

Jeffrey C. Fereday (ID Bar No. 2719)  
Michael C. Creamer (ID Bar No. 4030)  
GIVENS PURSLEY LLP  
601 W. Bannock Street  
Boise, Idaho 83702  
Telephone: (208) 388-1200  
Facsimile: (208) 388-1300  
JeffFereday@givenspursley.com  
mcc@givenspursley.com

Jonathan W. Rauchway (CO Bar No. 34786)  
*(Pro Hac Vice Pending)*  
Zach C. Miller (CO Bar No. 10796)  
*(Pro Hac Vice Pending)*  
DAVIS GRAHAM & STUBBS LLP  
1550 17th Street, Suite 500  
Denver, Colorado 80202  
Telephone: (303) 892-9400  
Facsimile: (303) 893-1379  
jon.rauchway@dgsllaw.com  
zach.miller@dgsllaw.com

Attorneys for Plaintiffs Nu-West Mining, Inc., and  
Nu-West Industries, Inc.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

NU-WEST MINING, INC., and  
NU-WEST INDUSTRIES, INC.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No.

**COMPLAINT**

Nu-West Mining, Inc. and Nu-West Industries, Inc. (collectively “Plaintiffs”), by and through their undersigned counsel, state their Complaint against the United States of America (“United States”), and allege as follows.

### **INTRODUCTION AND NATURE OF ACTION**

1. Plaintiffs bring this civil action pursuant to 42 U.S.C. §§ 9607(a) and 9613(g)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) to recover response costs incurred by them and to be incurred by them in connection with the remediation of four historic phosphate mine sites located in and around Dry Valley in Caribou County, Idaho: (1) the South Maybe Canyon Mine; (2) the North Maybe Mine; (3) the Champ Mine and Champ Mine Extension; and (4) the Mountain Fuel Mine (collectively, the “Mine Sites”). *See* Overview Map, attached as Exhibit A.

2. The Mine Sites require environmental remediation, or cleanup, because historic mining and reclamation operations resulted in the release of selenium into the environment. Selenium is a naturally occurring element in the earth’s crust that is an essential micronutrient for most animals. In large enough doses, however, selenium is toxic to animals. Selenium is naturally present at the Mine Sites, particularly in a rock layer called “middle waste shale.” Middle waste shale was excavated at the Mine Sites during phosphate mining because phosphate deposits in the region are generally located in two ore zones separated by the layer of middle waste shale.

3. The Mine Sites are located on property owned in fee simple by the United States. The United States has continuously owned the Mine Site properties since before phosphate mining began in the region. Beginning in 1910, the United States conducted exploration and related activities on and in the vicinity of the Mine Sites to evaluate their potential for phosphate

mining. In 1950, the United States began leasing these properties to various mining concerns for the purpose of mining phosphate ore. Since that time, the United States has earned millions of dollars in rents and royalties from the phosphate extracted from the Mine Sites.

4. The United States has actively managed the Mine Sites since before phosphate mining began, and it continued its hands-on management of the Mine Sites throughout the periods of active mining and reclamation at each site. The United States' involvement included management and direction of waste disposal operations and arranging for waste disposal at the Mine Sites.

5. Specifically, the United States directed historic mine operators to stockpile middle waste shale and then to place the shale on the exterior of their waste rock dumps in the mine reclamation process. The United States required mine operators to cover the exteriors of their waste rock dumps with middle waste shale as a precondition to the acceptance of their mine and reclamation plans, because the shale acts as a growth medium to promote revegetation of the Mine Sites.

6. For at least some of the Mine Sites, the United States also designed and ordered particular waste disposal methods over the protest of the historic mine operators. At two of the four Mine Sites, the United States directed historic mine operators to construct massive cross valley fill ("CVF") waste dumps. CVF dumps are vast waste rock piles, large enough to fill a valley from side-to-side and to cover the stream bed at the valley bottom. CVF dumps are composed of an underlying rock drain constructed from overburden and waste rock from phosphate mining operations that is covered with a top layer of middle waste shale. The United States intended that vegetation would grow in the middle waste shale layer on top of the CVF

dumps, while the more permeable waste rock underneath would allow for the passage of the buried streams.

7. Plaintiffs had no idea there was any environmental contamination problem at the Mine Sites until 1996. That fall, six horses confined in a small pasture downstream from the South Maybe Canyon Mine Site were diagnosed with selenosis – a disorder caused by elevated levels of selenium. Five of the horses were euthanized. The United States refused to reply to the requests for assistance and reimbursement of the affected rancher. At their sole expense, Plaintiffs purchased new property to relocate the affected rancher and his livestock operation.

8. Immediately after this incident, Plaintiffs began investigating the source of the selenium contamination. In February 1997, Plaintiffs discovered that the United States had conducted a water quality study in the vicinity of the Mine Sites from 1989 through 1993 – without any notice to the public or the Mine Site lessees. The results of the United States' water quality study showed elevated levels of selenium downstream from the South Maybe Canyon Mine Site.

9. The United States published some of the results of its multi-year water quality study in 1991 and 1995. But on both occasions, the United States intentionally omitted its selenium data from the published reports. Upon eventual disclosure, only in response to a Freedom of Information Act (“FOIA”) request by Plaintiffs, the United States admitted that it had withheld this selenium data from the public and even from its Mine Site lessees.

10. An internal government memorandum further reveals that two soil scientists employed by the United States had warned their superiors in the early 1990s that leaching of hazardous substances from waste rock at the Mine Sites could cause a severe environmental

problem. But the United States ignored its own scientists' warnings and refused to fund further study or to notify the public or Plaintiffs of this condition.

11. Plaintiffs learned in 1997 what the United States had known for years: the source of selenium contamination at the Mine Sites is the middle waste shale that was used as a surface covering during mine reclamation. As was known by the United States at least as early as 1976, middle waste shale contains particularly high concentrations of selenium. When middle waste shale is exposed to air and water over a period of time, it undergoes a chemical reaction that results in the release of selenium into the environment. As a result of the United States' directives to its lessees and mine operators to reclaim the Mine Sites using middle waste shale as a surface covering on waste rock dumps, selenium was released into the environment.

