

Settlement Agreement Between the Navajo Nation and the United States

WHEREAS, on August 16, 2016, the Navajo Nation filed suit against the United States of America and the United States Environmental Protection Agency (“EPA”) (collectively, “the United States”) in the United States District Court for the District of New Mexico in a case captioned as *Navajo Nation v. United States*, 1:16-cv-00931 (D.N.M.) (“the Navajo Nation Action”);

WHEREAS, the Navajo Nation filed the Navajo Nation 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 (the “August 2015 Gold King Mine Release”);

WHEREAS, the Navajo Nation brought claims against the United States pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and the Federal Tort Claims Act;

WHEREAS, the Navajo Nation 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 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 BPMD;

WHEREAS, EPA will provide Navajo Nation with technical assistance on its grant applications for the non-competitive funding described in this Settlement Agreement, and if EPA identifies issues or errors in the Navajo Nation’s proposed work plans or grant applications that render them inconsistent with the authorities, regulations, or policies under which they would be funded, EPA will communicate such issues or errors to the Navajo Nation, and time permitting, provide advice on resolving the issues or correcting the errors; and

WHEREAS, the Navajo Nation and the United States (the “Settling Parties”) have determined that settlement of the Navajo Nation 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 Navajo Nation Action;

NOW, THEREFORE, the Navajo Nation 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 the Navajo Nation's First Amended Complaint (ECF 7 in the MDL docket).
- 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 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.
- d. **CERCLA** shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.
- e. **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.
- f. **Effective Date** shall mean the date on which the Settlement Agreement is signed by both the Navajo Nation and the United States.
- g. **EPA** shall mean the United States Environmental Protection Agency.
- h. **FTCA** shall mean the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.
- i. **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.
- j. **Natural Resources** shall have the meaning provided in 42 U.S.C. § 9601(16).
- k. **Navajo Nation** shall mean the Navajo Nation and all of its agencies, instrumentalities and officers.

- l. **Navajo Nation Action** shall mean *Navajo Nation v. United States*, 1:16-cv-00931 (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.).
 - m. **Restoration Plan** shall mean a plan for use by the Navajo Nation 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.
 - n. **Settling Parties** shall mean the Navajo Nation and the United States. **Settling Party**, when used in the singular, shall mean either the Navajo Nation or the United States.
 - o. **“Timely submitted”** applications, for purposes of Paragraph 5, shall mean applications by the Navajo Nation for Superfund cooperative agreement funding, Clean Water Act section 319 funding, or General Assistance Program funding that are submitted to EPA no later than 275 days after the Effective Date of this Settlement Agreement.
 - p. **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 the Navajo Nation’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 the Navajo Nation the sum of \$18,000,000. Payment to the Navajo Nation under this Paragraph 2 shall be in the form of an electronic funds transfer per instructions that the Navajo Nation 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. The Navajo Nation and the United States agree that all funds disbursed from the Escrow Account shall be utilized by the Navajo Nation 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 the Navajo Nation’s discretion with respect to the use of the sum paid to the Navajo Nation by the United States pursuant to Paragraph 2.
 4. **Interest accrual.** If payment by the United States to the Navajo Nation pursuant to Paragraph 2 or to the Escrow Account pursuant to Paragraph 3 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.

5. **EPA action on grant application/s submitted by the Navajo Nation.** As soon as reasonably practicable following the Effective Date of this Settlement Agreement, and no later than 275 days following the Effective Date, the Navajo Nation shall submit to EPA eligible grant application/s for up to \$1,500,000 in Superfund cooperative agreement funding, up to \$1,000,000 in Clean Water Act section 319 grant funding, and up to \$500,000 in General Assistance Program grant funding. The Navajo Nation shall ensure that each such application clearly identifies this Agreement. EPA shall evaluate the Navajo Nation's 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 \$1,500,000 in Superfund cooperative agreement funding, \$1,000,000 in Clean Water Act section 319 grant funding, and \$500,000 in General Assistance Program grant 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 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 the Navajo Nation.
6. **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.
7. **The Settling Parties' releases and covenants not to sue.**
 - a. The Navajo Nation 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 the Navajo Nation in the Navajo Nation Action, or on matters which the Navajo Nation 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. The Navajo Nation'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 and 3, including payment of any interest required by Paragraph 4; and (ii) EPA has

taken action on all timely submitted grant applications in accordance with Paragraph 5, provided, however, that if the Navajo Nation does not timely submit any eligible grant applications, then the Navajo Nation'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 the Navajo Nation based on matters which were asserted, or could have been asserted, by the United States in the Navajo Nation Action, or on matters which the United States hereafter could assert in an action against the Navajo Nation for CERCLA Natural Resource Damages resulting from BPMD Contamination or the August 2015 Gold King Mine Release. The United States' release and covenant not to sue the Navajo Nation shall take effect on the same date that the Navajo Nation'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 the Navajo Nation to the United States for CERCLA Natural Resource Damages.

8. Stay of litigation and voluntary dismissals.

- a. Within two (2) 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 Navajo Nation Action with respect to claims between Navajo Nation and the United States.
- b. Within seven (7) days after the United States has made the payments described in Paragraphs 2 and 3, including payment of any interest required by Paragraph 4, the Navajo Nation shall file a stipulation of voluntary dismissal with prejudice of all of its claims against the United States and EPA in the Navajo Nation Action including both FTCA and CERCLA claims.

9. 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 Navajo Nation Action, nor is it an admission of violation by either Settling Party of any law, rule, regulation or policy.

10. 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.

11. **No effect on claims and defenses other than between the Navajo Nation and the United States.** Except as provided in Paragraph 12, 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.
12. **Agreement not to participate in pre-trial proceedings on spoliation issues.** Beginning on the Effective Date of this Settlement Agreement, the Navajo Nation agrees to permanently forego and withdraw from any active participation (for example, seeking further testimony or other evidence from the United States or its past employees) in all pre-trial proceedings that the Court has ordered or may order regarding spoliation issues identified in the Court’s August 6, 2021 Order, ECF No. 1292 (“Spoliation Issues”), including but not limited to the evidentiary hearing that the Court has ordered will occur after June 17, 2022 and before trial in *In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015*, 1:18-md-02824 (D.N.M.), or in any related discovery. *See* Multi-District Litigation ECF Nos. 1508, 1646. For the avoidance of doubt, the Navajo Nation may actively participate in any pre-trial proceeding to the extent the proceeding addresses issues other than Spoliation Issues.
13. **Notices.** Any notices as required under the Settlement Agreement shall be provided in writing, via electronic mail, as follows:

As to the Navajo Nation:

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Hueston Hennigan LLP
523 West 5th St, Suite 400
Los Angeles, CA 90014
awalsh@hueston.com

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”)

14. **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.
15. **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 Paragraph 5 of this Settlement Agreement because of any of the following circumstances beyond its control: (a) a federal government shutdown or a tribal government shutdown in the Navajo Nation; (b) an extreme event that renders EPA or Navajo Nation 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 Navajo Nation staff resources away from the work needed to meet the schedule for the specified action. In such circumstances, any resulting inability of EPA or Navajo Nation 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.
16. **Amendments.** Except as provided in Paragraph 15, this Settlement Agreement may only be amended by subsequent written and signed agreement of the Settling Parties.
17. **Complete agreement.** This Settlement Agreement was negotiated between the Navajo Nation 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.
18. **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.
19. **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

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