



MEMORANDUM

TO: BNRC Council Members, Public

FROM: NRDP

DATE: July 23, 2019

SUBJECT: Proposed 2019 Butte Area One Restoration Plan Amendment

1. Purpose and Background

By this memorandum the Governor, as the Trustee of the State's natural resources, proposes this 2019 Butte Area One Restoration Plan Amendment (BAO Amendment) to reallocate certain unexpended funds, within the 2012 Butte Area One Restoration Plan Fund to the NRDP Parrot Tailings Removal Fund. The funds transferred would be used to assist with the implementation of the Butte Area One Restoration Plan Amendment – Parrot Tailings Waste Removal, approved in December 2016 (2016 BAO Parrot Amendment). Specifically, these 2019 BAO Amendments would reallocate and transfer a total of \$5.8 million from the allocations made in 2012 to the Stream Restoration, and the Waste Area Improvement/Revegetation, categories, to the NRDP Parrot Tailings Removal Fund.

This BAO Amendment is necessary in order to continue with and complete the Parrot Tailings Waste Removal Project (Parrot Project). It is proposed in view of the Environmental Protection Agency's (EPA) 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.

Because the timeline for completing the Parrot Project and remaining restoration activities will likely extend through 2024, this BAO Amendment also extends the term of the Butte Natural Resource Damage Restoration Council (BNRC) to December 31, 2024.

As background, in 2010, in order to develop the BAO Restoration Plan, the BNRC first produced the Butte Area One Final Restoration Process Planning Document. Among other things, this document contained the NRD legal and policy criteria by which projects/alternatives would be evaluated. That document was subject to public review and was approved by the Governor in March 2012. The provisions in the Process Planning Document were followed during the development of the Butte Area One Final Restoration Plan. In the final BAO Restoration Plan, the BNRC recommended that the Trustee concentrate his/her efforts primarily on direct restoration of the injured natural resources in Butte Area One. As a result, the chosen alternative in the BAO Restoration Plan was the "BNRC Restoration Recommendation" which

concentrates on the “restoration of the Upper Silver Bow Creek Corridor” from Texas Avenue to Montana Street.

The BAO Restoration Fund was originally funded at approximately \$32 million. The BNRC Restoration Recommendation recommended allocating those funds into several categories and amounts, as follows:

- Restoration of the Upper Silver Bow Creek Corridor - \$10.0 million
- Water System Improvements - \$10.0 million
- Waste Cap Improvements/Revegetation - \$6.0 million
- Stream Restoration - \$4.0 million
- Storm Water Controls - \$0
- Recreation - \$1.0 million
- Small/Miscellaneous Projects - \$1.0 million

In this amendment the Trustee proposes to reallocate some of the funds not already expended (i.e., not yet under contract) to the NRDP Parrot Tailings Removal Fund, as set forth below.

This BAO Amendment is proceeding concurrently with proposed actions to allocate and transfer up to \$8.0 million of the Upper Clark Fork River Basin Aquatic and Terrestrial Reserves, and up to \$4.7 million from the Butte Silver Bow Groundwater Restoration Plan (2014), to the NRDP Parrot Tailings Removal Fund. Together, these actions will provide for the transfer up to a total of \$18.5 million to the NRDP Parrot Tailings Removal Fund to allow for the completion of the Parrot Project.

Pursuant to these concurrent proposed 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 Project costs will come from the UCFRB Restoration Fund/Butte Groundwater Restoration; 31% of any future Parrot Project costs will come from the BAO Restoration Fund; and 43% of any future Parrot Project costs will come from the UCFRB Restoration Plan Aquatic and Terrestrial 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 BAO Restoration Fund under this BAO Amendment 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 Montana Department of Environmental Quality to complete the Blacktail Creek and Confluence portions of the BPSOU remedy.¹ 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

¹ The State retains and reserves all rights and authorities, consistent with state and federal law and all final consent decrees.

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.

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.² 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.³ The 2012 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.

2. Review and Approval Processes, and Public Participation

This BAO Amendment, along with concurrent proposed 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.