12. The United States' defective CVF designs have particularly harmful environmental impacts. The CVF dumps act as massive heap leaches for selenium contamination, with direct pathways into the streams over which they were constructed. Although the United States touted its CVF designs as state-of-the-art and award-winning at the time they were constructed, it has since abandoned these designs and ordered its phosphate lessees to stop using middle waste shale as a vegetation growth medium. Current mining practice requires entombing the middle waste shale underground – essentially where it came from – where the selenium in the rock remains inert.

13. Since 1997, Plaintiffs have worked diligently to investigate and remediate the Mine Sites. The United States, however, has not cooperated in any fashion. Although the United States is the landowner and the party most responsible for the selenium contamination at the Mine Sites, the United States chose to oversee the cleanup of the Mine Sites itself and has demanded that Plaintiffs conduct the remediation at their sole expense.

14. The United States' oversight of Plaintiffs' efforts to remediate the Mine Sites has been incompetent, inefficient, and irresponsible. The United States has repeatedly delayed the progress of Plaintiffs' remediation efforts by refusing to review Plaintiffs' required submissions, often violating binding agreements and missing its own deadlines. The United States also has repeatedly obstructed the progress of the remediation by dismissing the plans of Plaintiffs' experts to investigate and remediate the Mine Sites. The United States' oversight of the remediation of the Mine Sites has displayed the same lack of expertise that led to the United States' ill-advised waste disposal designs at the Mine Sites – the very cause of the problem that now requires remediation.

15. Despite its central role in causing the selenium contamination at the Mine Sites, and even though it owns the Mine Site properties and profited handsomely from the phosphate mining that it supervised there, the United States has insisted that Plaintiffs bear the entire cost of cleaning up the sites. Plaintiffs have spent over \$10 million to date on remediation activities at the Mine Sites, while the United States has contributed nothing.

16. The United States also received over \$15 million in the settlement of the bankruptcy case of Washington Group International in 2004. The United States was awarded these funds by the bankruptcy court based on its representations that it would use the money to remediate the Mine Sites. To date, however, the United States has improperly refused to spend or release these funds for the remediation of the Mine Sites and, upon information and belief, has improperly spent this money on employee seminars, salaries, and other expenses not related to remediation of the Mine Sites.

17. As a direct result of the United States' heavy-handed and incompetent oversight of the remediation and its intransigence in refusing to contribute to the cost of the remediation,

very little progress has been made toward the actual cleanup of the Mine Sites over the last twelve years. Selenium levels remain elevated in the vicinity of the Mine Sites, and selenium continues to leach into the environment at some of the sites. In the face of this ongoing problem, the United States continues to impede Plaintiffs' reasonable efforts to clean up the Mine Sites, continues to deny responsibility for contaminating the Mine Sites, and refuses to contribute toward the cost of remediating the Mine Sites. Plaintiffs have been willing and ready to remediate the Mine Sites for over a decade. The United States has given Plaintiffs no choice but to file this lawsuit.

### **JURISDICTION, VENUE, AND STATUTORY REQUIREMENTS**

18. The Court has original, subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b). An actual, existing, and justiciable controversy exists between Plaintiffs and the United States for each and every claim in this Complaint concerning the United States' obligation to reimburse Plaintiffs for environmental response costs and other expenses that Plaintiffs have incurred and will in the future incur to remediate hazardous substances at the Mine Sites that are the subject of this action.

19. Venue is proper in the District of Idaho pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to this action occurred in this judicial district and the property that is the subject of this action is situated in this judicial district. Venue also is proper under 42 U.S.C. § 9613(b) because the releases that are the subject of this action occurred in this judicial district.

20. The United States has waived sovereign immunity pursuant to 42 U.S.C. § 9620(a)(1) with respect to the claims in this action.

21. A copy of this Complaint has been provided to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency (“EPA”), as required by section 113(l) of CERCLA, 42 U.S.C. § 9613(l).

22. The United States has ordered, directed, or otherwise overseen CERCLA response actions at certain of the Mine Sites, and has stated its expectation that it intends to order, direct, and otherwise oversee further response actions at the Mine Sites in the near future.

23. The United States has required Plaintiffs to investigate, pay for, and perform response actions at certain of the Mine Sites, and has indicated that it intends to require Plaintiffs to investigate, pay for, and perform further response actions at all of the Mine Sites in the future. Plaintiffs have incurred remedial investigation and other response costs at all of the Mine Sites.

### **PARTIES**

24. Plaintiff Nu-West Mining, Inc. is a Delaware Corporation with its principal place of business in Soda Springs, Idaho.

25. Plaintiff Nu-West Industries, Inc. is a Delaware Corporation with its principal place of business in Soda Springs, Idaho.

26. Defendant United States of America includes the Department of the Interior (“DOI”), acting primarily through the Bureau of Land Management (“BLM”) and the United States Geological Survey (“USGS”), the Department of Agriculture (“USDA”), acting primarily through the United States Forest Service (“USFS”), and other current and former agencies and instrumentalities of the United States government.

## GENERAL ALLEGATIONS

### **I. Ownership And Location Of The Mine Sites**

27. The United States established a Forest Reserve over lands encompassing the Mine Sites in 1903 and designated the area as a National Forest in 1907. With the exception of a small parcel at the South Maybe Canyon Mine Site – a portion of the property Plaintiffs purchased to relocate the rancher whose horses were diagnosed with selenosis – the United States is the fee simple owner of all of the property where the Mine Sites are located.

28. Through its agencies and instrumentalities, the United States has actively managed and operated the properties on which the Mine Sites are located since before subsurface phosphate deposits were first leased in 1950. After 1950, the United States continued its control and operation of the Mine Sites, leasing phosphate mineral deposits under the federal Mineral Leasing Act, 30 U.S.C. §§ 181-287, and retaining and exercising exclusive control over the surface estate and non-phosphate subsurface deposits.

29. The Mine Sites are described as follows:

(a) South Maybe Canyon Mine (“SMCM”), is located 16 miles east of Soda Springs in Caribou County, Idaho in the Caribou-Targhee National Forest. SMCM currently is leased to Nu-West Mining, Inc. under BLM Federal Phosphate Lease I-04, and occupies portions of Sections 10, 11, 14, and 15, Township 8 South, Range 44 East, Boise Meridian.

