Parrot Amendment, and that this allocation is based on and gives effect to the intent of those prior recommendations. The Trustee does not intend for the process utilized in this allocation to set a precedent for future actions, and to the greatest extent possible consistent with his responsibilities as Trustee, he intends to follow the process and priorities set out in the Process Plan and the Restoration Plans for future actions.

3. Proposed UCFRB Restoration Plan Allocation of \$4.8 million from the Aquatic Reserve and \$3.2 million from the Terrestrial Reserve to the NRDP Parrot Tailings Waste Removal Project

Under this allocation, the Trustee would direct NRDP as follows:

a. To place any additional funds made available from the SSTOU/SBC Remediation Fund pursuant to DEQ's July, 2019 determination, as approved by EPA, into UCFRB Restoration Fund Aquatic and Terrestrial Reserves consistent with the Process Plan, with 60% going to the Aquatic Reserve and 40% to the Terrestrial Reserve, to be allocated to aquatic and terrestrial resources during the next Restoration Plan revision.

b. To allocate \$8.0 million from the UCFRB Restoration Fund Aquatic and Terrestrial Reserves (\$4.8 million from Aquatic Reserve and \$3.2 million from the Terrestrial Reserve) to the NRDP Parrot Project, and to transfer that same amount to the NRDP Parrot Tailings Removal Fund to fund a portion of the Butte Area One Restoration Plan Amendment – Parrot Tailings Waste Removal Project, approved by the Governor in December 2016.

The funds transferred from the UCFRB Aquatic and Terrestrial Reserves to the NRDP Parrot Tailings Removal Fund would be expended in the following sequence: (a) all of the existing (as of July 23, 2019) funds in the NRDP Parrot Tailings Removal Fund will first be expended; then (b) concurrently, 26% of any future Parrot Project costs from the UCFRB Restoration Fund/Butte Groundwater Restoration; 31% of any future Parrot Project costs from the BAO Restoration Fund; and 43% of any future Parrot Project costs from the UCFRB Restoration Plan Reserves. These percentages are based on the contribution from each fund of the total \$18.5 million being proposed at this time through the three amendments.

Consistent with the 2016 approval of the \$8.5 million allocation of Restoration Funds to the Parrot Project, this \$8.0 million is proposed to be allocated on the condition that this amount is to be reimbursed to the extent feasible. The funds would be reimbursed from such a future settlement in the same proportions as the funds are expended. That is, 26% of any future settlement would reimburse the UCFRB Restoration Fund/Butte Groundwater Restoration; 31% from any

future settlement would reimburse the BAO Restoration Fund; and 43% of any future settlement would reimburse the UCFRB Restoration Plan Reserves.

Parrot Tailings Waste Removal Project Funding Structure

This figure shows the restoration plan amendments needed to produce the funding for completing the Parrot Tailings Waste Removal Project, including the BSB Shops.
(All numbers approximate and rounded)

