

SETTLEMENT AGREEMENT BETWEEN NEW MEXICO AND THE UNITED STATES

WHEREAS, on May 23, 2016, the State of New Mexico, on behalf of the New Mexico Environment Department (“NMED”) (together, “New Mexico”), filed suit against the United States of America, the United States Environmental Protection Agency (“EPA”) and the Administrator of EPA (collectively, “the United States”) in the United States District Court for the District of New Mexico in a case captioned as *State of New Mexico v. USEPA, et al.*, 1:16-cv-00465 (D.N.M.) (“the New Mexico Action”);

WHEREAS, New Mexico filed the New Mexico Action following the release, on August 5, 2015, of more than three million gallons of acid mine drainage containing heavy metals from the Gold King Mine located in San Juan County, Colorado, into downstream waters including the Animas and San Juan Rivers, which occurred during an EPA removal site evaluation;

WHEREAS, New Mexico brought claims against the United States pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and the Federal Tort Claims Act, as well as a claim pursuant to the Clean Water Act that was subsequently dismissed;

WHEREAS, the New Mexico Action was consolidated as part of the multi-district litigation captioned as *In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015*, 1:18-md-02824 (D.N.M.);

WHEREAS, EPA has listed the Bonita Peak Mining District Superfund Site (“BPMD”) encompassing the Gold King Mine on the National Priorities List under CERCLA;

WHEREAS, EPA has the authority and discretion to investigate and respond to releases or threatened releases of hazardous substances from the BPMD, and conduct removal and remedial actions at the BPMD, see 42 U.S.C. §§ 9604(a), 9621(a); 40 C.F.R. §§ 300.415, 300.430, 300.435;

WHEREAS, EPA is currently implementing CERCLA response actions to assess and respond to the commingled release of hazardous substances into surface water originating from historic mining activities within the BPMD;

WHEREAS, EPA is engaging with the State of New Mexico regarding the ongoing and planned response actions at the BPMD, which can extend to wherever contamination from the commingled release of hazardous substances from the mining-related source areas in the BPMD comes to be located; is assessing and characterizing downstream risks attributed to the commingled release of hazardous substances described above; and is providing the State of New Mexico meaningful and substantial involvement in CERCLA response actions taken at the BPMD, consistent with 40 C.F.R. Part 300.500(a), to address releases of hazardous substances from the BPMD causing an unreasonable risk to human health or the environment;

WHEREAS, if additional information becomes available that indicates BPMD-related contamination is posing risks to human health or the environment outside the scope of EPA's current investigations, including, for example, if NMED provides additional information to EPA showing risks in New Mexico that may be attributable to BPMD-related contamination, then EPA intends to assess that information and evaluate whether, in EPA's discretion, further action may be appropriate;

WHEREAS, EPA has developed a BPMD Community Involvement Plan and intends to update and revise it, and its associated appendices, as appropriate; and EPA remains willing to receive public input from New Mexico stakeholders;

WHEREAS, consistent with the BPMD Community Involvement Plan, EPA strives to provide community members with accurate, timely, and understandable information about BPMD site-related activities that reflect community communication preferences and culture, and EPA expects to provide community members with opportunities for involvement in site-related activities;

WHEREAS EPA has updated its Bonita Peak Mining District Alert and Notification Plan Standard Operating Procedure to ensure that contacts identified by New Mexico are timely notified in the event of actual or potential changes to the appearance or quality of water in the Animas River stemming from the BPMD Site; and EPA intends to periodically update the Alert and Notification Plan as necessary to accurately reflect current NMED personnel, as provided by New Mexico to EPA, with such updates occurring no more than twice annually; and

WHEREAS, New Mexico and the United States (the "Settling Parties") have determined that settlement of the New Mexico Action, without any admission of liability as to any factual or legal issue, is in the public interest and in the interest of the Settling Parties, and is the most appropriate means of resolving the New Mexico Action;

NOW, THEREFORE, New Mexico and the United States hereby agree to the following:

1. **Definitions**

Any term in the Settlement Agreement that is defined in CERCLA shall have its statutory meaning pursuant to CERCLA unless otherwise expressly defined below:

- a. **August 2015 Gold King Mine Release** shall mean the release described in the allegations of Paragraph 1 of New Mexico's Second Amended Complaint, ECF 339, in the New Mexico Action.
- b. **BPMD or Bonita Peak Mining District** shall mean the Bonita Peak Mining District Superfund Site in San Juan County, Colorado, EPA Docket ID No. EPA-HQ-OLEM-2016-0152, as published in the Federal Register on September 9, 2016, 81 Fed. Reg. 62397, including all areas of the Site that EPA has ever defined or described for purposes of or in relation to the National Priorities List, 40 C.F.R. Part 300, Appendix B, as of the Effective Date of this Settlement Agreement.