(b) North Maybe Mine (“NMM”), is located 16 miles east of Soda Springs in Caribou County, Idaho in the Caribou-Targhee National Forest. NMM currently is leased to Nu-West Mining, Inc. under BLM Federal Phosphate Leases I-04 and I-8289, and occupies portions of Sections 9, 10, 15, 16, 21, 22, 27, 28, 33, and 34 of Township 7 South, Range 44 East, and Sections 3, 4, 9, and 10 of Township 8 South, Range 44 East, Boise Meridian.

(c) Champ Mine and Champ Mine Extension (collectively “Champ”), is located 16 miles east of Soda Springs in Caribou County, Idaho in the Caribou-Targhee National Forest. Champ currently is leased to Nu-West Mining, Inc. under BLM Federal Phosphate Leases I-04979 and I-19602, and occupies portions of Sections 2 and 35 of Township 9 South, Range 44 East, Boise Meridian.

(d) Mountain Fuel Mine (“MFM”), is located 15 miles east of Soda Springs in Caribou County, Idaho in the Caribou-Targhee National Forest. MFM currently is leased to Nu-West Mining, Inc. under BLM Federal Phosphate Lease I-012989 and occupies portions of Sections 14, 15, 23-26, 35, and 36 of Township 9 South, Range 44 East, Boise Meridian.

## **II. History Of Operations At The Mine Sites (1965-1993)**

### **A. The Mine Site Leases And Lessees**

30. Phosphate mining in southeastern Idaho began in the mid-1900s and continues to this day. Much of the land containing commercial-grade deposits of phosphate rock in southeastern Idaho is owned and managed by the United States. Federal phosphate leases require the lessee to pay rents and royalties to the United States for the right to mine phosphate rock on government-owned land. The Mine Sites were mined pursuant to the terms of federal phosphate mining leases issued under the Mineral Leasing Act (the “Mine Site Leases”) and associated Special Use Permits (“SUPs”) between 1965 and 1993.

31. The BLM issued Lease I-04, where SMCM and NMM would later be located, on October 1, 1950. The United States modified Lease I-04 in September 1953 to incorporate additional acres. El Paso Natural Gas Products Company (“El Paso”) developed NMM on the northern portion of the Lease I-04 property, and operated that mine from 1965 to 1967. In 1972, Lease I-04 was assigned to Agricultural Products Corporation (“APC”), which immediately

reinitiated mining at NMM. Beker Industries Co. (“Beker”) merged with APC in 1975. Thereafter, Beker continued to operate NMM. In January 1979, Beker assigned a 50% interest in Lease I-04, and the other Mine Site Leases, to Western Co-operative Fertilizers (U.S.) Inc. (“WCFUS”). On the same day, Beker and WCFUS assigned their respective 50% shares in Lease I-04 and the other Mine Site Leases to the newly-formed Conda Partnership. Beker continued to mine at NMM until 1984, initially as the lessee of Lease I-04 and later as the managing partner of the Conda Partnership.

32. In 1975, Beker opened and began mining at SMCM, located on the southern portion of Lease I-04. Beker mined at SMCM under the direction of the United States until 1983, initially as Lease I-04 lessee and, beginning in January 1979, as the managing partner of the Conda Partnership.

33. Lease I-04979, where Champ would later be located, was issued in 1954 and encompassed 401.25 acres. In 1973, Lease I-04979 was assigned to APC, which merged into Beker in 1975. The lease was assigned to the Conda Partnership in January 1979. The Conda Partnership opened the Champ mine in 1982 and conducted mining activities until 1984. In 1983, FMC Corporation assigned a 236.75 acre portion of an adjacent lease to the Conda Partnership. This area, referred to as “Champ Extension” was treated as a new lease (Lease I-019602), and mined until 1986.

34. Lease I-012989, where MFM would later be located, was issued in 1962 and encompassed 560 acres. In 1966, Mountain Fuel Supply Company established the MFM and operated it through 1967. In 1977, Lease I-012989 was assigned to Beker. In January 1979, the lease was assigned to the Conda Partnership. The Conda Partnership conducted mining activities

at MFM between 1985 and 1993. The lease was modified four times during this period, bringing the total acreage under the lease to 1,120 acres.

35. In 1985, Beker initiated bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York. In 1987, Nu-West Industries, Inc. was incorporated to purchase several assets of Beker out of the bankruptcy, including Beker's 50% partnership interest in the Conda Partnership, pursuant to 11 U.S.C. § 363(b), (f). Under those subsections of the Bankruptcy Code and the terms of a July 24, 1987 order of the bankruptcy court, Beker's 50% interest in the Conda Partnership was "transferred and assigned" to Nu-West Industries, Inc. "free and clear of any and all liens, claims, security interests, encumbrances, liabilities, or obligations of whatsoever type or description, whether direct or indirect, absolute or contingent, mature or unmatured, liquidated or unliquidated." After this transfer, Nu-West Industries, Inc. and WCFUS became the partners of the Conda Partnership, and the Partnership retained the Mine Site Leases. Beker emerged from Chapter 11 bankruptcy on or about October 6, 1988. On or about February 25, 1991, Beker was administratively dissolved, its corporate status was forfeited, and it ceased to exist.

36. In 1992, Nu-West Industries, Inc. purchased the stock of WCFUS, and changed the name of WCFUS to Nu-West Mining, Inc. Nu-West Mining, Inc. and Nu-West Industries, Inc. thus became the partners of the Conda Partnership, and the Partnership retained the Mine Site Leases.

37. In 1995, the Conda Partnership was dissolved. The Mine Site Leases were assigned to Nu-West Mining, Inc., which remains the lessee to this day.

**B. Mining Activities At The South Maybe Canyon Mine**

38. Mining began at SMCM in 1975 and ended in 1983. Beker managed the SMCM under the direction of the United States during the entire 1975-1983 mining period: from 1975 through 1978 as the sole lessee under Lease I-04, and from 1979 through 1983 as the managing partner of the then-lessee, the Conda Partnership.

39. Beker contracted with Washington Construction Co. (“Washington”), which later became Washington Group International (“WGI”), to conduct on-the-ground mining activities at SMCM. Washington conducted mining activities at SMCM as the mining contractor during the entire period of large-scale mining activity from 1975 through 1983.

