UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION, *Plaintiff*, vs. UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY; et al. *Defendants*.	C.A. No. 1:16-cv-00465-MCA-LF (Consolidated with C.A. No. 1:16-cv-00931-MCA-LF) **PLAINTIFF NAVAJO NATION'S BRIEF IN OPPOSITION TO DEFENDANT ENVIRONMENTAL RESTORATION'S MOTION TO DISMISS AND MOTION TO STRIKE [DKT. 101]**

INTRODUCTION

Defendant Environmental Restoration ("ER") was directing remediation activities and conducting operations at the Gold King Mine when the Gold King Mine spill occurred. ER now attempts to avoid liability for the unprecedented spill—which caused substantial damage to the Navajo Nation, its environment, and its people—but the Court should reject its attempt.

First, the Navajo Nation (the "Nation") states a claim against ER for liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") because it has alleged that ER controlled operations at the Gold King Mine, arranged for disposal of hazardous substances there, and selected the site for that disposal.

Second, ER misstates the law in arguing that section 113(h) of CERCLA bars the Nation's requests for injunctive relief and that CERCLA's natural resource damages scheme preempts the Nation's plea for damages. In fact, the mere listing of the Bonita Peak Mining District as a Superfund site does not trigger section 113(h), and ER's preemption arguments are inappropriately directed at a remedy, not a claim. In any event, the Nation does not seek preempted damages.

Third, ER is not entitled to invoke the government contractor defense. As it is moving to dismiss, ER must show that every element of the defense plainly appears on the face on the Complaint. It fails to carry this burden. The Complaint does not plead a uniquely federal interest on the part of the EPA or a significant conflict between that interest and the operation of state law. To the contrary, the Complaint pleads that there was no conflict between ER's state-imposed and contractual duties to conduct its work reasonably in compliance with the contract and safety standards. ER's attempt to demonstrate a conflict through the discretionary function exception to Federal Tort Claims Act ("FTCA") liability fails because the Complaint pleads that the EPA's and ER's contractual agreements removed any discretion and because the negligent performance of the work at the Gold King Mine was not driven by policy considerations. ER also has not shown that the Complaint pleads that ER received—and complied with—reasonably precise specifications from the EPA. Further, the weight of authority limits the government contractor defense to military procurement contracts, rendering it inapplicable here.

Fourth, ER's motion to strike the Nation's requests for joint and several liability and for punitive damages incorrectly relies on Colorado law. In fact, New Mexico law applies.

Accordingly, the Nation respectfully requests that ER's motion to dismiss and motion to strike be denied.

FACTUAL BACKGROUND

The Gold King Mine, located in the Upper Animas Watershed, was discovered in 1887, but has been inactive since the 1920s. (Complt. ¶ 37.) The topography of the Upper Animas Watershed is laden with faults, fissures, and fractures that are impacted by mining behavior. (*Id.* ¶ 41.) Tunneling associated with mining redirects and contaminates groundwater flowing through the mountains. (*Id.*) This contaminated water is referred to as "acid mine drainage." (*Id.*)

In 1991, Sunnyside Gold Corporation ("Sunnyside") plugged the nearby Sunnyside Mine with two "bulkheads"—massive plugs in the mine opening designed to hold back the acid mine drainage accumulating within the mine. (*Id.* ¶ 45.) The bulkheads forced water that normally would have exited through Sunnyside Mine to accumulate within nearby mines, including the Gold King. (*Id.* ¶ 48.) This buildup risked a "blowout"—a catastrophic event in which colossal volumes of contaminated acid mine drainage are released all at once into downstream waterways. (*Id.* ¶ 49.)

