UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

THE STATE OF NEW MEXICO, *Plaintiff*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Defendants*.	CASE NO.: 16-cv-00465-MCA-LF Hon. M. Christina Armijo, U.S.D.J.
NAVAJO NATION, *Plaintiff*, v. UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Defendants*.	CASE NO.: 16-cv-00931-MCA-LF Hon. M. Christina Armijo, U.S.D.J. **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ENVIRONMENTAL RESTORATION, LLC'S MOTION TO DISMISS AND MOTION TO STRIKE [DOC. 101]**

I. INTRODUCTION

Plaintiff Navajo Nation ("Plaintiff") alleges that Environmental Restoration, LLC ("ER") is liable for past and future damages under CERCLA and several state tort claims for relief. Those claims in turn are based on the release of allegedly hazardous substances from the Gold King Mine near Silverton, Colorado ("Gold King") into the Animas and San Juan Rivers on August 5, 2015 (the "Release"). Under prevailing law, Plaintiff fails to state a claim for relief because, *inter alia*, its Complaint does not—and cannot—allege "control" by ER (a federal government contractor) over the alleged circumstances that led to the Release. Further, Plaintiff's claims for "joint and several" liability and punitive damages should be stricken.

First, under CERCLA (First and Second Claims for Relief), Plaintiff must—but does not—allege any facts showing that ER controlled the relevant activities at Gold King. To the

contrary, Plaintiff alleges that Defendant U.S. Environmental Protection Agency ("EPA") was authorized to approve all work at Gold King (Compl. ¶ 67) and that an EPA on-site coordinator ("OSC") was "***in charge***" at Gold King at all times leading up to and following the Release (Compl. ¶ 79). Plaintiff also references documents, such as a May 2015 Action/Work Plan (Compl. ¶ 72), which establish that ER had to work "as directed by the OSC." Accordingly, ER cannot be liable under CERCLA as an "operator," "arranger" or "transporter" because EPA (not ER) controlled the alleged activities at Gold King. ER cannot be an "arranger" for the additional reasons that (i) Plaintiff does not allege that the Release was anything other than accidental, and (ii) Plaintiff does not allege that ER arranged to have hazardous substances from Gold King treated or disposed by another party. Nor can ER be liable as a "transporter" because Plaintiff does not allege that ER participated in selecting any disposal sites.

Second, CERCLA bars Plaintiff's request for an order requiring Defendants to abate the alleged nuisance and cure the alleged trespass. (Prayer for Relief No. 4.) EPA has designated Gold King and the surrounding area a "Superfund Site" and CERCLA prohibits Plaintiff from interfering with ongoing efforts to monitor, assess and evaluate areas potentially affected by the Release, including the San Juan River and Navajo Nation. 42 U.S.C. § 9613(h).

Third, because the San Juan River is a natural resource, CERCLA preempts Plaintiff's state law claims for unrestricted monetary damages (Third through Seventh Claims for Relief) based on the alleged contamination of the river. *See* 42 U.S.C. §§ 9607(a)(4)(C) & 9607(f)(1).

Fourth, ER is protected from any state tort law liability under the "Government Contractor Defense." As set forth in Plaintiff's Complaint, EPA had to approve all work at Gold King and an EPA OSC was "in charge" during all relevant times at Gold King. (Compl. ¶¶ 67,

79.) EPA's actions at Gold King were discretionary functions under the Federal Tort Claims Act ("FTCA") and Plaintiff does not allege that ER did anything other than adhere to either an EPA-approved work plan or directions from the EPA OSC who was "in charge" at Gold King. Under established Supreme Court precedent, federal government contractors, like ER, are protected against state tort liability under such circumstances.

Finally, Plaintiff's "joint and several" liability and punitive damage claims should be stricken. Under Supreme Court precedent, the law of Colorado, as the "point source" state, governs Plaintiff's tort claims. Colorado has abolished "joint and several" liability in favor of a pro rata approach, and bars plaintiffs from asserting punitive damage claims in initial pleadings.

II. STATEMENT OF FACTS ALLEGED BY PLAINTIFF

One of several hundred abandoned mines located in the San Juan Mountains of Colorado, Gold King had been an inactive, "dry" mine for decades since the mid-1900s. (Compl. ¶¶ 5–6, 36–37, 42–43.) Gold King's condition changed in the 1990s after Defendant Sunnyside Gold Corporation ("Sunnyside Gold")—with the approval of the State of Colorado—installed two bulkheads in the American Tunnel, an exploratory tunnel "dug in a lower portion of the Gold King Mine and eventually extended to the Sunnyside Mine." (Compl. ¶¶ 42, 45–46.) As a direct result of Sunnyside Gold plugging the American Tunnel, groundwater backed up into Gold King through natural fractures in the mountainside and caused the once-dry mine "to fill with untreated, contaminated water." (Compl. ¶ 48.)

The plugging of American Tunnel and resulting build-up of acid mine wastewater in Gold King and the nearby Red & Bonita Mine created an environmental risk that both EPA and the Colorado Division of Reclamation, Mining and Safety ("DRMS") sought to address.

(Compl. ¶¶ 49, 56, 61, 66–67.) EPA initiated remedial work at Red & Bonita in 2011. (Compl. ¶ 61.) EPA drained the mine and excavated "successfully without a blowout." (Compl. ¶ 63.) DRMS attempted reclamation work at Gold King in 2008 and 2009, but its efforts resulted in "further collapsing that buried the observation and drainage pipes" at Gold King. (Compl. ¶ 66.)