40. APC submitted a proposed mine plan for SMCM in 1974, including a proposal for a number of waste rock dumps on slopes outside of Maybe Canyon. APC’s waste dumps were designed so as not to impact or interfere with the flow of Maybe Creek. The United States refused to approve the July 1974 operating plan, because the USFS opposed the proposed location of the waste rock dumps. According to a USGS memorandum, a USFS official stated during a meeting to discuss the plan that “personally he didn’t give a damn but that the proposed mine plan and environmental assessment would meet USFS approval or there would be no mining at all.” The USFS official also stated: “you’ll do things our way or not at all.”

41. Under pressure from the federal agencies, APC altered its plans to satisfy USFS and USGS requirements in an Environmental Analysis Report (“EAR”), increasing the volume of all proposed waste rock dumps in Maybe Canyon and extending one dump across the bottom of the upper canyon. The USFS added certain “Management Requirements and Constraints” in an addendum to this EAR, directing APC to apply middle waste shale to the surface of the waste dumps to aid revegetation.

42. Later in 1975, after the APC merger, at the direction of the federal agencies, Beker submitted a new proposed SMCM mine and reclamation plan to the United States, proposing three waste rock dump sites, one on Dry Ridge (to the west of the Mine pit) and two within Maybe Canyon. The United States also rejected this proposed mine plan.

43. In December 1975 the USGS and USFS held a day-long meeting concerning SMCM. The lessee, Beker, was not allowed to attend the meeting. During that internal meeting, the United States formulated an alternative mine plan for SMCM, including a new design for waste rock disposal facilities. Instead of accepting the proposed plans of Beker's expert consultants, the agencies unilaterally decided that all waste rock dumps would be combined into one massive "cross-valley fill" waste rock dump to be located in the middle of Maybe Canyon, completely covering Maybe Creek.

44. The next day, the United States directed Beker to construct the estimated 46-million-ton waste rock dump in the bottom of Maybe Canyon, underlain by an extensive French drain composed of rex chert to allow the passage of Maybe Creek beneath the dump. The United States directed Beker to place all of the waste rock from SMCM on top of this French drain in a single massive dump, which later became known as the Cross-Valley Fill ("CVF Dump"). The United States also directed Beker to remove and stockpile selenium-bearing middle waste shale for use as a growth medium on the surface of the CVF Dump.

45. As directed, Beker submitted an amended mine plan in January 1976, incorporating the United States' CVF waste disposal design and its requirement that middle waste shale be deposited on the surface of the CVF Dump during reclamation. In a subsequent meeting, the USGS and USFS noted that they were "aware that all the potential problems of constructing this dump have not been identified." In an attempt to address this problem, the United States

“decided that the agencies would observe the construction of [the CVF] dump and reserve the right to make modifications during construction.” The United States approved the plan in February 1976 with the addition of several stipulations by the USFS specifying exactly how Beker was to conduct waste disposal operations.

46. The USGS and USFS closely managed and directed the construction of the CVF Dump to ensure that mine waste was disposed of according to the government’s specific instructions. In January 1977, the USFS recommended that the USGS post a man at the SMCM dump site “to insure proper construction through daily inspection” because “proper dump construction is Geological Survey’s responsibility.”

47. USGS and USFS officials directed and closely supervised Beker’s construction of the CVF Dump and imposed detailed requirements concerning waste disposal operations. The USGS also indicated that “[p]eriodic examination by personnel from either or both agencies can be expected frequently. This office will expect to be kept informed about current operations throughout the life of the South Maybe Canyon pit.”

48. In October 1977, during an inspection of SMCM by USGS and USFS personnel, the USGS “insisted” that Beker increase the number of hours worked per shift to nine hours and increase the work week to six days. The USGS believed that this increase was necessary to meet a USGS requirement that Beker advance the CVF Dump by 350 feet per month.

49. The United States’ heavy involvement in daily, on-the-ground operations continued through 1978 and into 1979, when the ongoing design of the CVF Dump was complete.

50. Large-scale mining and reclamation continued at SMCM between 1980 and 1983. By 1983, mining and reclamation was complete and selenium-bearing middle waste shale had been placed throughout the completed dump per the United States’ direction. The agencies’

defective CVF Dump design, particularly the placement of a huge deposit of middle waste shale designed to percolate precipitation run-off to the underlying water body, has resulted in the release or threat of release of selenium into the environment.

51. Activities at SMCM between 1983 and 1985 consisted of some small-scale reclamation, seeding, and revegetating of the CVF Dump. In mid-1996, at the direction of the USFS, Plaintiffs supplemented the reclamation of SMCM by adding topsoil and seeding and planting trees on portions of the CVF Dump.

52. In total, approximately 9,973,000 tons of phosphate ore were mined from SMCM, resulting in royalty payments to the United States of approximately \$4.5 million.

**C. Mining Activities At The North Maybe Mine**

53. Mining began at NMM in 1965, and continued intermittently until mining ended in 1993. The periods of active mining at NMM were 1965-1967, 1972-1984, and 1993.

54. El Paso began mining operations at NMM in 1965 with the assistance of Wells Cargo, its mining contractor. El Paso mined NMM through the end of 1967. During this period, the El Paso Dump and what is now called NMM Dump No. 5 were constructed.

55. APC, and later Beker, operated NMM between 1972 and 1978 using Washington as its mining contractor. After Lease I-04 was assigned to the Conda Partnership in January 1979, Beker continued mining at NMM as the managing partner of the Partnership, with Washington as its mining contractor, until 1984.

56. The United States' CVF dump design also was implemented at NMM in what is called the East Mill Dump. The East Mill Dump CVF was constructed over Mill Creek. This CVF allows the passage of Mill Creek underneath the dump through a French drain structure that was based on the United States' design of the SMCM CVF Dump.

57. Like the CVF Dump at SMCM, the layer of waste rock on top of the underlying rock drain in the East Mill Dump CVF is composed of middle waste shale. The USGS, BLM, and USFS managed and directed mining, reclamation, and waste disposal operations at NMM through numerous meetings, site visits, and directives during the entire period of active mining and reclamation at NMM. Among other things, the United States directed Beker and other lessees to remove and stockpile selenium-bearing middle waste shale for use as a growth medium on the surface of the East Mill Dump CVF and at the other waste rock dumps at NMM. The placement of middle waste shale on the surface of the rock dumps has resulted in the release or threat of release of selenium into the environment.