The buildup did not go unnoticed, since mines that had been dry for decades—including the Gold King Mine and the nearby Red and Bonita Mine—began to fill with acid mine drainage. (*Id.* ¶ 56.) In 2011, the EPA initiated remedial work at the Red and Bonita Mine due to the increased flow of water there. (*Id.* ¶¶ 58-59, 61.) Before opening the portal, or entrance, to the mine, the EPA asked the Bureau of Reclamation ("BOR") to conduct an independent review of its plans to open the mine. The BOR warned the EPA that the water pressure in the mine could build up so high that the acid mine drainage would explode out the side of the mountain. (*Id.*) The EPA thus drilled a well upslope from the Red and Bonita Mine that permitted it to measure the water level inside the mine. (*Id.* ¶ 62.) More water was present than the EPA expected, so the EPA enlarged its treatment ponds and pumped water out of the top of the mine. (*Id.* ¶¶ 62-63.) After it pumped out the water, the EPA safely excavated the portal. (*Id.* ¶ 63.)

In 2014, the Colorado Department of Reclamation, Mining, and Safety ("DRMS") asked the EPA to open an adit, or horizontal tunnel, at the Gold King Mine to investigate the acid mine drainage. (*Id.* ¶¶ 65-67.) In connection with the planned reclamation work, the EPA sought a work plan from ER and issued a Task Order Statement of Work (the "Task Order") on June 25, 2014. (*Id.* ¶ 67). It stated that "the work is to be conducted in compliance with appropriate Mine Safety and Health Administration (MSHA) regulations inclusive of establishing a safe

underground working environment for personnel and the rehabilitation of underground workings and escapeways." (*Id.*). Further, "[a]ll work" was to "be performed under the conditions as described in an approved Work Plan," and those conducting the work were to use best management practices and engineering specifications. (*Id.*)

ER subsequently submitted a Request for Proposal ("RFP") dated July 29, 2014, which noted that the USEPA tasked ER with "procur[ing] and manag[ing] the reopening and ground support construction at the Upper Gold King Mine – 7 level adit." (*Id.* ¶ 68.) The RFP provided that ER was to select a subcontractor to "mobilize all labor, material, equipment, and supplies necessary to perform as directed by" ER and the EPA, and that ER would then "conduct operations in oversight management of surface and underground work activities." (*Id.*) Work was to be conducted in compliance with "all safety requirements set forth in applicable State, Federal and local laws and regulations," and workers were to "fully investigate[] and comply with the need/potential need for a Professional Engineer's review and stamp for project plans." (*Id.* ¶ 69.)

On or around September 11, 2014, the EPA began excavating at the Gold King Mine. (Complt. ¶ 70.) But seepage quickly appeared. (*Id.*) The EPA (incorrectly) estimated that there was approximately six feet of impounded water, and because the settling pond at the time was not large enough to treat that much water, the excavation work was suspended until July 2015. (*Id.*)

In July 2015, the EPA's On-Scene Coordinator (the "Original OSC") spoke with a civil engineer at the BOR because he wanted an independent review. (Complt. ¶ 75.) They both agreed that the engineer would conduct an all-day site assessment of the Gold King Mine plans on August 14, 2015. (*Id.*) On July 29, 2015, the Original OSC emailed explicit instructions for the week of August 3 to the crew working on the Gold King Mine site. (*Id.* ¶ 79.) The Original OSC then left for vacation, leaving another OSC (the "Substitute OSC") on duty in the interim. (*Id.*)

On August 4, 2015, representatives of ER, among others, observed concerning conditions similar to 2014: water was seeping out at an elevation of 5-6 feet above the adit floor. (*Id.* ¶ 76.) But rather than drill into the mine to directly observe the water level inside—an approach taken earlier with the Red and Bonita Mine and which would have prevented the blowout—the EPA and ER incorrectly assumed that the seepage level *outside* the mine reflected the water level *inside* the mine. (*Id.* ¶¶ 76-77.) ER began excavation on August 5, contrary to the work plan and explicit instructions and despite the fact that ER lacked adequate emergency response plans. (*Id.* ¶¶ 80, 92.) Shortly thereafter, pressurized water began spurting out and then rapidly increasing in flow. (*Id.*) Personnel evacuated as the massive blowout dumped millions of gallons of contaminated water, and at least 880,000 pounds of metals, into Cement Creek. (*Id.* ¶¶ 80, 83.) ER failed to mitigate the release or to timely notify downstream communities. (*Id.* ¶ 144.)