- c. **BPMD Community Involvement Plan** shall mean the Bonita Peak Mining District Superfund Site Community Involvement Plan (rev. Sept. 2019), *available at*: <https://semspub.epa.gov/work/08/100007750.pdf>.
- d. **BPMD Contamination** shall mean any releases or threatened releases of hazardous substances that occurred or are occurring on or before the Effective Date at or from mining-related sources in Colorado within the BPMD.
- e. **CERCLA** shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.
- f. **CERCLA Natural Resource Damages** shall mean any damages recoverable on behalf of the public for injury to, destruction of, or loss or impairment of Natural Resources as set forth in 42 U.S.C. § 9607(a)(4)(C), including but not limited to: (i) the costs of assessing such injury, destruction, loss of use, or impairment; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost Natural Resources or of acquisition of equivalent resources; (iii) the costs of identifying, planning, implementing, and monitoring such restoration, rehabilitation, replacement or acquisition activities; (iv) compensation for injury, destruction, loss of use, or impairment of Natural Resources; and (v) each of the categories of recoverable damages described in 43 C.F.R. § 11.15 and/or the New Mexico Natural Resources Trustee Act.
- g. **Effective Date** shall mean the date on which the Settlement Agreement is signed by both New Mexico and the United States.
- h. **EPA** shall mean the United States Environmental Protection Agency.
- i. **FTCA** shall mean the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.
- j. **Escrow Account** shall mean the account identified in Paragraph 3 of this Settlement Agreement and Attachment A hereto, which shall be used and managed in accordance with that Paragraph.
- k. **Long-Term Monitoring** shall mean those response actions within the State of New Mexico set forth in the “Gold King Mine Spill Long-Term Monitoring Plan” as published by New Mexico’s Long-Term Impact Team on May 5, 2017, a true and correct copy of which is attached to this Settlement Agreement as Attachment B.
- l. **Natural Resources** shall have the meaning provided in 42 U.S.C. § 9601(16).
- m. **New Mexico** shall mean the State of New Mexico and all of its agencies, instrumentalities and officers, including but not limited to the New Mexico Office of the Attorney General, the New Mexico Environment Department, and the New Mexico Office of Natural Resources Trustee.
- n. **New Mexico Action** shall mean *State of New Mexico v. USEPA*, et al. (1:16-cv-00465 (D.N.M.)) consolidated in the multi-district litigation for pre-trial purposes in *In re Gold*

King Mine Release in San Juan County, Colorado on August 5, 2015 (1:18-md-02824 (D.N.M.)).

- o. **NMED** shall mean the New Mexico Environment Department.
 - p. **Restoration Plan** shall mean a plan for use by New Mexico of some or all of the funds paid into the Escrow Account by the United States pursuant to Paragraph 3, that has been adopted consistent with the requirements of 42 U.S.C. § 9611(i) and 43 C.F.R. § 11.93.
 - q. **Settling Parties** shall mean New Mexico and the United States. **Settling Party**, when used in the singular, shall mean either New Mexico or the United States.
 - r. **“Timely submitted”** applications, for purposes of Paragraph 6, shall mean applications by New Mexico for Clean Water Act section 106 funding or Superfund Subpart O funding that are submitted to EPA no later than 180 days after the Effective Date of this Settlement Agreement.
 - s. **United States** shall mean the United States of America and all of its agencies, instrumentalities and officers, including but not limited to EPA.
 - t. **Uranium Mine Reclamation Coordinators** shall mean those persons serving in the positions of Uranium Mine Reclamation Coordinator at NMED and at the New Mexico Energy, Minerals and Natural Resources Department, respectively, pursuant to 2022 N.M. Laws, ch. 26, § 1 and 2.
2. **Payment for New Mexico’s CERCLA response costs and enforcement costs.** As soon as reasonably practicable after the Effective Date of this Settlement Agreement, the United States shall pay to New Mexico the sum of \$18,100,000. This amount shall be expended for costs and fees and/or in the sole discretion of the Attorney General to address harms to New Mexico and its communities resulting from the release and to enhance the Office’s law enforcement efforts to prevent and prosecute environmental contamination. Payment to New Mexico under this Paragraph 2 shall be in the form of an electronic funds transfer per instructions that New Mexico shall provide to the United States no later than the Effective Date.
3. **Payment for CERCLA natural resource damages.**
- a. As soon as reasonably practicable after the Effective Date of this Settlement Agreement, the United States shall pay the sum of \$10,000,000 by electronic funds transfer into the Escrow Account.
 - b. New Mexico and the United States agree that all funds disbursed from the Escrow Account shall be utilized by New Mexico’s Natural Resources Trustee for purposes consistent with CERCLA’s authorized uses of recovered damages as specified in 42 U.S.C. § 9607(f)(1), pursuant to a publicly reviewed Restoration Plan as set forth in 42 U.S.C. § 9611(i) and the CERCLA Natural Resource Damage Assessment and Restoration regulations at 43 C.F.R. § 11.93. This Paragraph 3.b applies only to the use

