

***In re Gold King Mine Release*, Case No. 1:18-md-02824-WJ (D.N.M.)
DRAFT Settlement Agreement between the *McDaniel* Plaintiffs and the United States
CONFIDENTIAL UNDER F.R.E 408
USA DRAFT 10/28/22**

**SETTLEMENT AGREEMENT BETWEEN
THE *McDANIEL* PLAINTIFFS AND THE UNITED STATES**

WHEREAS, on July 7, 2017, the *McDaniel* Plaintiffs filed suit against the United States of America and the United States Environmental Protection Agency in the United States District Court for the District of New Mexico in a case captioned as *Joanna McDaniel et al. v. United States, et al*, Case No. 1:17-cv-00710 (D.N.M.);

WHEREAS, the *McDaniel* Plaintiffs filed the *McDaniel* Plaintiff 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, through the *McDaniel* Plaintiff Action, the *McDaniel* Plaintiffs brought claims against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C §§ 1346(b), 2671-2680;

WHEREAS, the *McDaniel* Plaintiff 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, the *McDaniel* Plaintiffs and the United States have determined that settlement of the *McDaniel* Plaintiff 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 *McDaniel* Plaintiff Action;

WHEREAS, the allocation of the attorneys' fees settlement among and between the *McDaniel* Plaintiffs is determined by the *McDaniel* Plaintiffs, their counsel, and their experts and is not determined by the United States, its agencies, or employees.

NOW, THEREFORE, the *McDaniel* Plaintiffs and the United States hereby agree to the following:

1. Definitions

- a. *McDaniel* Plaintiff Action** shall mean *Joanna McDaniel et al. v. United States, et al*, Case No. 1:17-cv-00710 (D.N.M).

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- b. ***McDaniel* Plaintiffs** shall mean all plaintiffs who remain in the *McDaniel* Plaintiff Action: Joanna *McDaniel*, Ronnie *McDaniel*, Carolyn Emerson, Joseph Emerson, Michael Pratt, Deborah Pratt, Danny Booher, Rosemary Hart, and Georgia Wilson.
 - c. **August 2015 Gold King Mine Release** shall mean the release described in the allegations of Paragraph 28 of Plaintiffs' Complaint, ECF 1, in the *McDaniel* Plaintiffs' Action.
 - d. **Effective Date** shall mean the date on which the Settlement Agreement is signed by both counsel for the *McDaniel* Plaintiffs and counsel for the United States and the Environmental Protection Agency.
 - e. **EPA** shall mean the United States Environmental Protection Agency.
 - f. **FTCA** shall mean the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.
 - g. **Settling Parties** shall mean the *McDaniel* Plaintiffs and the United States. **Settling Party**, when used in the singular, shall mean either the *McDaniel* Plaintiffs or the United States.
 - h. **United States** shall mean the United States of America and all of its agencies, instrumentalities, and officers, including but not limited to EPA.
2. **Payment for *McDaniel* Plaintiffs' Attorney Fees Related to Spoliation of Evidence Pursuant to Fed. R. Civ. 37(e)(2)**. As soon as reasonably practicable after the Effective Date of the Settlement Agreement and upon the receipt of releases of claims of the *McDaniel* Plaintiffs, the United States shall pay to *McDaniel* Plaintiffs' counsel the sum of two hundred thousand dollars (\$200,000.00) under the Equal Access to Justice Act, 28 U.S.C. 2412(c)(2). Payment shall be in the form of an electronic funds transfer per instructions that *McDaniel* Plaintiffs' counsel shall provide to the United States no later than the Effective Date.
3. **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.

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

- a. The *McDaniel* Plaintiffs hereby release, discharge, and covenant not to assert any and all claims of any kind that they may have had, or may now or hereafter have, against the United States or the Environmental Protection Agency based on matters which were asserted or could have been asserted by the *McDaniel* Plaintiffs in the *McDaniel* Plaintiff Action and/or resulted from BPMD Contamination or the August 2015 Gold King Mine Release. The *McDaniel* Plaintiffs will indemnify and hold harmless the United States from any loss, claim, expense, demand, or cause of action of any kind or character through the assertion by any assignee, subrogee, successor, heir, or legatee hereto of a claim or claims connected with the subject matter of this Agreement, and from any loss incurred directly or indirectly by reason of the falsity or inaccuracy or any representation made herein by the undersigned. The *McDaniel* Plaintiffs' release and covenant not to sue the United States and the Environmental Protection Agency shall take effect on the date that the United States has made the payment required in Paragraph 2.
- 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 the *McDaniel* Plaintiffs based on matters which were asserted, or could have been asserted, by the United States or the EPA in the *McDaniel* Plaintiff Action. The United States' release and covenant not to sue the *McDaniel* Plaintiffs shall take effect on the same date that the *McDaniel* Plaintiffs release and covenant not to sue the United States takes effect.

5. Stay of litigation and voluntary dismissal.

- a. On October 14, 2022, the Settling Parties executed a term sheet. Pursuant to that agreement, the *McDaniel* Plaintiffs' counsel will make all reasonable efforts to obtain releases from the *McDaniel* Plaintiffs within ninety (90) days of that agreement, or no later than January 14, 2023.
- b. On October 17, 2022, the Court granted a stay of all proceedings in the *McDaniel* Plaintiff Action for ninety (90) days. *See* ECF 1834. The stay of proceedings will conclude on January 17, 2023. The Settling Parties will provide a status update to the Court at the earlier of (1) January 17, 2023, or (2) the Effective Date.

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- c. On or before the seventh day following the date on which counsel for the *McDaniel* Plaintiffs receive complete payment of the settlement sum, as described in Paragraph 2, the *McDaniel* Plaintiffs shall file a stipulation of voluntary dismissal with prejudice of all claims in the *McDaniel* Plaintiff Action pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).
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 raised by any claim or defense in the *McDaniel* Plaintiff Action, 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 the *McDaniel* Plaintiffs and the United States.** The Settlement Agreement shall have no third-party beneficiaries, nor shall it bind any third party.
9. **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 5 of this Settlement Agreement because of a federal government shutdown. In such circumstances, any resulting inability of the United States or the *McDaniel* Plaintiffs 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.
10. **Amendments.** This Settlement Agreement may only be amended by subsequent written and signed agreement of the Settling Parties.
11. **Complete agreement.** This Settlement Agreement was negotiated between the *McDaniel* Plaintiffs 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

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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.

12. **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.
13. **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.
14. THE REMAINDER OF THIS PAGE IS PURPOSEFULLY BLANK.

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FOR THE UNITED STATES OF AMERICA AND THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY:

February 16, 2023

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November 21, 2022

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