The yellow sludge followed its natural, hydrologic course and rushed into downstream waterways, including approximately two hundred miles of the San Juan River, poisoning one of the Navajo people's most important water sources with dangerous toxins. (*Id.* ¶¶ 1, 83-84.)

ARGUMENT

To survive a motion to dismiss brought under Rule 12(b)(6), a plaintiff need allege "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts adjudicating Rule 12(b)(6) motions "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007).

I. The Complaint States A Claim For CERCLA Liability

CERCLA provides liability for, among others, persons who "operated any facility at which [] hazardous substances were disposed of," "arranged for disposal or treatment" of hazardous substances, or "accepted any hazardous substances for transport." 42 U.S.C. § 9607(a)(2)-(4).

Because the Nation sufficiently alleges that ER was an operator, an arranger, and a transporter (any one of which is sufficient to create liability) within the meaning of § 9607(a) at the time of disposal of the toxic wastewater, ER's motion to dismiss fails. (*E.g.*, Complt. ¶¶ 123-25.)

A. The Complaint States A Claim For Operator Liability

"[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility," or who "manage[s], direct[s], or conduct[s] operations specifically related to pollution" or the "leakage or disposal of hazardous waste." *U.S. v. Bestfoods*, 524 U.S. 51, 66 (1998). The Tenth Circuit has applied two tests to determine whether a particular entity qualifies as an operator: the "actual control" test and the "authority to control" test. *See FMC Corp v. Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993) (describing both tests and declining to "decide which approach is best"). The inquiry is "fact-intensive" and requires the "consideration of the totality of the circumstances." *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000) (citing *U.S. v. Vertac Chem. Corp.*, 46 F.3d 803, 808 (9th Cir. 1995)). Here, either test is satisfied, as the Complaint alleges that ER had authority to control, and actually controlled, operations at the Gold King Mine. The Nation alleges, for example, that ER "had authority to control and did control, manage, direct, and implement the conduct of those working on site" at the Gold King Mine, (Complt. ¶ 123), and that ER *itself* described its task at the Gold King Mine as "procur[ing] and manag[ing] the reopening and ground support construction at the Upper Gold King Mine" as well as "conduct[ing] operations in oversight management of surface and underground work activities." (Complt. ¶ 68.) These allegations alone suffice to state a claim for operator liability under CERCLA. *See Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp.*, 976 F.2d 1338, 1341-42 & n.6 (9th Cir. 1992) (reversing district court's dismissal of operator liability claims where the defendant was hired to grade contaminated soil at a work site and alleged control over that "phase of [] development"); *Clean Harbors, Inc. v. CBS*

Corp., 875 F. Supp. 2d 1311, 1329 (D. Kan. 2012) (denying defendant's summary judgment motion on operator liability where parties disputed what role defendant played in "manag[ing], direct[ing], or conduct[ing] operations"); *Diamond X Ranch LLC v. Atlantic Richfield Co.*, 2016 WL 4498211, at *7-8 (D. Nev. Aug. 26, 2016) (denying motion to dismiss operator liability claims where the "gist" of the plaintiff's allegations was that the defendant "carried out maintenance activities including the removal of sediment containing hazardous substances . . . that resulted in the moving, spread, and release" of those substances); *BancorpSouth Bank v. Environ. Ops., Inc.*, 2011 WL 4815389, at *3 (E.D. Mo. 2011) (denying motion to dismiss operator liability claim where complaint "sufficiently allege[d] control" of landfill work site).