"In 2014, DRMS asked USEPA to re-open the Gold King Mine Level 7 adit and investigate the acid mine drainage." (Compl. ¶ 67.) EPA hired ER as a contractor to assist with EPA's work at Gold King. (Id.) Under its April 11, 2013 Emergency and Rapid Response Services (ERRS) IV contract with ER (the "ERRS Contract"; Sheridan Decl., Doc. 98, Ex. G),[1] EPA had the exclusive authority to direct and control the activities at Gold King, including all actions to be taken by ER. For example, section I.E of "Attachment 1 – Statement of Work" of the ERRS Contract provides: "The contractor shall take any response action, ***under the direction of the Ordering Officer***, consistent with the terms and conditions of the contract, and in accordance with the directions of the TO." Reflecting the ERRS Contract's mandate that EPA direct the work at Gold King, a June 25, 2014 Task Order Statement of Work ("Task Order"; Sheridan Decl., Doc. 98, Ex. C) issued by EPA provided that ER's work plans had "to be submitted to the OSC for approval . . . before mine rehabilitation work begins." (Compl. ¶ 67.)

Plaintiff alleges that "USEPA began excavating at the Gold King Mine" on or around September 11, 2014, but "abruptly halted its efforts" after "seepage appeared." (Compl. ¶ 70.)

[1] Both the Task Order and RFP referenced in the Complaint (Compl. ¶¶ 67–68) refer to and were issued under the ERRS Contract and, therefore, the Court may take these documents into account when ruling on ER's Motion. *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (on a motion to dismiss, a court may consider "documents referred to in the complaint if the documents are central to the plaintiff's claims and the parties do not dispute the documents' authenticity"). The ERRS Contract is also available on EPA's website relating to Gold King (https://www.epa.gov/sites/production/files/2015-08/documents/1574081_0.pdf). The Tenth Circuit has repeatedly taken judicial notice of documents available on government websites. *See, e.g., U.S. v. Iverson*, 818 F.3d 1015, 1021–22 (10th Cir. 2016); *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1212–13 (10th Cir. 2012); *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009).

EPA "temporarily suspended" its work and "planned to return in the summer of 2015." (Id.) Over the ensuing months, "between September 2014 and the summer of 2015, USEPA began planning and preparing for the work to be conducted in the future." (Compl. ¶ 71.) In May 2015, ER submitted an "Action/Work Plan" (Compl. ¶ 72; Sheridan Decl., Doc. 98, Ex. D), which provided that the "project work" would be performed "***as directed by the OSC***."

Plaintiff alleges that EPA and its contractors returned to Gold King in June and July 2015. (Compl. ¶¶ 73–74.) From July to August 4, 2015, EPA, its contractors, and DRMS were allegedly "on site taking measurements and preparing for the excavation." (Compl. ¶ 76.) They returned on August 5, 2015, "to collectively assess the situation at the Gold King Mine adit/portal." (Compl. ¶ 78.)

At some point in late July or early August 2015, Plaintiff alleges that a "Substitute OSC" had replaced the "Original OSC" at Gold King because the Original OSC "left for vacation." (Compl. ¶ 79.) Accordingly, at all relevant times from late July to August 5, 2015, Plaintiff alleges that the Substitute OSC was "***in charge***" at Gold King. (Compl. ¶ 79.)

Plaintiff alleges "[o]n information and belief" that "excavation began on August 5, 2015, contrary to the work plan." (Compl. ¶ 80.) During the alleged excavation work at Gold King, "a rapid release of water from the mine" occurred. (Compl. ¶¶ 80–81.) Plaintiff alleges that "millions of gallons of contaminated water that was stored behind collapsed material spilled out into Cement Creek, a tributary of the Animas River," "made its way to the Animas River and then to the San Juan River," which passes through the Navajo Nation. (Compl. ¶¶ 83–85.)

III. STANDARD FOR A MOTION TO DISMISS

"To survive a motion to dismiss, a complaint must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This requires a plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Federal courts have granted motions to dismiss based on the defenses that ER asserts in this Motion. *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 206–07 (5th Cir. 2009) (affirming dismissal with prejudice based on the Government Contractor Defense); *Ryland Group, Inc. v. Payne Firm, Inc.*, 492 F. Supp. 2d 790, 794 (S.D. Ohio 2005) (dismissing CERCLA claim based on contractor's lack of control over underlying activities).

IV. ER IS NOT LIABLE UNDER CERCLA

CERCLA imposes liability on four categories of responsible persons: owners, operators, arrangers, and transporters. *See* 42 U.S.C. § 9607(a)(1)–(4). Plaintiff claims that ER is liable in this case under three of these categories: operator, arranger and/or transporter. (Compl. ¶¶ 123–125.) All three of Plaintiff's theories fail as a matter of law because Plaintiff does not allege facts showing that ER controlled the alleged activities at Gold King. *See FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993) (recognizing control as the key factor for determining whether a defendant qualifies as an "operator" under CERCLA); *United States v. Shell Oil Co.*, 294 F.3d 1045, 1055 (9th Cir. 2002) (recognizing "that control is a crucial element of the determination of whether a party is an arranger under § 9607(a)(3)"); *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1284, 1289 (N.D. Iowa 1994) ("[T]ransporter liability is predicated on control over site selection.").