of the sum paid into the Escrow Account by the United States pursuant to Paragraph 3.a. Neither Paragraph 3.b nor any other term of the Settlement Agreement limits New Mexico's discretion with respect to the use of the sum paid to New Mexico by the United States pursuant to Paragraph 2.

- c. For purposes of this Settlement Agreement, New Mexico and the United States agree that a Restoration Plan consistent with Paragraph 3.b may provide for the use of funds disbursed from the Escrow Account for any or all of the following non-exclusive list of program activities within the State of New Mexico:
 - i. River/Watershed Assessment and Restoration (including drinking water protection, pollution source control and mitigation);
 - ii. Land and Habitat Conservation and Restoration; or
 - iii. Public Education Campaign regarding Natural Resources impacted by the release or threatened release of hazardous substances at or from the Gold King Mine or the Bonita Peak Mining District.
 - d. New Mexico and the United States further agree that, to avoid double recovery under 42 U.S.C. § 9614(b), funds from the Escrow Account shall not be used to pay for costs of Long-Term Monitoring.
4. **Payment for Fed. R. Civ. P. 37(e)(1) attorney's fees and costs.** As soon as reasonably practicable after the Effective Date of this Settlement Agreement, the United States shall pay to New Mexico the sum of \$400,000 to resolve New Mexico's claim for "all reasonable attorneys' fees and costs associated with investigating the Federal Parties' spoliation and preparing [its Motion] for sanctions," ECF No. 1206, filed May 24, 2021 in *In Re Gold King Mine Release*, No. 1:18-MD-02824-WJ (D.N.M.). ECF No. 1292 at 13-14 (Mem. Opinion and Order dated Aug. 6, 2021). Payment to New Mexico under this Paragraph 4 shall be in the form of an electronic funds transfer per instructions that New Mexico shall provide to the United States no later than the Effective Date.
5. **Interest accrual.** If payment by the United States to New Mexico pursuant to Paragraphs 2 or 4 or to the Escrow Account pursuant to Paragraph 3 is made later than 120 days after the Effective Date, such payment shall include interest at the rate then prescribed pursuant to section 107(a) of CERCLA, running from the Effective Date.
6. **EPA action on grant application/s submitted by New Mexico.** As soon as reasonably practicable following the Effective Date of this Settlement Agreement, and no later than 180 days following the Effective Date, New Mexico shall submit to EPA eligible grant application/s for up to \$1,000,000 in Clean Water Act section 106 funding and up to \$2,500,000 in Superfund Subpart O funding. New Mexico shall make best efforts to submit all such eligible applications within 90 days following the Effective Date, and shall ensure that each such application clearly identifies this Agreement. EPA shall evaluate New Mexico's timely submitted grant application/s (which could include an application for supplemental funding for a preexisting grant or cooperative agreement) to determine their

consistency with applicable statutory, regulatory, and program policy requirements, including any cost share. Upon completing its evaluation, EPA shall take action on such application/s. EPA anticipates that it will provide \$1,000,000 in Clean Water Act section 106 grant funding and \$2,500,000 in Superfund Subpart O cooperative agreement funding, depending on submission of eligible application/s that is/are consistent with the authorities under which they would be funded, including applicable statutory, regulatory, and program policy requirements, and availability of funds. Nothing in this Agreement shall be construed to require EPA to approve or award funds in response to an application that is ineligible or otherwise inconsistent with such authorities, to award funding in any amount greater than anticipated as described in this Paragraph, or to take any action in response to an application that is not timely submitted. EPA shall make best efforts to take action on each timely submitted application no later than 90 days following EPA's receipt of such submission from New Mexico.