Demonstrating that operator liability is a fact-intensive inquiry ill-suited to a motion to dismiss, ER cites only a single case where a motion to dismiss an operator liability claim was granted. *See Ryland Grp., Inc. v. Payne Firm, Inc.*, 492 F. Supp. 2d 790 (S.D. Ohio 2005).[1] But *Ryland* has little in common with this case. There, a subcontractor was "retained to perform soil mixing" at a contaminated site using a large rototilling machine. *Id.* at 792. A supervisor "directed the depth to which [the subcontractor] was to rototill and controlled the area to be so treated with flags." *Id.* The court found that the pleadings demonstrated that the "activities on site were completely controlled and directed" by the supervisor. *Id.* Here, by contrast, the Complaint alleges

[1] ER incorrectly asserts that *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1284 (N.D. Iowa 1994), "dismiss[ed a] CERCLA claim" against a contractor who acted "at the direction of other parties." (*See* ER Brief at 9.) In fact, the *Interstate Power* court granted a *summary judgment* motion, but only after determining "the facts of th[e] case." 909 F. Supp. at 1289. The case is distinguishable on its facts as well. As in *Ryland*, the *Interstate Power* defendant was only retained to perform a discrete function at a work site: "certain demolition services." *Id.* at 1285. ER, by contrast, was deputized in 2014 to muster "all labor, material, equipment, and supplies necessary" for work at the Gold King Mine. (Complt. ¶ 68.) And while it was "undisputed that all of [the defendant's] actions were taken at the direction of other parties" in *Interstate Power*, here the Nation has alleged that ER had a management role at the site. *Compare Interstate Power*, 909 F. Supp. at 1289, *with* Complt. ¶ 68.

that ER "manage[d]" activities at the Gold King Mine, "select[ed] a subcontractor," and "conduct[ed] operations in oversight management" at the work site. (Complt. ¶ 68.) These allegations and others sufficiently plead that—unlike the subcontractor in *Ryland* who tilled where he was told—ER exercised control and management over a wide variety of activities at the Gold King Mine. (*See id.*)

Finally, while ER makes much of the Nation's unremarkable allegation that the Substitute OSC was left "in charge" while the Original OSC was on vacation, (*see* Complt. ¶ 79), there is no basis for reading those two words to mean that ER had no control over any operations at the Gold King Mine. Read plainly, the Complaint simply alleges that the Substitute OSC was filling in for the Original OSC "in the interim." *See id.* Of course, the very nature of a contracted relationship means that there is ultimately someone the contractor answers to; yet contractors commonly incur CERCLA liability. *See, e.g.*, *Kaiser Aluminum*, 976 F.3d at 1342.[2] The Complaint sufficiently alleges that ER had control over operations; nothing more is required.

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[2] ER also relies on the contents of three documents to argue that the Nation fails to allege operator liability: the Task Order; an "Action/Work Plan," submitted by ER in 2015, (*see* Complt. ¶ 72); and a document unmentioned in the Complaint, described by ER as an "April 11, 2013 Emergency and Rapid Response Services ("ERRS") IV contract" between ER and the EPA. The Task Order and Action/Work Plan support the Nation's allegations regarding ER's control over the disposal of hazardous substances at the Gold King Mine. (Dkt. 98, Ex. C ["Task Order"] at 5-6 (providing that ER would, among other things, "[p]rovide for appropriate removal of contamination" and "[p]rovide for appropriate disposal and transportation of all contaminated debris"); *id.*, Ex. D ["Action/Work Plan"] at 16 (providing that ER's "Response Manager" would "oversee the [Gold King Mine] project and ensure that all technical, regulatory, and safety requirements are met").)

The ERRS was not even mentioned in the Complaint, let alone central to it, and is thus not subject to consideration on this motion. *See Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (requiring that a document be "referred to in the complaint" and "central to the plaintiff's claim" to be considered on a motion to dismiss). ER argues that because the document apparently appears on a government website, the Court may consider it, but none of ER's caselaw supports this point. *See U.S. v. Iverson*, 818 F.3d 1015, 1022 (10th Cir. 2016) (concerning hearsay exceptions and noting only in passing that the FDIC website contains information about banks

B. The Complaint States A Claim For Arranger Liability

To be liable under CERCLA as an arranger, a party must satisfy three requirements. "First, the party must be a 'person' as defined in CERCLA. Second, the party must 'own' or 'possess' the hazardous substance at issue. Third, the party must, by contract, agreement, or otherwise, arrange for the transport or disposal of such hazardous substances." *Raytheon Constructors, Inc. v. Asarco Inc.*, 368 F.3d 1214, 1219 (10th Cir. 2003) (citing 42 U.S.C. § 9607(a)(3)).