A. ER Was Not an "Operator"

In order to be liable as an operator under CERCLA, the defendant must be "someone who directs the workings of, manages, or conducts the affairs of a facility." *United States v. Bestfoods*, 524 U.S. 51, 66 (1998). *See also* 42 U.S.C. § 9601(20)(A). In *Bestfoods*, the Supreme Court explained that "the verb 'to operate' . . . obviously meant something more than mere mechanical activation of pumps and valves." *Id.* at 71. Consistent with the Supreme Court's definition in *Bestfoods*, the Tenth Circuit has identified ***control*** as the key factor for determining "operator" liability under CERCLA and has recognized two "control" tests: (1) "authority to control," and (2) "actual control." *FMC Corp.*, 998 F.2d at 846. The Tenth Circuit did "not decide which approach is best" (*id.*), and after *Bestfoods*, district courts within the Tenth Circuit have not adopted a uniform approach. *Compare United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1071 (D. Colo. 2000) (applying both "control" tests), *with City of Wichita v. Trustees of APCO Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1055 (D. Kan. 2003) (applying "actual" control test because "*Bestfoods* rejected authority to control" test).

Regardless of which "control" test the Court might apply, ER cannot be liable as an "operator" under CERCLA based on Plaintiff's allegations and the documents Plaintiff references in its Complaint. The ERRS Contract, Task Order, and Action/Work Plan establish that EPA had exclusive authority to direct and control the activities at Gold King and that ER had no authority or discretion to decide what actions to take. The ERRS Contract expressly provides that ER "shall take any response action, ***under the direction of the Ordering Officer***" (Sheridan Decl., Doc. 98, Ex. G at Attachment 1, ¶ I.E), and the Action/Work Plan likewise requires that the "project work" be performed "***as directed by the OSC***" (Sheridan Decl.,

Doc. 98, Ex. D at 1). Further, as set forth in the Task Order, all work plans at Gold King had "to be submitted to the OSC for approval . . . before mine rehabilitation work begins." (Compl. ¶ 67.) These documents confirm the OSCs' legal duty "to coordinate and ***direct***" response and removal actions. *See* 40 C.F.R. § 300.5 (emphasis added).

ER also lacked actual control over the work at Gold King. As Plaintiff alleges, at all relevant times from late July through the day of the Release, the Substitute OSC was "***in charge***" of directing activities at Gold King. (Compl. ¶ 79.) This unequivocal allegation establishes that EPA—not ER—actually controlled the activities at Gold King that resulted in the Release.

Plaintiff's allegations about EPA's control (Compl. ¶¶ 67, 79) also establish EPA's authority over any sub-contractor selected under the July 29, 2014 Request for Proposal ("RFP"). (Compl. ¶ 68.) Based on Plaintiff's allegations, ER had no discretion to direct the sub-contractor to take any action that was not authorized by EPA. Plaintiff's allegation that the work on August 5, 2015, proceeded "contrary" to the Action/Work Plan does not change or alter the other allegations regarding EPA's control. The Substitute OSC had the authority to control the work at Gold King and any alleged deviation from a prior work plan is consistent with that control because it demonstrates that the OSC not only had the authority to deviate from a prior work plan, but (as alleged) also exercised it.

Plaintiff's factual allegations are analogous to cases in which federal courts dismissed CERCLA claims against contractors who lacked discretion to act on their own and followed directions from the hiring party. In *Ryland Group, Inc.*, *supra*, the Southern District of Ohio granted a subcontractor's motion to dismiss a CERCLA claim because the general contractor "effectively directed and controlled all activities that took place" at the site and there were no

allegations that the sub-contractor "exercised any discretion over the activities at the site." 492 F. Supp. 2d at 794. Just like the general contractor in *Ryland*, Plaintiff alleges that EPA had to approve all work plans at Gold King (Compl. ¶ 67) and was "in charge" at Gold King at all relevant times (Compl. ¶ 79). Plaintiff fails to allege any facts showing that ER actually controlled activities at Gold King or that ER could have done so. Therefore, ER cannot be liable as an operator under CERCLA. *See Interstate Power Co.*, 909 F. Supp. at 1289 (dismissing CERCLA claim against contractor that acted "at the direction of other parties").

B. ER Was Not an "Arranger"

Plaintiff fails to allege any facts that support its claim that ER "arranged for the disposal, treatment, and transport of hazardous substances released from the Gold King Mine" and should therefore be liable as an arranger under CERCLA. (Compl. ¶ 124.)

First, Plaintiff does not allege any facts showing that the Release was anything other than an accident, which negates arranger liability under CERCLA. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 612–13 (2009) (defendant who sold and shipped a hazardous substance was not an arranger because it did not intend for the substance to be disposed, even though it "was aware that minor, accidental spills occurred during the transfer"); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (defendant was not an arranger as a result of TCE spilled by a common carrier because defendant "did not hire it to spill TCE" and arranger liability "excludes accidental spillage").