58. In 1993, the Conda Partnership briefly mined the area known as the “saddle” on Lease I-8289. Conda Mining, a subsidiary of Washington, was the mining contractor.

59. In total, approximately 14,960,000 tons of phosphate ore were mined from NMM, resulting in royalty payments to the United States of approximately \$6.75 million.

**D. Mining Activities At The Champ Mine**

60. Mining at Champ began in 1982 and ended in 1986. Champ was mined by the Conda Partnership, with Beker as the managing partner for most of the period of active mining. Conda Mining, a subsidiary of Washington, operated Champ as the mining contractor for the entire period of active mining.

61. The USGS, BLM, and USFS managed and directed mining, reclamation, and waste disposal operations at Champ through numerous meetings, site visits, and directives throughout the period of active mining and reclamation. Among other things, the United States directed the Conda Partnership to remove and stockpile selenium-bearing middle waste shale for use as a growth medium on the surface of waste rock dumps at Champ. The placement of middle

waste shale on the exterior surfaces of the waste dumps at Champ has resulted in the release or threat of release of selenium into the environment.

62. In total, approximately 8,300,000 tons of phosphate ore were mined from Champ, resulting in royalty payments to the United States of approximately \$3.75 million.

**E. Mining Activities At The Mountain Fuel Mine**

63. Mining at MFM began in 1966 and continued through 1967. Mining then recommenced in 1985 and ended in 1993. In 1966 and 1967, Mountain Fuel Supply Company opened the MFM. From 1966 through 1967, Mountain Fuel Supply Company and its contractor, Wells Cargo, stripped approximately one million tons of overburden from the ore zone. The Conda Partnership mined MFM from 1985 until 1993. Conda Mining, a subsidiary of Washington, operated MFM as the mining contractor for this latter period of active mining.

64. The USGS, BLM, and USFS managed and directed mining, reclamation, and waste disposal operations at MFM through numerous meetings, site visits, and directives throughout the period of active mining and reclamation at MFM between 1985 and 1993. Among other things, the United States directed the Conda Partnership to remove and stockpile selenium-bearing middle waste shale for use as a growth medium on the surface of waste rock dumps and other areas at MFM. The placement of middle waste shale on the exterior surfaces of the waste dumps and other areas at MFM has resulted in the release or threat of release of selenium into the environment.

65. In total, approximately 10,450,000 tons of phosphate ore were mined from MFM, resulting in royalty payments to the United States of approximately \$4.75 million.

### III. Plaintiffs' Discovery Of Selenium Contamination At The Mine Sites

66. In the fall of 1996, six horses in a small enclosed pasture on Maybe Creek downstream from the CVF Dump were diagnosed with selenosis, an ailment caused by elevated levels of selenium. Five of the horses were euthanized.

67. In response, Plaintiffs arranged for emergency alternative grazing and water supplies for the cattle of Mr. Fred Anderson, the owner of the pasture and surrounding ranch. Plaintiffs requested assistance from both the USFS and the BLM in this effort, but both declined. The United States also refused to respond to a request for assistance and reimbursement by Mr. Anderson.

68. Immediately after the discovery of selenosis in Mr. Anderson's horses, Plaintiffs voluntarily initiated an investigation of the cause of the selenium contamination and, specifically, the upstream CVF Dump.

69. In February 1997, Plaintiffs' investigation uncovered that the USFS had conducted water quality monitoring and analyses in Maybe Creek below the CVF Dump from 1989 through 1993, without notice to Plaintiffs, the lessee, or the public. Some of the results of the USFS's multi-year Maybe Creek water quality study were presented in a peer-reviewed technical paper in 1991 and published as a chapter in a book in 1995. Although the USFS had tested for selenium during its multi-year water quality study, and its results showed that constituent alone exceeding applicable water quality standards, the USFS omitted its selenium test results from the published reports and declined to disclose that information to Plaintiffs or to the public.

70. In the fall of 1991, a summer intern at the Conda Partnership took a single water-quality grab sample from Maybe Creek as part of a short-term, area-wide sampling program requested by the USFS. The samples were analyzed and the results were reported to the USFS in

1992. As part of that project, the intern learned that the USFS was conducting water quality tests in Maybe Creek. The intern repeatedly requested that the USFS provide the Conda Partnership with the results of its Maybe Creek water quality tests. The USFS declined to respond to the intern's requests for the data and did not comment on the sample results the intern submitted to it.

71. The USFS also chose not to provide the results of its multi-year Maybe Creek water quality study to Mr. Anderson, Plaintiffs, or the public at the time they were prepared. Plaintiffs had no knowledge of selenium contamination at SMCM or any of the Mine Sites until they conducted their own investigation in late 1996, following the Anderson Ranch horse incident.

72. In 1997, upon first disclosing its selenium data after a FOIA request by Plaintiffs, the USFS Region 4 Research Station admitted to Plaintiffs in writing that “[n]one of the Se data have been reported before” and that “we never reported these data.” The stated reason for the USFS's failure to report its data indicating selenium contamination was “because they are unverified.” The USFS also admitted, however, that it had made no effort to verify the selenium data and further, if the data were verified, “a very grim picture of Se contamination emerges.”

73. Plaintiffs' investigation further uncovered a memorandum which showed that a recommendation and funding request for further water quality monitoring at Maybe Creek had been made internally at the USFS by one of its own scientists in 1992, but the request had been denied. Moreover, two soil scientists employed by the USFS had warned their superiors in 1992 that leaching of hazardous substances from waste rock at the Mine Sites “could evolve into a severe environmental problem.” The scientists reported, however, that their warnings were “overlooked or ignored” by the United States.

74. In the summer of 1998, due to elevated selenium levels in Mr. Anderson's pasture, Plaintiffs again arranged for alternative grazing land and water supplies for Mr. Anderson's livestock. In December 1998, Plaintiffs agreed to acquire property at their own expense to permanently relocate Mr. Anderson's livestock business. The United States declined to assist Plaintiffs or to participate in any way in providing alternative grazing land and water supplies for Mr. Anderson in 1997 or 1998. The United States also declined to assist Plaintiffs or Mr. Anderson, or to participate in any way in the permanent relocation of Mr. Anderson's livestock business.