ER argues that it cannot be an arranger for three reasons. First, it argues, the spill was an accident, and arranger liability can never attach to accidents. This is simply wrong; in fact all that is required is that an arranger "take[] intentional steps" to dispose of a substance. *Burlington N. and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 610-11 (2009) (noting that arranger liability is "fact intensive and case specific"). The Nation alleges a number of "intentional steps," including that ER began "excavating above the old adit" on August 5, 2015—an intentional step that led to disposal of a hazardous substance. (Complt. ¶¶ 8, 79-80, 91.) These allegations are sufficient to state a claim for arranger liability. *See, e.g., U.S. v. Wilmer*, 2013 WL 856513, at *6 (D. Colo. March 7, 2013) (denying summary judgment on the issue of arranger liability where "a genuine dispute of material fact remain[ed] as to . . . whether [a party] had the requisite intent to dispose of the materials within the meaning of CERCLA").

Second, ER argues that in order to be liable as an arranger, a defendant must arrange to have hazardous substances transported or disposed of *by someone else*. (*See* Dkt. 102 ("ER Brief")

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reliable enough for judicial notice); *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1213 (10th Cir. 2012) (taking notice only of the "existence" of certain online public filings, not their substantive contents); *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking judicial notice of online documents only insofar as they demonstrated that certain releases had actually occurred). ER cites no authority for the proposition that a court may take judicial notice of, *and then construe*, on a motion to dismiss, a 145-page document that is not mentioned in a complaint.

at 9-10.) This view is held by the First Circuit but is not widely shared, as ER acknowledges.[3] At any rate, the Complaint alleges that ER's role at the Gold King Mine included "select[ing] a subcontractor to mobilize all labor, material, equipment, and supplies necessary to perform" remediation, and that "contractors and subcontractors" both excavated the adit at the Gold King Mine on August 5. (Complt. ¶¶ 68, 80.) Accordingly, the Nation has alleged that ER arranged *with other parties* for the transport or disposal of waste "by contract, agreement, or otherwise." *See Raytheon*, 368 F.3d at 1219; Complt. ¶ 124 (alleging arranging "by contract or otherwise").

Finally, ER insists that it cannot be liable as an arranger because it did not control operations at the Gold King Mine. But as the Nation has demonstrated, the Complaint *does* allege that ER exercised control at the excavation site. *See, e.g., Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1525 (D. Colo. 1996) (denying motion to dismiss arranger liability claim where plaintiff alleged defendant should have known of leakage of spill and "controlled certain activities" at a work site); *Cal. Dept. of Toxic Substances Control v. Payless Cleaners, College Cleaners*, 368 F. Supp. 2d 1069, 1080-81 (E.D. Cal. 2005) (denying motion to dismiss arranger liability claim where plaintiff alleged that the defendant exercised "control over [a hazardous substance's] disposal" by hooking up dry cleaning machines, which dispersed the substance to a sewer line). ER identifies no case law to the contrary; it again cites to *Interstate Power*. But, as explained, that

[3] *Compare American Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004) (acknowledging that 42 U.S.C. § 9607(a)(3) "can be read two ways" and interpreting it to mean that "the disposal or treatment must be performed by another party or entity") *with Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1081-82 (9th Cir. 2006) (holding that an arranger may itself dispose of waste and incur arranger liability and noting that the First Circuit's approach leaves a "gaping and illogical hole in the statute's coverage" by permitting arrangers to dispose of waste themselves and avoid liability, particularly in light of "CERCLA's overwhelmingly remedial statutory scheme"). The Tenth Circuit has not taken up the question, but it has emphasized CERCLA's "broad, remedial purpose." *See Pub. Serv. Co. of Colorado v. Gates Rubber Co.*, 175 F.3d 1177, 1181 (10th Cir. 1999).

case disposed of arranger liability claims after determining facts at summary judgment and involved a situation where it was "undisputed" that the defendant acted solely at the direction of another party. *See Interstate Power*, 909 F. Supp. at 1287-89.