Public comment on this BAO Amendment can be submitted in writing during a public comment period scheduled for July 23, 2019 through August 22, 2019. 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.

The BNRC's consideration and comment concerning this proposed BAO Amendment will be considered along with public input; there will not be a separate meeting for the BNRC to consider these proposed revisions. Following consideration of public comment, the Trustee will make the final decision on this BAO Amendment.

The process set out in this amendment differs in some respects from the review and recommendation process set forth in the BAO Plan. The Trustee is satisfied that the basis of, and need for, the Parrot Project has already been considered by the BNRC in the Butte Area One Restoration Plan Amendment – Parrot Tailings Waste Removal (December, 2016), and that this allocation is based on and gives effect to the intent of the BNRC's prior recommendations. The Trustee does not intend for the process utilized in this amendment 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.

² 42 U.S.C. §9607 and §9611

³ 43 CFR §11.82

3. Amendment to the BAO Restoration Plan – Allocation of \$5.8 million to the Parrot Tailings Waste Removal Fund

a. Waste Area Improvements/Revegetation

As of June 2019, none of the \$2.7 million allocated to the soil amendment, placement, and seeding of 100 acres has been spent. The BPSOU remedy will address these un-reclaimed and insufficiently reclaimed areas remaining on the Butte Hill. Therefore, the Trustee proposes dedicating \$1.8 million of those funds toward the implementation of the Parrot Project. The remaining \$914,000 will be held in reserve to address revegetation projects in the Silver Bow Creek corridor or the Butte Hill that might not otherwise get accomplished. NRDP proposes that this work be conducted through the Montana Tech Native Plant Program, in consultation with Butte-Silver Bow.

As of June 2019, Butte-Silver Bow has expended approximately \$555,441 of the \$2.08 million allocated to soil testing and placement, and tree and shrub planting. The balance remaining in the funding dedication is approximately \$1,524,559. NRDP proposes dedicating \$1.0 million of these funds toward the implementation of the Parrot Project. The remaining \$524,559 will be used to continue soil testing and placement, tree and shrub planting. Public ideas #50 and #56 remain unchanged.

Table 1: 2019 waste area improvement/ revegetation funding summary (after 2019 amendment)

Proposed Funding Component	Funding Amount
Butte Area One DCRP: soil amendment, placement, and seeding (100 acres)	\$914,000
Butte-Silver Bow soil testing and placement, tree and shrub planting	\$524,559
Public idea #50, revegetate Parrot Mine area	\$206,000
Public idea #56, Montana Tech forb and shrub project	\$1,000,000
Total =	\$2,644,559

b. Stream Restoration

The Trustee proposes to transfer \$3.0 million from the Stream Restoration category to the NRDP Parrot Tailings Removal Fund, where it will be used to help fund the second phase of the Parrot Project. As part of this transfer, the Trustee proposes to eliminate the requirement that \$300,000 of the Stream Restoration funds be used for a surface water beneficial use study,

since attempts to fund several projects have failed. That would leave a balance of approximately \$1.0 million in the “Stream Restoration” category to fund potential stream restoration projects.

Table 2: 2019 Stream restoration project funding summary (after 2019 amendment)

Proposed Funding Component	Funding Amount
Upper Silver Bow Creek and tributaries restoration and Riparian habitat improvements	\$1,000,000
Total =	\$1,000,000

c. Sequence of Expenditure of Funds

The funds transferred from the BAO Restoration Fund to the NRDP Parrot Tailings Removal Fund will 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 will come from the UCFRB Restoration Fund/Butte Groundwater Restoration; 31% of any future Parrot Project costs will come from the BAO Restoration Fund; and 43% of any future Parrot Project costs will come from the UCFRB Restoration Plan Aquatic and Terrestrial Reserves.

d. Extension of Term of BNRC

By this BAO Amendment, the Trustee extends the term of the BNRC to and including December 31, 2024. All current Gubernatorial appointees to the BNRC are hereby re-appointed for a term to and including December 31, 2022.

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)