Second, in order to be held liable as an arranger under CERCLA, a defendant must arrange to have hazardous substances transported or disposed "by any other party or entity." 42 U.S.C. § 9607(a)(3). As the First Circuit has explained, the "clause 'by any other party or entity'

clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity."[2] *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004) (defendants liable as an arranger because they "brokered" the disposal of hazardous substances by third-parties). Plaintiff, however, does not allege that ER contracted or otherwise arranged with any third-party to dispose of, treat or transport any hazardous substances from Gold King.

Finally, as set forth above, Plaintiff does not allege any facts showing that ER controlled the process of disposing or treating the hazardous substances from Gold King. *See Shell Oil Co.*, 294 F.3d at 1055. In *Interstate Power Co.*, *supra*, the Northern District of Iowa held that an excavation contractor was not liable as an arranger under CERCLA because the contractor lacked control over the disposal of hazardous substances. 909 F. Supp. at 1288. Plaintiff's allegation that the work on August 5, 2015, was "contrary" to the Action/Work Plan (Compl. ¶ 80) does not affect the analysis because Plaintiff also alleges that the Substitute OSC was "in charge" at Gold King at all relevant times (Compl. ¶ 79). The only reasonable inference from Plaintiff's allegations is that the Substitute OSC directed (and, therefore, controlled) any work that allegedly deviated from the Action/Work Plan. Thus, Plaintiff failed to allege any facts that ER "did not do anything that they were not ordered to do" or "given the go ahead to do" by an EPA OSC. *Interstate Power Co.*, 909 F. Supp. at 1288.

[2] The Ninth Circuit appears to have a different opinion about the scope of arranger liability, however, that court had to add an "or" to the statute to adopt its view, which is contrary to longstanding rules of statutory interpretation. *Compare Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1080 (9th Cir. 2006), *with Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2033 (U.S. 2014) ("But this Court does not revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address."). *See also 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.").

C. ER Was Not a "Transporter"

Plaintiff also fails to allege any facts to support its claim that ER "undertook to dispose, treat, and transport hazardous substances away from the Gold King Mine." (Compl. ¶ 125.) Thus, ER cannot be held liable as a transporter under CERCLA.

In the Tenth Circuit, transporter liability under 42 U.S.C. § 9607(a)(4) "is predicated on site selection by the transporter." *United States v. Hardage*, 985 F.2d 1427, 1435 (10th Cir. 1993) (defendant liable as a transporter because it "selected the Hardage Site for disposal of MDC's waste"). "[A] transporter selects the disposal facility when it actively and substantially participates in the decision-making process which ultimately identifies a facility for disposal." *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 90 (3d Cir. 1994). *Accord Interstate Power Co.*, 909 F. Supp. at 1289 (contractor not liable as a transporter because the contractor "was under the direct supervision and control of other parties and had no authority or opportunity to exercise any discretion" and "[i]t did not" select "any sites for disposal"). Plaintiff fails to allege any facts that ER participated (let alone "actively and substantially participated") in any decision-making process to select a disposal or treatment facility for hazardous substances from Gold King. Because it did not have any alleged "control over site selection," ER cannot be liable as a transporter under CERCLA. *Interstate Power Co.*, 909 F. Supp. at 1289.

V. CERCLA BARS PLAINTIFF'S REQUESTS FOR INJUNCTIVE RELIEF

For its Fifth, Sixth and Seventh Claims for Relief, Plaintiff requests that the Court order the Defendants "to abate the nuisance and cure the trespass within the Nation." (Prayer for Relief No. 4; Compl. ¶¶ 161, 172, 178.) These claims should be dismissed—or Plaintiff's requested relief should be stricken—because EPA has begun removal efforts at Gold King and

the Court lacks jurisdiction "to review any challenges to removal or remedial action selected under section 9604 of this title." 42 U.S.C. § 9613(h). Section 9613(h) "strips federal court jurisdiction once the Government has ***begun*** a removal action," "even if the Government has only ***begun*** to 'monitor, assess, and evaluate the release or threat of release of hazardous substances.'" *Cannon v. Gates*, 538 F.3d 1328, 1333, 1334 (10th Cir. 2008) (emphasis added).

The Court may take judicial notice that EPA has begun removal work at areas potentially affected by the Release because the information is readily available on EPA's website (https://www.epa.gov/goldkingmine). *See, e.g.*, *U.S. v. Iverson*, 818 F.3d 1015, 1021–22 (10th Cir. 2016) (taking judicial notice of documents available on government website). EPA's work to date (which is ongoing) has at least matched (if not exceeded) the efforts that the Tenth Circuit held in *Cannon* were sufficient to trigger § 9613(h)'s jurisdictional bar. In that case, the Government "initiated efforts to study the contamination," but had not yet cleaned up the affected property. *Cannon*, 538 F.3d at 1330. In this case, EPA has sampled and monitored soil and surface water in areas potentially affected by the Release, including the Navajo Nation, throughout the 15 months since the Release.[3] EPA has also designated the area encompassing Gold King and the American Tunnel as a "Superfund Site" by listing the area on the National Priorities List ("NPL"). *See* 81 Fed. Reg. 62397, 62401 (Sept. 9, 2016). As in *Cannon*, Plaintiff's "requested injunctive relief ordering" remediation should be rejected because it "would undoubtedly interfere with the Government's ongoing removal efforts."[4] *Cannon*, 538

[3] EPA, Post-Gold King Mine Release Incident: Conceptual Monitoring Plan for Surface Water, Sediments, and Biology (Mar. 2016) at 1, *available at* https://www.epa.gov/sites/production/files/2016-03/documents/post-gkm-final-conceptual-monitoring-plan_2016_03_24_16.pdf. *See Iverson*, 818 F.3d at 1021–22 (taking judicial notice of documents available on government website).

