

Agreement Between Colorado and the United States to Settle Potential CERCLA Natural Resource Damages Claims of Colorado

WHEREAS, on August 5, 2015, more than three million gallons of acid mine drainage containing heavy metals from the Gold King Mine located in San Juan County, Colorado, were released into downstream waters including the Animas and San Juan Rivers during a removal site evaluation by the United States Environmental Protection Agency (“EPA”);

WHEREAS, several lawsuits pertaining to the Release were filed and then 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.) (the “MDL”);

WHEREAS, EPA has listed the Bonita Peak Mining District Superfund Site (“Site”) encompassing the Gold King Mine on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”);

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

WHEREAS, the State of Colorado (“Colorado”), the United States of America, the Sunnyside Gold Corporation (“SGC”) and the Kinross Gold Corporation previously entered into a consent decree pertaining to the Site, which consent decree expressly reserved all rights of the Colorado Natural Resource Trustees (“Trustees”) and of the Federal Natural Resource Trustees with respect to CERCLA Natural Resource Damages (“NRD”) claims under CERCLA Section 107, 42 U.S.C. § 9607. *See In re Gold King Mine Release*, ECF No. 1629 (Apr. 28, 2022) ¶ 27.c, *corrected for unrelated reasons by MDL ECF No. 1634* (Apr. 29, 2022);

WHEREAS, the State of Colorado, acting through the Trustees, also entered into a separate consent decree resolving SGC’s liability to Colorado for NRD resulting from the release of hazardous substances from the Site. *See In re Gold King Mine Release*, ECF No. 1453 (Feb. 18, 2022);

WHEREAS, the State of Colorado, acting through the Trustees, alleges that releases in the Site, including the Gold King Mine release and releases from mines on federal lands, have caused injury to natural resources in Colorado;

WHEREAS, the State of Colorado, acting through the Trustees, and the United States of America (“Settling Parties”) have determined that settlement of Colorado’s potential CERCLA NRD claims against the United States under the terms set forth in this Settlement Agreement, 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 those potential claims;

NOW, THEREFORE, the Settling Parties hereby agree to the following:

1. Definitions

Any term in the Settlement Agreement that is defined in CERCLA or in regulations promulgated at 43 C.F.R. Part 11 and 40 C.F.R. Part 300 will have the meaning assigned to them in CERCLA or such regulations unless otherwise expressly defined below:

- a. **Site** 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. The definition for this Site shall be construed to include all areas of the Site ever defined or described by EPA for purposes of or in relation to the National Priorities List, 40 C.F.R. Part 300, including any further expansion of such Site as may in the future be determined by EPA.
- b. **Site 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.
- c. **CERCLA** shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.
- d. **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.
- e. **Colorado Natural Resources Trustees** shall mean the Colorado Attorney General and the executive directors of Colorado's Department of Public Health and the Environment and Department of Natural Resources, who collectively serve as Colorado's Natural Resource Trustees and as such, have authority to bring claims for NRD on behalf of Colorado.
- f. **Colorado Project Selection Guidance** shall mean the guidance document titled "Colorado Natural Resource Damages Restoration Project Selection Process and Administration of the Colorado Natural Resource Damage Recovery Fund," as revised on September 16, 2022, and available at: <https://coag.gov/app/uploads/2022/09/2022-NRD-Project-Selection-Guidance.docx.pdf>.
- g. **Effective Date** shall mean the date on which this Settlement Agreement is signed by the last Settling Party.
- h. **EPA** shall mean the United States Environmental Protection Agency.

- i. **Federal Natural Resource Trustees** shall mean, among others, the United States Department of the Interior and the United States Forest Service.
- j. **Natural Resources** shall have the meaning provided in 42 U.S.C. § 9601(16).
- k. **Restoration Plan** shall mean a plan for use by Colorado 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.
- l. **Settling Parties** shall mean Colorado, acting through the Colorado Natural Resources Trustees, and the United States. **Settling Party**, when used in the singular, shall mean either Colorado or the United States.
- m. **United States** shall mean the United States of America and all of its agencies, instrumentalities and officers.

2. **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 to the Colorado Natural Resource Trustees, on behalf of Colorado, the sum of \$5,000,000. Such payment shall be made by electronic funds transfer to the Natural Resource Damage Recovery Fund established pursuant to Colo. Rev. Stat. § 25-16-104.7, and specifically to the account identified below. Colorado shall provide to the United States by the Effective Date, or as soon as possible thereafter, any other information necessary to process the electronic funds transfer.

Bank Name: Wells Fargo

Bank Address: 1675 Broadway, Suite 2700, Denver, CO 80202

Account Name: Treasurer State of Colorado

Account Number: 4120280912

ABA for Wires & ACHs: 121000248

Type of Account: Checking

- b. Colorado and the United States agree that all funds disbursed from the payment made by the United States pursuant to this Paragraph shall be utilized by Colorado to restore, replace, and/or acquire the equivalent of allegedly injured Natural Resources at or in connection with the Site, 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. Colorado and the United States mutually acknowledge that, in addition to developing a publicly reviewed Restoration Plan, Colorado intends to apply the Colorado Project Selection Guidance. Colorado and the United States agree that Colorado may use a portion of the payment made by the United States pursuant to this Paragraph to fund the development of the Restoration Plan.

3. **Interest accrual.** If payment by the United States to the Escrow Account pursuant to Paragraph 2 is made later than 90 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.
4. **Availability of funds.** Payment to be made by the United States pursuant to this Settlement Agreement is 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.
5. **Colorado's release and covenant not to sue the United States.** Colorado, acting through the Colorado Natural Resources Trustees, 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 for CERCLA Natural Resource Damages resulting from Site Contamination. This Paragraph shall take effect on the Effective Date of this Settlement Agreement. Nothing in this Paragraph or any other provision of this Settlement Agreement is intended or shall be construed to resolve alleged liability for any release or threatened release of hazardous substances other than those defined as Site Contamination in Paragraph 1.b.
6. **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, nor is it an admission of violation by either Settling Party of any law, rule, regulation or policy.
7. **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.
8. **No effect on claims and defenses other than between Colorado 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.
9. **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
10. **Notices.** Any notices as required under the Settlement Agreement shall be provided in writing, via electronic mail, as follows:

As to Colorado:

Colorado Department of Law
Natural Resources and Environment Section
Attn: Emily Splitek, Senior Assistant Attorney General
Hazardous Waste, Solid Waste, and CERCLA Litigation Unit
1300 Broadway, 7th Floor
Denver, CO 80203
Email: Emily.Splitek@coag.gov

As to the United States:

United States Environmental Protection Agency
Office of Regional Counsel
Attn: Paul Logan, Senior Assistant Regional Counsel
Legal Counseling and FOIA Branch
1595 Wynkoop Street (8ORC-LE-C)
Denver, CO 80202
Email: Logan.Paul@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”)

11. **Amendments.** This Settlement Agreement may only be amended by subsequent written and signed agreement of the Settling Parties.
12. **Complete agreement.** This Settlement Agreement was negotiated between Colorado 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.
13. **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.

14. **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:

_____, 2023

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division

By:

BRIAN H. LYNK
Senior Trial Counsel
Environmental Defense Section
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044

FOR COLORADO, ACTING THROUGH THE COLORADO NATURAL RESOURCES TRUSTEES:

_____, 2023

By:

MARY EMILY SPLITEK
Senior Assistant Attorney General
Hazardous Waste, Solid Waste, and CERCLA
Litigation Unit
Colorado Department of Law
1300 Broadway, 7th Floor
Denver, CO 80203