75. Extensive studies conducted by Plaintiffs confirmed that the CVF Dump is the primary source of selenium contamination in Maybe Creek. Selenium and other metals are present in the middle waste shale that the USGS and USFS directed government lessees to deposit on the exterior of the CVF Dump and other waste rock dumps at the Mine Sites. After reaction with the middle waste shale, contaminated precipitation runoff filters through the CVF Dump and into the French drain, where it commingles with the waters of Maybe Creek. As a result, the CVF Dump, which the United States designed and ordered its lessees to build, essentially operates as a massive leach field for selenium contamination.

#### **IV. The Mining Contractor For The Mine Sites Goes Bankrupt, And The United States Keeps The Money Earmarked For The Remediation Of The Mine Sites.**

76. In 2001, WGI (the successor to Washington and Conda Mining) filed for bankruptcy in the United States Bankruptcy Court for the District of Nevada. During the bankruptcy proceedings, the United States claimed \$76,883,000 for the environmental cleanup of five phosphate mines in southeastern Idaho where WGI had acted as a CERCLA "operator" in its role as a contract miner.

77. In settlement of the United States' CERCLA claims against WGI, later revised to include only the four Mine Sites, the bankruptcy court approved the payment to the United States of \$4,500,000 in cash, and allowed the United States an additional general unsecured claim in the bankruptcy in the amount of \$30,000,000. Upon information and belief, the United States' \$30,000,000 claim was resolved by payment to the United States of 150,000 shares of WGI common stock (valued at \$35 per share as of June 2004) and 250,000 warrants of WGI (valued at \$20 per warrant as of June 2004). While the United States has not released the details of this transaction, upon information and belief, a total of more than \$15 million was paid to the United States to settle WGI's CERCLA liability for its operation of the Mine Sites.

78. Although the United States represented to the bankruptcy court that it had spent and would be required to spend \$76,883,000 to clean up the Mine Sites, the United States refuses to use or release the funds it received from the WGI bankruptcy to conduct or provide assistance to Plaintiffs for the remediation of the Mine Sites. Instead, the United States deposited the millions of dollars of settlement money it received from the WGI bankruptcy into a non-interest-bearing account. Upon information and belief, the United States has improperly treated the WGI funds as its private source of funding to pay for employee salaries, training, travel, and other general expenses not directly related to the remediation of the Mine Sites.

#### **V. The United States' Oversight Of Remediation At The Mine Sites (1998-2009)**

79. The United States denies any responsibility for the cleanup of the Mine Sites, despite overwhelming evidence documenting the United States' ownership of the Mine Sites, its direction of waste disposal operations at the Mine Sites, and its arranging for waste disposal at the Mine Sites, including its directives for the placement of selenium-bearing middle waste shale on

the exterior of waste rock dumps at all of the Mine Sites, and its designing and ordering the construction of the CVF dumps at SMCM and NMM.

80. In August 1998, the USFS initiated an agency-lead administrative CERCLA action to address the remediation of SMCM. Despite the United States' central role in creating the condition requiring remediation, the USFS demanded that Plaintiffs immediately execute an Administrative Order on Consent ("AOC") under CERCLA, which required Plaintiffs to complete a Site Investigation and Engineering Evaluation/Cost Analysis ("SI-EE/CA") and Risk Assessment for the site at their sole expense. The USFS informed Plaintiffs that, if they did not agree to perform this work, the United States would issue a Unilateral Order under CERCLA section 106 requiring Plaintiffs to do it, subject to the threat of fines and treble damages.

81. Plaintiffs questioned at that time whether a "streamlined" SI-EE/CA process was appropriate for this complex site and whether a more robust Remedial Investigation/Feasibility Study ("RI/FS") process might later be necessary. The USFS summarily dismissed Plaintiffs' concerns, as well as Plaintiffs' objections about the United States' own liability and culpability for the environmental condition at SMCM.

82. Under protest, Plaintiffs executed a negotiated Administrative Order on Consent in June 1998 for SMCM ("1998 AOC") and are currently completing an SI-EE/CA for that site. In April 2007, after eight years of the USFS second-guessing its own previous approvals and repeatedly requiring additional incremental studies, the USFS approved the Site Investigation as final and complete under the 1998 AOC.

83. The USFS also decided in April 2007 that the SI-EE/CA process – a process it chose and mandated over Plaintiffs' objections – was, in fact, inappropriate for SMCM. The USFS demanded that Plaintiffs start over and begin a new RI/FS – an entirely different regulatory

process. In a May 2007 letter, Plaintiffs protested that this abrupt reversal was not necessary, would be unduly costly to Plaintiffs, would significantly delay the progress of the remediation. Now over two years later, the USFS still has not responded to Plaintiffs' letter.

84. Despite its demand that Plaintiffs switch to an RI/FS process, the USFS also ordered Plaintiffs to complete and submit the EE/CA Report for the Site within 90 days, based on its previous determination that the Site Investigation required under the existing 1998 AOC was final and complete.

85. As a component of the completed Site Investigation, Plaintiffs' consultants had conducted a Risk Assessment ("RA") of the Site, which was necessary to identify the pertinent criteria for the remedial planning process. The USFS staff provided comments on the draft RA and provided oral approval of a final RA, which had been revised to respond to those official USFS comments. In July 2007, however, only ten days before the EE/CA Report was due (subject to severe stipulated penalties under the 1998 AOC if late), the USFS notified Plaintiffs that it planned to "revisit" the final RA, but also that the EE/CA Report still was due within the original 90-day deadline. Plaintiffs were then forced to complete the EE/CA Report subject to the USFS's last-minute notice that it might back-track on its approval of the RA, which contained the analyses necessary for the proper completion of the EE/CA Report.

86. Nonetheless, Plaintiffs timely submitted their EE/CA Report to the USFS in July 2007. The USFS then failed for over 16 months to provide any written comments on the EE/CA Report, in violation of the United States' obligations under the 1998 AOC.

87. In November 2008, USFS notified Plaintiffs that, because it had decided that the SMCM site needed a full RI/FS, they now wanted Plaintiffs to "convert" its "complete" EE/CA, which addressed the overall remediation of SMCM, to a more limited "targeted" EE/CA, focusing

solely on recontouring and constructing an impermeable cover (a “cap”) on top of the SMCM CVF Dump. Although Plaintiffs disagreed that such approach was necessary or appropriate, they again complied with the USFS’s request and quickly generated a revised EE/CA focused on a targeted capping action and submitted it in December 2008.

