



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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DEC 08 2016

Ref: 8TMS-G

The Honorable Clement Frost, Chairman
Southern Ute Indian Tribe
P.O. Box 737
Ignacio, Colorado 81137-0737

Re: Southern Ute Indian Tribe Gold King Mine Cooperative Agreement #V96836301

Dear Chairman Frost:

This letter is intended to convey the U.S. Environmental Protection Agency's (EPA) final decision on the reimbursement of allowable costs associated with the Southern Ute Indian Tribe's (SUIT) cooperative agreement application submitted on January 21, 2016. Under that agreement, the EPA has reimbursed SUIT \$281,365 for allowable pre-award costs incurred in responding to the Gold King Mine (GKM) release. To promote maximum transparency and provide the SUIT with a meaningful opportunity to avail itself of the EPA's dispute process, the attachments contain the specific costs that were disallowed and the Agency's bases for the disallowance.

The EPA would like to express its appreciation to the SUIT for its support and involvement in the GKM release response. The dedication and commitment demonstrated by tribal staff, management and leadership have been exemplary. Noteworthy examples include: active participation at the Incident Command Post, hosting and facilitating two tribal meetings and two informal tribal consultations to address tribal membership concerns, granting full access to current and historical water quality data on the Animas River, providing written comments on the EPA's Conceptual Monitoring Plan, providing river access and tribal support during water quality monitoring events, and developing a joint communication plan. The EPA recognizes that this effort did not occur without an increased workload to tribal staff and management and, on behalf of the EPA, I wish to express our gratitude for the SUIT's support and involvement in this response.

Beyond reimbursement of Gold King Mine response costs, the EPA remains committed to providing continued funding to the SUIT through other grant opportunities. For fiscal year 2016, the EPA has awarded the SUIT \$1,371,551 in additional grant funding in support of the Tribe's environmental programs for a variety of activities, including \$263,000 for conceptual monitoring plan activities to enhance the Tribe's water quality program.

If you have any questions about this letter, please contact Sarah Hulstein, Grants Specialist, at (303) 312-6014 or by email at hulstein.sarah@epa.gov, or Cinna Vallejos, Grants Project Officer, at (303) 312-6376 or by email at vallejos.cinna@epa.gov. If you have questions about other programmatic matters, please contact Randy Brown, Tribal Program Manager, at (303) 312-6048 or by email at brown.randy@epa.gov.

Sincerely,



James A. Hageman
Program Director
Grants/Audit/Procurement Program

Enclosures:

Attachment A
Attachment B
Attachment C

cc: Cinna Vallejos, EPA R8
Sarah Hulstein, EPA R8
Randy Brown, EPA R8

Attachment A

Cooperative Agreement

On January 21, 2016, the Southern Ute Indian Tribe (SUIT) submitted an Application for Federal Assistance to the U.S. Environmental Protection Agency. In this application, the SUIT requested pre-award costs of \$358,459.63¹ for expenses incurred responding to the Gold King Mine (GKM) release, and future expenses of \$5,097,027.37 for workplan activities through January 31, 2026. On March 25, 2016, the SUIT and the EPA entered into a cooperative agreement under the authority of section 104(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and implementing regulations at 40 C.F.R. Part 35, Subpart O, for SUIT's allowable expenditures directly related to activities in support of the EPA's response efforts to the Gold Kind Mine release. That cooperative agreement was intended to reimburse SUIT for the allowable costs it had incurred. To accomplish that objective, Region 8 secured deviations from various applicable regulatory provisions to allow it to reimburse affected entities for pre-award costs up to 180 calendar days prior to the signed award. In total, the EPA has reimbursed the SUIT for \$281,365 for a variety of allowable pre-award response activities under this cooperative agreement. The EPA has disallowed the remainder of the requested pre-award costs and all of the future costs as unallowable for the reasons described in greater detail below. See Attachments.

General Provisions

As a threshold matter, a cost is allowable under a federal award if necessary and reasonable for the performance of the award and allocable to the award. 2 C.F.R. § 200.403. A cost is reasonable if it doesn't exceed that which a prudent person under the circumstances at the time would incur. 2 C.F.R. § 200.404. Finally, a cost is allocable to a particular award if the goods or services involved are chargeable or assignable to that award in accordance with relative benefits received. This standard is met if the cost is incurred specifically for the award, benefits both the award and other work of the entity, and can be distributed in proportions using reasonable methods, and is necessary to the overall operation of the entity and is assignable in part to the award. 2 C.F.R. § 200.405.

CERCLA defines removal response costs as costs for "the cleanup or removal of released hazardous substances from the environment, . . . such actions that may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare of the United States or to the environment, which may otherwise result from a release or threat of release." 42 U.S.C. § 9601(23).

In addition to the general regulatory provisions governing the use of federal funds, and the specific requirements applicable to Superfund cooperative agreement, codified at 40 C.F.R. Part 35, Subpart O, removal costs under a Superfund cooperative agreement must also comply with the cost principles for federal grants in 2 C.F.R. Part 200, Subpart E.