[4] It is irrelevant whether or not EPA has selected a remedy. The Tenth Circuit rejected this argument in *Cannon*

F.3d at 1335. *See also New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) ("CERCLA protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort.").

VI. CERCLA PREEMPTS PLAINTIFF'S CLAIM FOR MONETARY DAMAGES

For its Third, Fourth, Fifth, Sixth and Seventh Claims for Relief, Plaintiff seeks unrestricted monetary damages under state law for the alleged contamination of the San Juan River. (Compl. ¶¶ 97(b)–(e), 98, 145, 151, 160, 161, 169, 170, 172, 176, 178; Prayer for Relief No. 3.) A claim for relief may be dismissed under Rule 12(b)(6) if it seeks a remedy that is not available under statute. *See Scherer v. United States*, 241 F. Supp. 2d 1270, 1278 (D. Kan. 2003) (dismissing FOIA claims because plaintiff sought relief "that is not available under the Act").

The San Juan River is a natural resource under CERCLA (*see* 42 U.S.C. § 9601(16)), which provides a comprehensive scheme for recovering natural resource damages and "preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource."[5] *New Mexico*, 467 F.3d at 1247. *See also* 42 U.S.C. §§ 9607(a)(4)(C) & 9607(f)(1). Like the plaintiff's state law claims in *New Mexico*, Plaintiff's tort claims are based on the alleged contamination of a natural resource (the San Juan River). Contrary to the Tenth Circuit's express holding in *New Mexico*, however, Plaintiff does not limit its request for damages to the costs of remediating the San Juan River. Rather, Plaintiff seeks compensation for a host of damages that it is not entitled to in the Tenth Circuit, such as stigma damages and loss of tax and business revenue. (Compl. ¶ 97.)

"because it unduly restricts the plain language of § 9613(h). That section is a 'blunt withdrawal' of the jurisdiction of federal courts, which applies once the Government has begun its removal action." *Cannon*, 538 F.3d at 1335.

[5] CERCLA's saving clauses did not lead to a different result because Congress did not intend "to undermine CERCLA's carefully crafted NRD scheme through these saving clauses." *New Mexico*, 467 F.3d at 1247.

Thus, Plaintiff's state law Claims for Relief should be dismissed or, in the alternative, Plaintiff's claims for unrestricted monetary damages should be stricken.

VII. UNDER THE GOVERNMENT CONTRACTOR DEFENSE, ER IS SHIELDED FROM LIABILITY FOR PLAINTIFF'S STATE LAW CLAIMS

Plaintiff alleges that ER was an EPA contractor that assisted EPA with its efforts "to re-open the Gold King Mine Level 7 adit." (Compl. ¶¶ 7, 67.) Under the facts alleged here and in similar cases, federal government contractors cannot be held liable under state tort law for damages caused by their performance of a government contract. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (military contractor not liable under state tort law for a defectively designed emergency escape system for a helicopter); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940) (government contractor not liable for producing "artificial erosion" along a river because the work was "authorized and directed by governmental officers"); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 423–24 (D.S.C. 1994) (granting summary judgment in favor of a contractor hired by EPA to assist with clean-up activities, including excavation, based on the Government Contractor Defense). Thus, Plaintiff's Third, Fourth, Fifth, Sixth and Seventh Claims for Relief should be dismissed.

A. The Government Contractor Defense Applies to ER's Alleged Conduct

In order to establish a Government Contractor Defense, a contractor must first show that its underlying conduct falls within the scope of immunized conduct. The underlying conduct must: (1) involve "uniquely federal interests," (2) present a "significant conflict" between the federal interest and the operation of state law, and (3) involve "a discretionary function" by the Government agency or agent directing the work of the contractor under the FTCA, 28 U.S.C.

§ 2680(a). *Boyle*, 487 U.S. at 504, 507, 511.

1. ER's Performance Involved "Uniquely Federal Interests"

This case involves "uniquely federal interests" because, as courts have held under similar facts, ER's alleged conduct arises from its performance of the ERRS Contract during an EPA-led reclamation project. (See Compl. ¶ 67.) *See Boyle*, 487 U.S. at 504–05; *Richland-Lexington Airport Dist.*, 854 F. Supp. at 422–23. Acts that allegedly resulted in the Release occurred, *inter alia*, in 2014 when, after it had given up its efforts to remediate Gold King in 2009 (Compl. ¶ 66), "DRMS asked USEPA to re-open the Gold King Mine Level 7 adit and investigate the acid mine drainage" (Compl. ¶ 67). Further, all of the work at Gold King had to be approved by EPA. (Id.) EPA had a unique interest in conducting activities at Gold King, seeing that its federal contracts, such as the ERRS Contract, were fulfilled, and satisfying its obligation to DRMS to re-open the Gold King adit. *See Boyle*, 487 U.S. at 505–06.