88. Despite that prompt action by Plaintiffs, and rather than submitting comments to Plaintiffs on the EE/CA as required under the 1998 AOC, in January 2009 the USFS instead decided to “take over,” rewrite, and send out for public comment the long-pending EE/CA prepared by Plaintiffs’ consultants. The USFS indicated that it planned to characterize its unilaterally rewritten report as the product of Plaintiffs and its expert consultant, despite Plaintiffs’ continuing protests. In May 2009, Plaintiffs filed a formal Notice of Dispute under the 1998 AOC regarding this latest disruptive USFS action.

89. After additional negotiations, an agreement on the Notice of Dispute was reached, which provided that the USFS would submit comments on Plaintiffs’ December 2008 EE/CA in accordance with the express requirements of the 1998 AOC, rather than rewriting the EE/CA. Despite this agreement, however, on July 29, 2009, the USFS sent to Plaintiffs a completely rewritten EE/CA, substituting its own analyses in the place of Plaintiffs’ expert consultants’ analyses without explanation and with numerous admitted gaps and missing data. Less than 10% of the original text of the EE/CA remained.

90. In addition to almost entirely deleting the text of the EE/CA, the USFS submitted a handful of “comments” on its own rewritten EE/CA (not Plaintiffs’ December 2008 draft EE/CA). In many instances, the USFS’s “comments” requested explanations or elaborations on text that had been authored by the USFS or its consultants – not by Plaintiffs or their consultants. The USFS’s rewritten EE/CA also contained numerous substantive errors and inaccuracies,

including a rewriting of the history of SMCM. The USFS deleted all references to the federal agencies' extensive involvement in designing, ordering, and overseeing the construction of the CVF at SMCM as well as all references to the water quality data revealing the selenium problem that the USFS obtained in the late 1980s and early 1990s, but failed to disclose. Finally, the rewritten EE/CA included a "preferred alternative" for the remediation of SMCM that is not detailed or technically supported in the report. Just as it has done in the past, the United States has again prepared a remedial design without input from its lessee, and is attempting to force the implementation of its design at Plaintiffs' sole expense.

91. Despite the flawed analyses in the USFS's rewritten (but incomplete) EE/CA and the impossibility of responding to the USFS's "comments" on report sections that Plaintiffs did not even write, the USFS has demanded that Plaintiffs' consultants accept all of the USFS's rewritten text and unsubstantiated analyses under their own title and signature and return a completed EE/CA within 20 working days to the USFS, under the threat of penalties under the 1998 AOC. Plaintiffs have repeatedly requested that the USFS adhere to the 1998 AOC by providing Plaintiffs with reasonable comments on the December 2008 EE/CA, but the USFS has refused. As a result of the United States' delay and obstructionism with respect to the EE/CA, the capping of the CVF Dump at SMCM – a necessary measure that all parties agree will have environmental benefits – will be delayed for at least another year. This issue remains unresolved as of the date of this Complaint.

92. The story of the United States' oversight at the other Mine Sites is much the same. In April 2004, Plaintiffs entered into an Administrative Order on Consent with the United States for NMM, requiring the preparation of an SI-EE/CA for that site ("2004 AOC"). Plaintiffs have performed the SI beginning in 2004 and continuing through the present.

93. In 2006 and early 2007, Plaintiffs proposed and discussed with the USFS a targeted, time-critical removal action at the NMM site to remove two former stormwater and sediment retention ponds at NMM at the northern toe of the East Mill CVF Dump. After extensive discussions, it was agreed that these former retention ponds acted as a continuing source of selenium releases to Mill Creek and that their immediate removal and reclamation would be beneficial to the environment. At the express direction of the USFS, Plaintiffs submitted a work plan in May 2007 to complete the pond removal and reclamation work. Plaintiffs, with the approval of the USFS, also constructed a road for the purpose of carrying out this work.

94. Suddenly, in September 2007 the USFS changed its position and rejected Plaintiffs' work plan. The USFS asserted, for the first time, new demands and new legal positions that would have caused the performance of the pond removal work to be delayed for nearly two years. Only three weeks before, in the official USFS "Phosphate Newsletter," the agency had expressly represented to the public that: (1) at the NMM Site, the long-planned action to remove these sediment ponds was about to proceed; (2) immediate removal of these full sediment ponds made sense on several fronts; (3) "the sediment removal will complement future actions by removing one known source of contamination"; and (4) the Forest Service "anticipates approving a removal action . . . . scheduled to begin in 2007."

95. In October 2007, Plaintiffs filed a Notice of Dispute under the 2004 NMM AOC, protesting the USFS's change of position, restating the immediate need to reduce selenium loading in East Mill Creek, and requesting that the removal action be allowed to proceed as originally planned. Finally, after another year of waiting, in October 2008 the USFS granted the relief requested in Plaintiffs' Notice of Dispute and allowed Plaintiffs to conduct the proposed removal action at the NMM East Mill Dump CVF. After successfully resolving that prolonged

dispute, Plaintiffs promptly and successfully completed that work and avoided the additional year of delay initially ordered by the USFS.

96. The lack of progress in the remediation at the Champ and MFM sites is even more pronounced. Despite several requests from Plaintiffs, the United States has refused to initiate a process to investigate and clean up these sites. The USFS claims it lacks the resources to oversee the remediation of these sites, despite the nearly \$15 million in WGI Funds earmarked for the remediation of these sites that the USFS continues to hold in a non-interest-bearing account and improperly spend on agency personnel expenses.

97. Selenium levels remain elevated at the Mine Sites. To date, Plaintiffs have spent over \$10 million on the investigation and remediation of the Mine Sites. The United States has contributed nothing.

#### **FIRST CLAIM FOR RELIEF**

##### **CERCLA Cost Recovery, Under Section 107(a)(1), (2), (4)(B), 42 U.S.C. § 9607(a)(1), (2), (4)(B) – Owner/Operator Liability**

98. Plaintiffs hereby reallege and incorporate herein the allegations in Paragraphs 1 through 97.

99. CERCLA section 107(a) imposes liability upon any person who currently owns or operates a facility, or who at the time of disposal of any hazardous substance owned or operated any facility where such hazardous substance was disposed of. 42 U.S.C. § 9607(a)(1), (2).