C. The Complaint States A Claim For Transporter Liability

The Complaint's allegations are also sufficient to state a claim for transporter liability, which arises whenever a party "accepts . . . any hazardous substances for transport . . . from which there is a release[.]" 42 U.S.C. § 9607(a). CERCLA defines "transport" as "the movement of a hazardous substance by any mode . . . ." 42 U.S.C. § 9601(26).

ER objects that in the Tenth Circuit, "transporter liability is predicated on site selection by the transporter." *See U.S. v. Hardage*, 985 F.2d 1427, 1435 (10th Cir. 1993). Here, the Complaint alleges that by recklessly boring into the portal of the Gold King Mine, ER "selected the [] Site for disposal" of the acid mine drainage. *See id.* ER "knew that, in the event of a blowout, highly contaminated water . . . at the Gold King Mine would make its way from Cement Creek down to the Animas and San Juan Rivers, crossing through the Navajo Reservation." (*See* Complt. ¶¶ 125, 158.) The Nation's transporter liability claim is therefore not subject to dismissal at this stage.

II. CERCLA Does Not Bar The Nation's Request For Injunctive Relief

ER next argues that under 42 U.S.C. § 9613(h), the mere listing of the Bonita Peak Mining District as a "Superfund site" deprives this court of jurisdiction over the Nation's request for abatement. (ER Brief at 11-12.)[4] Not so. While the EPA listed the Bonita Peak Mining District after the Nation filed its lawsuit, no remedy has been selected. *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) ("[T]he obvious meaning of [§ 9613(h)] is that *when a*

[4] ER asks the Court to take judicial notice of other activities it claims the EPA has undertaken, but as explained *supra* note 2, there is no support for the argument that any document available on a government website is automatically judicially noticeable. Thus, the Court should not consider such documents at this stage.

remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." (emphasis added) (quoting *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990))). And ER cites no case holding that the mere listing of a Superfund site by the EPA is sufficient to trigger section 9613(h), especially when the EPA is a defendant in the case.

Should the Court find that the mere listing of the Bonita Peak Mining District deprives it of jurisdiction over the Nation's request for abatement, the Court should strike only the abatement remedy without prejudice to the Nation's right to seek that relief in the future, once any EPA remedial action has been completed. *See* 42 U.S.C. § 9613(h); *General Electric*, 467 F.3d at 1250.[5]

III. CERCLA Does Not Preempt The Nation's State Law Claims

The Tenth Circuit has repeatedly recognized that "Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination." *E.g., Gen. Elec. Co.*, 467 F.3d at 1244. The Nation's state law claims are only preempted if "it is impossible for a private party to comply with both state and federal requirements, or [if] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing CERCLA. *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000) (*quoting English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). None of the Nation's state law claims rises to this exacting standard.

ER contends that the Nation's state law claims for negligence, gross negligence, trespass, and public and private nuisance conflict with CERCLA's natural resource restoration objectives. (ER Brief at 13-14.) ER is mistaken. As an initial matter, its argument is premature at the motion to dismiss stage because it attacks a potential *remedy* as opposed to the sufficiency of a cause of

[5] ER did not seek dismissal of the nuisance and trespass claims in their entirety, nor could it have. Section 113(h) could not deprive the Court of jurisdiction over those claims to the extent the Nation seeks other forms of relief under them, including damages, as it does here.

action. *See City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 353 (E.D.N.Y. 2007) (holding that a Rule 12(b)(6) "motion for failure to state a claim properly addresses the cause of action alleged, not the remedy sought"). Indeed, "because the preemption argument does not extend to [the Nation's] claims, but rather the relief that is sought, it is premature" on a motion to dismiss. *Reece v. AES Corp.*, 2014 WL 61242, at *10 (E.D. Okla. Jan. 8, 2014), *aff'd*, 638 F. App'x 755 (10th Cir. 2016); *see also Bernard v. Kansas Health Policy Auth.*, 2011 WL 768145, at *13 (D. Kan. Feb. 28, 2011) (finding it "premature to dismiss" on preemption grounds and noting that "the court [could] revisit this issue at a later date").