2. The Alleged Conduct Presents a "Significant Conflict"

This case also presents a "significant conflict" between federal interests and the operation of state law. The import of Plaintiff's allegations that EPA had to approve all work at Gold King (Compl. ¶ 67) and that an OSC was "in charge" at Gold King (Compl. ¶ 79) is that ER was required to follow EPA's directions at Gold King. This is further established by (i) federal regulations, which authorize the OSC "to coordinate and direct" response and removal actions, 40 C.F.R. § 300.5, (ii) the ERRS Contract, which requires ER to act "under the direction of the Ordering Officer," and (iii) the Action/Work Plan, which provided that the "project work" would be "directed by the OSC." In *Boyle*, the Supreme Court explained that a "state-imposed duty of care" would not apply to a federal contractor if the duty of care was "precisely contrary to the

duty imposed by the Government contract." *Boyle*, 487 U.S. at 509. Thus, under *Boyle*, ER cannot be held liable for breaching a state-imposed duty of care if doing so would have required ER to disregard EPA directions, whether in an EPA-approved work plan or on-site directions from the OSC who was "in charge" at Gold King and allegedly deviated from the work plan.

As set forth in the Complaint, EPA OSCs carried out their legal duties and oversaw every act that Plaintiff alleges resulted in the Release. (Compl. ¶¶ 67, 70–81.) Based on Plaintiff's allegations, it is not plausible for Plaintiff to claim that ER could or should have acted independently in order to comply with a state-imposed duty of care. As an EPA contractor, ER had to follow EPA's directions, including on-site instructions from an OSC. Requiring ER to disregard some or all of such directions based on a state-imposed duty of care would necessarily interfere with EPA's authority "to decide the manner in which, and the extent to which, it will protect individuals and their property from exposure to hazardous wastes." *Cisco v. United States*, 768 F.2d 788, 789 (7th Cir. 1985). *See also* 42 U.S.C. § 9604(a)(1); 40 C.F.R. § 300.5.

3. ER's Alleged Acts Fall Within the FTCA's Discretionary Function Exception

A two-part test applies to determine whether a course of action is entitled to "discretionary function" immunity under the FTCA. First, a court must "consider whether the action is a matter of choice for the acting employee," in this case, the Original and Substitute OSCs. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The "discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* Second, "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield," *i.e.*, "'decisions grounded in social, economic, and political policy.'" *Id.* at 536–37 (quoting *United*

States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)). Significantly, "it is irrelevant whether the government employee actually balanced" these considerations. *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988). The relevant question is only "whether the decision is susceptible to policy analysis." *Id.* at 121. The Tenth Circuit has held that the discretionary function exception barred a similar action based on the Army's allegedly "deficient planning and execution" of an environmental clean-up of the Rocky Mountain Arsenal. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1542 (10th Cir. 1992).

The factual allegations that Plaintiff relies on to support its state law claims against ER fall within one of four categories: (1) misinterpreting the layout and conditions inside Gold King (Compl. ¶¶ 71, 76–78, 91); (2) not preparing for the "ramifications" of excavating Gold King (Compl. ¶¶ 80–81); (3) deciding to excavate Gold King on August 5, 2015 (Compl. ¶¶ 79–80); and (4) inadequately responding to the Release (Compl. ¶¶ 81, 93). As a threshold matter, all of these alleged actions and inactions were decisions made by EPA and its OSCs. As set forth in the Complaint and the documents Plaintiff referenced therein, EPA had exclusive authority to direct the activities at Gold King and an OSC was "***in charge***" during all relevant times. (See Compl. ¶¶ 67, 79.) Further, all of these alleged actions are susceptible to policy analysis and, therefore, are protected under the discretionary function exception of the FTCA.

a. The alleged actions were "a matter of choice" for EPA and its OSCs

EPA had broad discretion to determine what reclamation activities to undertake at Gold King, including how to investigate Gold King, whether and when to excavate, and what preparations to undertake. *See* 42 U.S.C. § 9604(a)(1); *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994) (CERCLA "grants the President broad power to command government

agencies and private parties to clean up hazardous waste sites."). *See also Spillway Marina, Inc. v. United States*, 445 F.2d 876, 878 (10th Cir. 1971) (dismissing FTCA action arising out of an Army Corps of Engineers project because "[d]ecisions of when to release and when to store required the use of discretion"); *Lockett v. United States*, 938 F.2d 630, 637 (6th Cir. 1991) (federal statutes and regulations "granted the regional EPA employees discretion to formulate a response to evidence of PCB contamination at a particular spill site within their jurisdiction," including when to inspect and "clean up the site"). Like other statutes that the Tenth Circuit has found grant the government discretion, CERCLA and other federal environmental laws and regulations include a "broad statutory directive" and there is no "statute, regulation or policy [that] specifically prescribes a course of action" for EPA to follow when conducting reclamation activities at an inactive mine. *See Johnson v. U.S. Dep't of Interior*, 949 F.2d 332, 337–38 (10th Cir. 1991) (National Park Service not liable for allegedly negligent rescue because no statute, regulation or policy "prescribe a specific course of conduct for search or rescue efforts").