100. Responsible persons under CERCLA section 107(a) are liable for necessary response costs incurred by any other person consistent with the National Contingency Plan. 42 U.S.C. § 9607(a).

101. Plaintiffs are “persons” within the meaning of CERCLA section 101(21). 42 U.S.C. § 9601(21).

102. The United States is a “person” within the meaning of CERCLA section 101(21). 42 U.S.C. § 9601(21).

103. Each of the Mine Sites qualifies as a “facility” within the meaning of CERCLA section 101(9). 42 U.S.C. § 9601(9).

104. “Hazardous substances” within the meaning of CERCLA section 101(14) were disposed of at each of the Mine Sites. 42 U.S.C. § 9601(14).

105. The United States currently owns and/or currently operates each of the Mine Sites.

106. The United States owned and/or operated each of the Mine Sites at the time hazardous substances were disposed of at each of the Mine Sites.

107. There have been “releases” or threatened “releases” as defined in CERCLA section 101(22), 42 U.S.C. § 9601(22), of hazardous substances into the environment at each of the Mine Sites.

108. Plaintiffs have incurred and will continue to incur necessary “response” costs as defined by CERCLA section 101(25), 42 U.S.C. § 9601(25), as a result of the release and/or threatened release of hazardous substances at each of the Mine Sites. These costs incurred and to be incurred by Plaintiffs are and will be consistent with the National Contingency Plan, 40 C.F.R., Part 300, promulgated by the United States under the authority of CERCLA section 105, 42 U.S.C. § 9605.

109. The United States is liable to Plaintiffs under CERCLA section 107(a), 42 U.S.C. § 9607(a), for response costs incurred and to be incurred by Plaintiffs in connection with the remediation of each of the Mine Sites.

**SECOND CLAIM FOR RELIEF**

**CERCLA Cost Recovery, Under Section 107(a)(3), (4)(B),  
42 U.S.C. § 9607(a)(3), (4)(B) – Arranger Liability**

110. Plaintiffs hereby reallege and incorporate herein the allegations in Paragraphs 1 through 109.

111. CERCLA section 107(a) imposes liability upon any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances. 42 U.S.C. § 9607(a)(3).

112. Responsible persons under CERCLA section 107(a) are liable for necessary response costs incurred by any other person consistent with the National Contingency Plan. 42 U.S.C. § 9607(a).

113. Plaintiffs are “persons” within the meaning of CERCLA section 101(21). 42 U.S.C. § 9601(21).

114. The United States is a “person” within the meaning of CERCLA section 101(21). 42 U.S.C. § 9601(21).

115. Each of the Mine Sites qualifies as a “facility” within the meaning of CERCLA section 101(9). 42 U.S.C. § 9601(9).

116. “Hazardous substances” within the meaning of CERCLA section 101(14) were disposed of at each of the Mine Sites. 42 U.S.C. § 9601(14).

117. By directing, designing, supervising, and controlling mining, reclamation, waste disposal, and other activities at the Mine Sites through its agencies the USFS, USGS, BLM, and

others, the United States arranged for the disposal of hazardous substances at each of the Mine Sites.

118. There have been “releases” or threatened “releases” as defined in CERCLA section 101(22), 42 U.S.C. § 9601(22), of hazardous substances into the environment at each of the Mine Sites.

119. Plaintiffs have incurred and will continue to incur necessary “response” costs as defined by CERCLA section 101(25), 42 U.S.C. § 9601(25), as a result of the release and/or threatened release of hazardous substances at each of the Mine Sites. These costs incurred and to be incurred by Plaintiffs are and will be consistent with the National Contingency Plan, 40 C.F.R., Part 300, promulgated by the United States under the authority of CERCLA section 105, 42 U.S.C. § 9605.

120. The United States is liable to Plaintiffs under CERCLA section 107(a), 42 U.S.C. § 9607(a), for response costs incurred and to be incurred by Plaintiffs in connection with the remediation of each of the Mine Sites.

### **THIRD CLAIM FOR RELIEF**

#### **CERCLA Declaratory Judgment – 42 U.S.C. § 9613(g)(2), 28 U.S.C. § 2201**

121. Plaintiffs hereby reallege and incorporate herein the allegations in Paragraphs 1 through 120.

122. CERCLA section 113(g)(2) provides that any person may seek a declaration of liability for response costs as defined under CERCLA sections 101(23)-(25). 42 U.S.C. § 9613(g)(2); 42 U.S.C. §§ 9601(23)-(25).

123. An actual and substantial controversy exists between Plaintiffs and the United States concerning the United States’ obligation to reimburse Plaintiffs for environmental response

costs and other expenses that Plaintiffs will incur in the future to remediate hazardous substances at each of the Mine Sites. Plaintiffs' future costs are neither remote nor speculative.

124. Absent a judicial declaration setting forth the parties' rights, duties, and obligations with respect to such costs, multiple legal actions may result.

125. Plaintiffs are entitled to a declaratory judgment pursuant to CERCLA section 113(g)(2) that requires the United States to reimburse Plaintiffs for necessary response costs to be incurred by Plaintiffs in the future in connection with the remediation of each of the Mine Sites.

### **PRAYER FOR RELIEF**

126. WHEREFORE, Plaintiffs request the following relief:

(a) Judgment in the amount of past response costs incurred by Plaintiffs at each of the Mine Sites, together with prejudgment interest accruing through the date of judgment; and

(b) A declaratory judgment declaring the United States liable for future response costs incurred by Plaintiffs in connection with each of the Mine Sites, with interest as allowed by law; and

(c) Attorneys' fees and costs, as allowed by law; and

(d) Such other and further relief in favor of Plaintiffs and against the United States as the Court deems just and proper.

Dated: September 2, 2009

Respectfully submitted,

s/ Michael C. Creamer

Jeffrey C. Fereday  
Michael C. Creamer  
GIVENS PURSLEY LLP

Jonathan W. Rauchway  
Zach C. Miller  
DAVIS GRAHAM & STUBBS LLP

*Attorneys for Plaintiffs Nu-West Mining, Inc.  
and Nu-West Industries, Inc.*