ER also overstates the holding of the only case it relies on, *New Mexico v. General Electric*. In that case, the State of New Mexico alleged state law claims for negligence and public nuisance to recover for damages to groundwater held in public trust. 467 F.3d at 1237. There was no dispute that New Mexico sought the equivalent of CERCLA natural resource damages ("NRD") by way of its state law causes of action. *E.g., id.* at 1244. Nor was there any dispute that New Mexico could properly seek NRD through state law causes of action. *Id.* at 1234. Instead, *General Electric* concerned New Mexico's attempt to recover in excess of $1 billion in NRD that it "earmarked for the State's general treasury fund" and *not* for restoring or replacing the contaminated groundwater. *Id*. at 1237. The Tenth Circuit held that such an award was impermissible because CERCLA provides that "[s]ums recovered by a State" for natural resource damages "shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State." *Id.* at 1234 (quoting 42 U.S.C. § 9607(f)(1)). But section 9607(f)'s restriction on how natural resource damages may be used applies, by its plain meaning, only to States and the federal government, not tribes. *See* 42 U.S.C. § 9607(f)(1). *General Electric*'s uncontroversial holding that, consistent with CERCLA's explicit statutory language, a *State* may

not "use an NRD recovery . . . for some purpose other than to restore, replace, or acquire the equivalent of" an injured natural resource, therefore has no bearing here. *See* 467 F.3d at 1248; 42 U.S.C. § 9607(f)(1).

Moreover, even if *General Electric*'s holding applied, it could not wholly preempt the Nation's state law claims in any event. First, any NRD award can be tailored to restoring and replacing the Nation's injured natural and cultural resources. And second, the Nation's tort claims also seek damages for harms unrelated to NRD, including, without limitation, significant consequential damages related to the health and well-being of the Navajo people, and damages due to the stigma associated with the spill.[6] Nothing in *General Electric* can be construed as barring state law claims seeking those damages, because CERCLA does not address them. *General Electric* therefore provides no basis for dismissal of the Nation's state tort law claims.

IV. ER Is Not Entitled To Dismissal Based On The Government Contractor Defense

A. ER Must Show That The Complaint Pleads Every Element Of The Defense

ER's motion to dismiss the Nation's claims pursuant to the government contractor defense ("GCD") is premature because "affirmative defenses must generally be pled in the defendant's answer, not argued on a motion to dismiss." *Benavidez v. Sandia Nat'l Labs.*, -- F. Supp. 3d. --, 2016 WL 3996151, at *13 (D.N.M. June 27, 2016). Indeed, an affirmative defense may serve as the basis for a motion to dismiss only when "the defense appears plainly on the face of the complaint itself." *Miller v. Shell Oil Co.*, 345 F.2d 891, 893 (10th Cir. 1965). ER therefore must demonstrate that the Complaint plainly pleads *every element* of the GCD. It cannot do so.

[6] ER asserts without authority that the Nation is "not entitled" in the Tenth Circuit to *state law tort* damages "such as stigma and loss of tax and business revenue." (ER Brief at 13.) ER is wrong. *See, e.g., Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 980 (D. Wyo. 1998); *City of Wichita, Kansas v. Trustees of APCO Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1101 (D. Kan. 2003).