The Third Circuit's decision in *U.S. Fidelity & Guaranty*, 837 F.2d 116, is illustrative. Contrary to an expert report that recommended only performing hazardous operations when the wind was blowing away from a nearby city, the EPA's OSC directed operations when the wind was blowing toward the city. During the course of the operations, an acid cloud was released and migrated to the city. The Third Circuit reversed a judgment against EPA because the discretionary function exception barred recovery. Despite the EPA OSC's alleged negligence, the Third Circuit found that the OSC, like the Original and Substitute OSCs at Gold King, "was dispatched with authority to determine how to schedule the cleanup operations at the Drake site in a manner that would most safely and effectively minimize the risk of serious injury to the

public." *Id.* at 122. Just like the OSC in *U.S. Fidelity & Guaranty*, the authority delegated to the Original and Substitute OSCs at Gold King "left room for, and indeed required, the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions." *Id.* (emphasis added).

Each of the alleged actions and inactions at Gold King that Plaintiff claims give rise to state tort liability involved a discretionary choice for EPA and its OSCs. Plaintiff alleges that Defendants did not utilize a particular technique for determining the water level inside Gold King (Compl. ¶¶ 76–77), but EPA was not required to follow a particular method. EPA also had discretion to decide whether and how to excavate, how to prepare for the ramifications of doing so, and how to respond to the Release. (Compl. ¶¶ 79–81.) EPA was not bound by any statute, regulation or policy prescribing "a specific course of conduct" at Gold King and, therefore, had discretion to choose among several alternatives. *See Johnson*, 949 F.2d at 337–38.

Plaintiff's allegations that "the Original OSC emailed instructions for the week of August 3 to the crew working on the Gold King Mine site" and that "[t]hese instructions differed from the actions actually taken on August 5, 2015," even if accepted as true, are irrelevant and do not change the analysis. (Compl. ¶ 79.) As Plaintiff expressly alleges in its Complaint, the Substitute OSC was "***in charge***" at Gold King while the Original OSC was out on vacation. (Compl. ¶ 79.) Accordingly, based on Plaintiff's own allegations, the Substitute OSC had the authority to decide what actions to take at Gold King and his alleged decisions fall within the discretionary function exception of the FTCA "whatever his . . . rank." *Varig Airlines*, 467 U.S. at 813. As a matter of both fact and law, the Original OSC's email was not "a federal statute, regulation, or policy that [was] both 'specific and mandatory'" and, therefore, the email did not

eliminate the "'element of judgment or choice'" from the Substitute OSC's decisions at Gold King. *See Elder v. United States*, 312 F.3d 1172, 1176–77 (10th Cir. 2002).

Because the Original and Substitute OSCs had to perform their duties "without reliance upon a fixed or readily ascertainable standard," their decisions were discretionary and protected from later liability. *See Miller v. U.S. Dep't of Transp.*, 710 F.2d 656, 663 (10th Cir. 1983). *See also Garcia v. U.S. Air Force*, 533 F.3d 1170, 1177–78 (10th Cir. 2008) (Air Force guide and instructions did "not prescribe a mandatory course of conduct that the government was required to follow"); *Elder*, 312 F.3d at 1177–78 (National Park Service's mandatory safety guidelines did "not dictate what actions park employees must take in response to particular problems").

b. <u>The alleged actions were grounded in policy</u>

Plaintiff alleges that the work at Gold King "was not driven by policy considerations." (Compl. ¶ 82.) Contrary to Plaintiff's threadbare legal conclusion (apparently made in response to ER's prior motion to dismiss brought against a complaint filed by the State of New Mexico), all of the alleged actions at Gold King were decisions made by EPA and its OSCs that presumptively (and actually) involved social, economic and political policy. Accordingly, these decisions (and the related directions to ER) are entitled to immunity under the FTCA.

The Tenth Circuit has ruled that "[w]hen government agents are authorized to exercise discretion in carrying out established government policy, such as the policies underlying CERCLA response actions, the exercise of that discretion is presumed to be grounded in policy." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1541–42 (10th Cir. 1992) (Army immune under FTCA for work at arsenal that "gass[ed]" an entire neighborhood; the Army had to choose how to go about "containing the spread of contamination before further damage could occur while still

protecting public health"). The alleged decisions that Plaintiff challenges in this case involved the same considerations that the Tenth Circuit has found to be discretionary "policy" judgments: safety, human resources, economic resources, and governmental interference. *See Johnson*, 949 F.2d at 339. Given the decisions alleged by Plaintiff, EPA had to weigh numerous policy considerations when deciding what to do at Gold King, including: the environmental impacts of any reclamation activity; the safety of on-site personnel and surrounding areas; the impacts of any activity on the conditions of other inactive mines in the area; the potential for delaying a project that was already postponed a year earlier and had to be completed in a mountainous region with a short work season; the scheduling of other EPA clean-up projects (particularly in terms of allocating personnel, equipment and other resources); the utility and practicality of different courses of action, including further or other testing; the availability of equipment and other resources; and costs. *See U.S. Fid. & Guar. Co.*, 837 F.2d at 122 (noting that the EPA OSC had to balance "the risks of proceeding with the neutralization on the day chosen against the risks of further delay"). Thus, all of the alleged decisions at Gold King were "susceptible to policy analysis," *even if* they did not consider "each of the identified policy factors." *Johnson*, 949 F.2d at 339; *U.S. Fid. & Guar. Co.*, 837 F.2d at 121.