7. Federal Action Commitments.

- a. Each year for the next three years (2022, 2023, and 2024), and no later than the 30th of September in both 2023 and 2024, EPA will offer to conduct a virtual annual informational meeting for NMED to review and discuss ongoing efforts at the BPMD. EPA reserves the right to combine this annual meeting with other annual meetings that EPA may host with Utah, Navajo Nation, and other downstream governmental stakeholders.
- b. Within twelve months after the Effective Date of this Settlement Agreement, EPA will issue a New Mexico-focused appendix to its existing BPMD Community Involvement Plan and post the appendix to its public webpage for the BPMD site.
- c. EPA hereby identifies the office director of EPA's Office of Mountains, Deserts, and Plains, as NMED's primary point of contact at EPA for the purpose of coordination with New Mexico's Uranium Mine Reclamation Coordinators and, as appropriate, other federal, state and tribal stakeholders, regarding issues associated with legacy contamination from uranium mine and mill sites, beginning on the Effective Date of this Settlement Agreement and continuing until December 31, 2024. Each Settling Party retains its sole discretion to terminate or re-designate its representative for this point of contact for any reason, with prior notice to the other Settling Party.

8. Availability of funds. Payments to be made and actions to be taken by the United States pursuant to this Settlement Agreement are subject to the availability of funds appropriated for such purpose. No provision of the Agreement shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

9. The Settling Parties' releases and covenants not to sue.

- a. New Mexico hereby releases, discharges, and covenants not to assert any and all claims of any kind that it may have had, or may now or hereafter have, against the United States

based on matters which were asserted or could have been asserted by New Mexico in the New Mexico Action, or on matters which New Mexico hereafter could assert in an action against the United States for CERCLA Natural Resource Damages resulting from BPMD Contamination or the August 2015 Gold King Mine Release. New Mexico's release and covenant not to sue the United States shall take effect on the date that all of the following conditions subsequent to the Effective Date have occurred: (i) The United States has made all payments required by Paragraphs 2, 3 and 4, including payment of any interest required by Paragraph 5; and (ii) EPA has taken action on all timely submitted grant applications in accordance with Paragraph 6, provided, however, that if New Mexico does not timely submit any eligible grant applications, then New Mexico's release and covenant not to sue the United States shall be deemed effective as of the date described in clause (i) of this sentence.

- b. The United States hereby releases, discharges, and covenants not to assert any claims of any kind that it may have had, or may now or hereafter have, against New Mexico based on matters which were asserted, or could have been asserted, by the United States in the New Mexico Action. The United States' release and covenant not to sue New Mexico shall take effect on the same date that New Mexico's release and covenant not to sue the United States takes effect.
- c. This Settlement Agreement does not resolve and is without prejudice to, and the United States hereby expressly reserves, any and all rights with respect to liability of any person other than New Mexico to the United States for CERCLA Natural Resource Damages.

10. Stay of litigation and voluntary dismissal.

- a. Within two business days after the Effective Date of this Settlement Agreement, the Settling Parties shall jointly move for an indefinite stay of all further judicial proceedings in the New Mexico Action with respect to claims between New Mexico and the United States, with quarterly status reports to be provided to the court until such time as the claims are dismissed in accordance with Paragraphs 10.b-10.c.
- b. Subject to Paragraph 10.c, within 7 days after the United States has made the payments described in Paragraphs 2, 3 and 4, including payment of any interest required by Paragraph 5, New Mexico shall file a stipulation (i) voluntarily dismissing with prejudice its pending FTCA claims against the United States and EPA in the New Mexico Action; and (ii) voluntarily dismissing without prejudice all other claims against the United States and EPA in the New Mexico Action.
- c. If, by the stipulation filing date described in Paragraph 10.b, New Mexico has already submitted the grant applications contemplated in Paragraph 6 and EPA has taken action on them, then the stipulation filed pursuant to Paragraph 10.b shall be for voluntary dismissal with prejudice of all claims of New Mexico against the United States and EPA in the New Mexico Action including both FTCA and CERCLA claims.