Disallowed Costs

Costs incurred in connection with Congressional Hearings

The SUIT sought reimbursement for travel and payroll costs incurred of approximately \$5,055 for its participation in a congressional hearing before the Joint Oversight Committee related to the Gold King Mine release. A review of the Committee's statement on the purpose of the hearings and the statement

¹ This figure does not reflect the actual invoiced pre-award costs. Therefore the amount of disallowed costs will not reflect the difference between this figure and the reimbursed amount.

submitted by SUIT to the Committee reveals that the purpose of the hearing was to examine the EPA's activities in connection with the release and subsequent response. The EPA has determined that these costs are not allocable to the cooperative agreement because participation in hearings of this nature do not constitute cleanup or removal of released hazardous substances from the environment. Further, to the extent participation in those hearings was intended to influence SUIT's receipt of any grants, contracts, cooperative agreement or loans, those are deemed an unallowable lobbying cost by the cost principles applicable to this cooperative agreement at 2 C.F.R. § 200.450, and do not fall within the exception in 2 C.F.R. § 200.450(c)(2)(i) applicable to technical and factual presentations on topics directly related to the performance of a grant, contract, or other agreement. Accordingly, those costs were disallowed.

Personnel Costs

The SUIT sought reimbursement for personnel costs associated with a number of response activities, including those of its Chief Financial Officer (CFO) at an hourly rate of approximately \$257.21. The EPA has determined that all of the CFO's activities in connection with the response are allowable and allocable to the award. However, the EPA disallowed the portion of the CFO's compensation in excess of that which the EPA has determined reasonable. Thus, the EPA reimbursed SUIT for all of the CFO's activities at a lower rate of pay than requested. As a general matter, compensation for employees engaged in work on a federal award are allowable if reasonable. 2 C.F.R. § 200.430. To determine the reasonableness of the compensation, the EPA must consider whether the compensation is consistent with that paid for similar work in other activities of the non-federal entity. Where such comparators are not available, the EPA must consider the extent to which the compensation is comparable to that paid for similar work in the labor market in which the non-federal entity competes for the kind of employees involved. 2 C.F.R. § 200.430(b). According to SUIT's submissions, the CFO's activities can be grouped as follows: water distribution, unified command, incident management, and public information. Most of these activities do not fit within the scope of a CFO's ordinary duties and, based on the payroll records submitted by SUIT, the other employees of SUIT engaged in these activities were compensated at a significantly lower rate of pay. The EPA has determined that the lower rate of pay for each of these groups of activities is reasonable. Therefore, the EPA reimbursed SUIT for all of the CFO's activities at the rate of pay of the next highest paid SUIT employee that was engaged in similar response activities. See Attachment B.

Professional Service Costs/Legal Fees

The SUIT sought reimbursement of \$53,029.71 for the legal services provided by two law firms through contracts with the Tribe. The EPA has determined that a limited subset of the services provided constitute allowable response activities. Among those allowable response activities, some of those hours were reimbursed to the Tribe at a lower rate than requested, as described more fully below. As a general matter, costs of professional and consultant services are allowable when reasonable in relation to the services rendered. 2 C.F.R. § 200.459. In order to determine the allowability of such costs, the EPA may consider, among other factors, the necessity of contracting for the service considering the non-federal entity's capability in the particular area, the nature and scope of the service required, and whether the service can be performed more economically by direct employment rather than contracting. 2 C.F.R. § 200.459(b).

Two law firms provided outside legal services to SUIT during the response period. One of those firms is located in Washington, D.C., and the other firm in Durango, Colorado. A review of the invoices submitted reveals that the services provided include, among other things, extensive time preparing for congressional hearings and reviewing proposed or contemplated legislation related to the release. To a lesser extent, those firms provided services related to the response activities and the cooperative agreement. The EPA has determined that only the latter activities, services related to the response activities and the cooperative agreement, are allocable to the cooperative agreement and, therefore, allowable. Specifically, the EPA has reimbursed SUIT for its legal fees associated with work on the

cooperative agreements, meetings with the EPA concerning the response, and other work in furtherance of the response activities, including the EPA's conceptual monitoring plan. See Attachment C. The remainder of the billed activities are not allocable to the cooperative agreement because they do not constitute removal activities in that they do not involve cleanup or removal of hazardous waste, and are hereby disallowed. In addition, the discussion above related to costs associated with congressional hearings is equally applicable to a number of these costs. Finally, applicable regulations at 2 C.F.R. § 200.435 specifically disallow costs associated with bringing claims against the federal government.