As in *Daigle*, Plaintiff's challenge to the reclamation activities at Gold King "is but an assertion that the [EPA] could have done a better job in planning for and attaining the overall goals of public health and safety as expressed throughout CERCLA." *Daigle*, 972 F.2d at 1541. Any alleged missteps by EPA, however, do not defeat discretionary function immunity. *Cisco*, 768 F.2d at 789 ("Whether the EPA acted negligently or even abused its discretion has no effect on the applicability of the discretionary function exception."). Just as the government was not

liable for refusing to implement a potentially safer method of removing a cap and backfilling a mine shaft in *White v. U.S. Department of Interior*, 656 F. Supp. 25 (M.D. Pa. 1986), EPA's alleged decisions regarding whether and how to determine the water level inside Gold King, whether and how to re-open the adit, what preparations to undertake and how to respond to the Release fall "squarely within the coverage of the discretionary function exception." *Id.* at 35.

B. ER Is Entitled to Protection as a Government Contractor

After determining that the underlying conduct falls within the scope of the Government Contractor Defense, a contractor is entitled to derivative sovereign immunity if (1) the government "approved reasonably precise specifications"; (2) the contractor's performance "conformed to those specifications"; and (3) the contractor warned the government about any dangers "that were known to the [contractor] but not to the United States." *Boyle*, 487 U.S. at 512; *Richland-Lexington Airport Dist.*, 854 F. Supp. at 423–24.

As to the first two elements, the Complaint alleges that EPA had to approve all work plans at Gold King (Compl. ¶ 67) and that the Substitute OSC was "in charge" at Gold King at all relevant times leading up to and following the Release (Compl. ¶ 79). Plaintiff does not allege that ER performed any action that was neither approved by EPA nor directed by the OSC who was on-site and "in charge" of all work at Gold King. (Compl. ¶ 79.)

As to the third element, Plaintiff alleges that all of the alleged risks relating to the water that was impounded inside Gold King were known by EPA. (Compl. ¶¶ 71, 77, 89–90.) In *Richland-Lexington*, as here, "the EPA made the decisions with respect to cleaning up the site," the contractor "performed the clean-up according to the specifications issued by the EPA," and "because the EPA determined that the site required clean-up and further determined the manner

to effectuate clean-up, the logical conclusion is that the EPA was fully apprised of any danger." *Richland-Lexington*, 854 F. Supp. at 423–24. As set forth above, Plaintiff alleges these same facts in this case, thus ER is entitled to derivative discretionary function immunity.

VIII. PLAINTIFF'S JOINT AND SEVERAL LIABILITY AND PUNITIVE DAMAGE CLAMS SHOULD BE STRICKEN

The Release occurred in Colorado. (Compl. ¶¶ 5, 36.) Thus, Colorado law governs Plaintiff's tort claims because Colorado is the "point source" of the alleged harm. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487, 497–98 (1987) (releases from New York mill that moved toward Vermont on Lake Champlain actionable only under New York law as the "point source" of the harm). *See also Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992) ("[T]he only state law applicable to an interstate discharge is the law of the State in which the point source is located.").

Colorado has abolished the doctrine of joint and several liability by statute and adopted a pro-rata liability approach.[6] Colo. Rev. Stat. § 13-21-111.5(1). Accordingly, Plaintiff's claims that ER is "jointly and severally liable" for damages under state tort law (Compl. ¶¶ 145, 151, 161, 171, 177; Prayer for Relief No. 5) should be stricken as immaterial under Fed. R. Civ. P. 12(f) because they have "no possible bearing on the controversy." *Fed. Nat'l Mortg. Ass'n v. Milasinovich*, 161 F. Supp. 3d 981, 993 (D.N.M. 2016). *See Nitzsche v. Stein, Inc.*, 797 F. Supp. 595, 601–02 (N.D. Ohio 1992) (striking prayer for joint and several liability); *Carlson v. Armstrong World Indus., Inc.*, 693 F. Supp. 1073, 1079 (S.D. Fla. 1987) (striking "punitive damages based on joint and several liability").

[6] Even if New Mexico state law applies to Plaintiffs' claims (which it does not), New Mexico has also abolished the doctrine of joint and several liability by statute. N.M. Stat. Ann. § 41-3A-1[A].

Plaintiff's punitive damages claim (Prayer for Relief No. 3) should also be stricken because Colorado prohibits punitive damage claims in initial pleadings under Colo. Rev. Stat. § 13-21-102(1.5)(a), which is a substantive law that applies in federal court. *Am. Econ. Ins. Co. v. William Schoolcraft, M.D., P.C.*, No. 05-cv-01870, 2007 WL 160951, at *2 (D. Colo. Jan. 17, 2007); *Hartshorn Props., LLC v. BNSF Ry. Co.*, No. 06-cv-00663, 2006 WL 3618292, at *1–2 (D. Colo. Dec. 7, 2006). *Cf. Jones v. Krautheim*, 208 F. Supp. 2d 1173, 1180 (D. Colo. 2002).

IX. CONCLUSION

The Court should grant ER's Motion to Dismiss with prejudice based on the admissions in the Complaint and the documents referenced therein. Since any potential amendments would be based on facts Plaintiff either knew or, in light of the scores of reports and investigations about the Release, should have known about "'but fail[ed] to include them in the original complaint,'" the Complaint should be dismissed without leave to amend. *See Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (internal citation omitted). The Court should also grant ER's Motion to Strike in its entirety.

DATED: December 16, 2016

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By: /s/ Terry D. Avchen

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2016, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Andriy R. Pazuniak