11. **No admission of liability.** This Settlement Agreement shall not constitute or be construed as an admission by either Settling Party with respect to any question of fact or law raised by any claim or defense in the New Mexico Action, nor is it an admission of violation by either Settling Party of any law, rule, regulation or policy.
12. **No effect on third parties.** Nothing in this Settlement Agreement shall bind, obligate, or otherwise create any rights or duties applicable to or enforceable by, or impose any limitations or conditions upon, any person or entity that has not signed the Agreement, nor shall the Agreement be construed to make such person or entity a third-party beneficiary of the Agreement.
13. **No effect on claims and defenses other than between New Mexico and the United States.** This Settlement Agreement does not resolve and is without prejudice to, and each Settling Party expressly reserves, any and all rights with respect to claims and defenses between each Settling Party and any third parties, specifically including but not limited to the rights (1) to depose Alexas Gilbert and Michael Rhodes, as permitted by ECF No. 1646, filed May 15, 2022, in *In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015*, 1:18-md-02824 (D.N.M.); (2) to cross-examine witnesses called by the United States during the evidentiary hearing that the Court has ordered will occur after June 17, 2022 and before trial; and (3) to introduce any testimonial or other evidence related to spoliation of evidence during trial proceedings in the New Mexico Action, and to object to such testimonial or other evidence.
14. **Notices.** Any notices in required under the Settlement Agreement shall be provided in writing, via electronic mail, as follows:

As to New Mexico:

New Mexico Office of the Attorney General
Consumer and Environmental Protection Division
Attn: William Grantham
Assistant Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Email: wgrantham@nmag.gov

New Mexico Environment Department
Office of General Counsel
Attn: Bruce C. Baizel, General Counsel
PO Box 5469
Santa Fe, NM 87502-5469
Email: Bruce.Baizel@state.nm.us

As to the United States:

United States Environmental Protection Agency
Office of General Counsel
Attn: Elizabeth G. Berg, staff attorney
Solid Waste and Emergency Response Law Office
1200 Pennsylvania Ave NW (MC2366A)
Washington, D.C. 20460
Email: berg.elizabethg@epa.gov

Chief, Environmental Defense Section
United States Department of Justice
P.O. Box 7611
Washington, DC 20044
Email: brian.lynk@usdoj.gov
(Communications shall refer to “DJ# 90-11-6-20816”)

15. **EPA discretion.** Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to EPA under general principles of administrative law, or under any other statutes, regulations or policies.
16. **Force majeure.** Each Settling Party shall promptly notify the other Settling Party if the notifying Settling Party believes that it will be unable to meet a schedule for action specified in Paragraphs 6 or 7 of this Settlement Agreement because of any of the following circumstances beyond its control: (a) a federal government shutdown or a state government shutdown in the State of New Mexico; (b) an extreme event that renders EPA or NMED staff unable to complete the work needed to meet the schedule for the specified action; or (c) a catastrophic environmental event (e.g., a natural disaster or environmental accident) that results in the necessary diversion of EPA or NMED staff resources away from the work needed to meet the schedule for the specified action. In such circumstances, any resulting inability of EPA or NMED to meet the specified schedule for action shall not constitute a failure to comply with the terms of this Agreement, and the date so affected shall be extended by one business day for each day of the unavoidable delay, unless the Settling Parties agree to a longer period. If a Settling Party invokes this provision, it shall provide the other Settling Party with reasonable notice and explanation for any unavoidable delay.
17. **Amendments.** Except as provided in Paragraph 15, this Settlement Agreement may only be amended by subsequent written and signed agreement of the Settling Parties.
18. **Complete agreement.** This Settlement Agreement was negotiated between New Mexico and the United States in good faith and at arm’s length, and contains all terms and conditions agreed upon by the Settling Parties. Any statements or representations, oral or otherwise, between the Settling Parties or their respective counsel that are not expressly included herein are specifically superseded by this Agreement and shall have no force or effect. The Settling

Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning or interpretation of this Agreement.

19. **Counterpart original agreements.** This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed an original agreement and all of which shall constitute one agreement. The execution of one counterpart by either Settling Party shall have the same force and effect as if that Settling Party had signed all other counterparts.

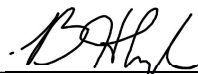
20. **Settlement authority.** Each individual signing this Settlement Agreement on behalf of a Settling Party hereby certifies that such individual has been duly authorized to bind such Settling Party to this Agreement by signing it.

FOR THE UNITED STATES OF AMERICA, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND USEPA ADMINISTRATOR MICHAEL REGAN:

June 14, 2022

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division

By:




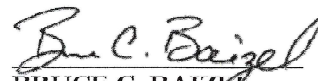
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FOR THE STATE OF NEW MEXICO, THE NEW MEXICO ENVIRONMENT
DEPARTMENT, AND THE NEW MEXICO OFFICE OF NATURAL RESOURCE TRUSTEE,
AND AUTHORIZED BY THE NEW MEXICO ATTORNEY GENERAL:

June 14, 2022


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