Further, in determining the reasonableness of the billed rate applicable to the firm located in Washington, D.C., (\$575/hour), the EPA considered, consistent with applicable regulations, whether the service could be performed more economically by direct employment rather than contracting, the necessity of contracting for the service, considering the non-federal entity's capability in the particular area, and the entity's past practice. In this regard, the EPA considered that SUIT was also reimbursed for the legal services provided by its in-house counsel, at an hourly rate of \$62.01. The EPA considered that SUIT also engaged the services of a local law firm in performing activities under the cooperative agreement at a maximum rate of \$376, and had previously engaged the services of the same local firm for other dealings with the EPA. The EPA considered that SUIT had not previously used outside counsel for work under prior cooperative agreements with the EPA. Therefore, the EPA determined that \$376/hour is the maximum reasonable rate of pay for outside legal services under this cooperative agreement and limited reimbursement accordingly. See Attachment C. The claimed reimbursement in excess of this amount, \$48,696.95, was disallowed.

Future Work

The cooperative agreement application also included a request for \$5,097,027.37 to engage in a number of future activities from FY 2016 through FY 2026. The SUIT application categorizes these activities as water quality monitoring, biological monitoring, agricultural monitoring, Tribal member health monitoring, Tribal Information Services, and contract program management and superfund designation. Examples of activities proposed include future water quality monitoring, future annual fish tissue sampling, future sampling for soil contamination, developing and implementing a protocol for livestock testing, compensation and costs associated for loss of livestock and crop production, human health monitoring, public information dissemination, management of the cooperative agreement by an outside contractor and contractor consultation services concerning possible superfund designation.

These requests for future costs are disallowed as not allocable to this cooperative agreement because the agreement was entered into to reimburse SUIT for the pre-award costs it incurred in supporting the EPA's response efforts.

Appeal Process

In accordance with 2 C.F.R. § 35.6770, the dispute process applicable to this decision is set forth in 2 C.F.R. Part 1500, subpart E. Specifically, in accordance with 2 C.F.R. § 1500.14, you may dispute this Agency decision by filing an appeal electronically within 30 calendar days from the date this Agency decision is electronically transmitted to you. The appeal must be transmitted via email to the EPA Region 8 Disputes Decision Official (DDO), Richard D. Buhl, at buhl.rick@epa.gov, with a copy to James A. Hageman, Action Official, at hageman.james@epa.gov, within this 30-calendar day period.

The appeal must include the following:

- (1) An electronic copy of the disputed Agency decision.
- (2) A detailed statement of the specific legal and factual grounds for the appeal including electronic copies of any supporting documents.

- (3) The specific remedy or relief sought under the appeal.
- (4) The name and contact information, including email address, of the designated point of contact for the appeal.

If you require a time extension to file the appeal, you may submit by electronic means a written request for the extension to the DDO (with a copy to the Action Official) before the expiration of the 30-day period. The DDO may grant a one-time extension of up to 30 calendar days when justified by the situation.

Attachment B – Personnel Costs for Chief Financial Officer

	Number of Hours Requested and Deemed Allowable	Hourly rate of pay of next highest paid SUIT employee engaged in similar activities	Amount Requested	Amount Reimbursed	Amount Disallowed
Water Distribution	5.00	\$36.38	\$1,286.05	\$181.90	\$1,104.15
Unified Command	4.50	\$54.80	\$1,157.45	\$246.60	\$910.85
Incident Management	35.75	\$61.41	\$9,195.29	\$2,195.44	\$6,999.85
Public Information	10.00	\$61.41	\$2,572.11	\$614.11	\$1,958.00
		Total	\$14,210.90	\$3,238.05	\$10,972.85

Attachment C: Outside Counsel Allowable Costs and Rate of Reimbursement

Maynes, Bradford, Shipp & Sheftel, LLP

Date	Activity	Hours	Hourly Rate	Total
8/15/2015	GKM waste meeting with EPA	2.0	\$200.94	\$401.88
8/20/2015	CDPHE GKM public meeting	2.5	\$200.94	\$502.35
9/3/2015	EPA briefing on Superfund site	2.0	\$200.94	\$401.88
10/5/2015	Reviewing EPA's conceptual monitoring plan	1.0	\$200.94	\$200.94
10/6/2015	Reviewing EPA's conceptual monitoring plan	1.75	\$200.94	\$351.65
10/7/2015	Cover letter on conceptual monitoring plan	2.25	\$200.94	\$452.12
10/8/2015	Letter to EPA on conceptual monitoring plan	0.5	\$200.94	\$100.47
10/19/2015	Cooperative Agreement application	3.0	\$200.94	\$602.82
10/29/2015	Cooperative Agreement application	1.5	\$376.76	\$565.14
Total		16.5		\$3,579.24

Powers, Pyles, Sutter & Verville, PC

Date	Activity	Hours	Hourly Rate	Total
8/12/2015	Conferring with EPA	0.50	\$376.76	\$188.38
8/13/2015	Conferring with EPA	0.50	\$376.76	\$188.38
8/13/2015	Teleconference with EPA	0.50	\$376.76	\$188.38
8/17/2015	Conferring with EPA	0.50	\$376.76	\$188.38
Total		2.00		\$753.52