B. The Nation Has Not Pled The Elements Of The Government Contractor Defense

The GCD is available only in limited circumstances. Three threshold requirements apply: first, the case must arise in an area concerning "uniquely federal interests"; second, a "significant conflict" must exist between an identifiable federal policy and the operation of state law; and third, the claim must be based on "a discretionary function" by the contractor or government agent. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 507 (1988); ER Brief at 14. If these requirements are met, three more apply: the United States must have approved "reasonably precise specifications" for a contractor's work, the contractor must have "conformed to those specifications," and the contractor must have warned the United States of any dangers known to the contractor but not to the government. *Id.* at 512. The defendant "bears the burden of proving each element of the government contractor defense." *Andrew v. Unisys Corp.*, 936 F. Supp. 821, 830 (W.D. Okla. 1996). ER—which cites not a single case granting a motion to dismiss based on the GCD—cannot meet that burden here, particularly not at this stage. *E.g., Winters v. Diamond Shamrock Chem. Co.*, 901 F. Supp. 1195, 1200 (E.D. Tex. 1995) ("The facts that establish the government contractor defense are questions for the jury.").[7]

1. This Action Did Not Arise In An Area Of Uniquely Federal Interests

In arguing that this lawsuit implicates a "uniquely federal interest," *see Boyle*, 487 U.S. at 504, ER asserts that the EPA's "alleged conduct arises from its performance of the ERRS Contract" and that the EPA had an "obligation to DRMS to re-open" the Gold King adit. (ER Brief at 15.) But the Complaint does not even refer to the ERRS. (*See supra* note 2.) Further, the Complaint

[7] ER's many citations to *Richland-Lexington Airport Dist. v. Atlas Props.*, 854 F. Supp. 400 (D.S.C. 1994), are of no help to it. That case actually demonstrates why ER's motion is premature here, as it granted a defendant's *summary judgment* motion based on the government contractor defense after considering what "the record reveal[ed]" and what "the evidence produced by [the defendant] showed." *Id.* at 423-24.

does not allege that the EPA had an obligation to DRMS to open the adit, only that DRMS asked the EPA to do so. (Complt. ¶ 67.) ER therefore has not met its burden to show how the Complaint pleads a uniquely federal interest on the EPA's part.

2. No Significant Conflict Exists Between ER's Obligations Under State Tort Law And The Federal Government's Interests

Even if a uniquely federal interest were implicated, however, the GCD is still unavailable to ER at this juncture because the Complaint does not allege that any federal interest significantly conflicts with the application, to ER, of state tort law. ER argues that "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." (ER Brief at 16.) But ER misconstrues the Complaint.

The Complaint alleges that ER was required to conduct its work in compliance with safety regulations, using "best management practices and engineering specifications," and that work was to be performed "under the conditions as described in the approved Work Plan." (Complt. ¶¶ 67, 143.) "[C]ontrary to the work plan," however, and contrary to instructions from the Original OSC, ER rushed headlong into the mine on August 5. (*Id.* ¶¶ 79-80.) Thus, this is the opposite of *Boyle*, in which a manufacturer designed helicopters to specifications required by government contract, but the asserted state-imposed duty of care (to design them a different way) was "precisely contrary" to the duty imposed by contract. *Boyle*, 487 U.S. at 509. Here, ER's state-imposed duty of care—to conduct its work reasonably in compliance with safety standards—was precisely in line with its contractual duties. (Complt. ¶¶ 67, 69, 143, 144(e)). Thus, no conflict exists.

3. The Complaint Does Not Plead The Discretionary Function Exception

The FTCA waives the United States' sovereign immunity so that the government can, subject to certain exceptions, be held liable in tort. One prominent carve-out is the "discretionary function exception," which bars "[a]ny claim . . . based upon the exercise or performance or the

failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government[.]" 28 U.S.C. § 2680(a). The exception applies if a two-part test, crystalized in *Berkovitz by Berkovitz v. U.S.*, 486 U.S. 531, 536-37 (1988), is met. That test asks first whether the action complained of was "a matter of choice for the acting [federal] employee." *Id.* at 536. Then, if so, the test asks whether the employee's judgment "is of the kind that the discretionary function exception was designed to shield," *i.e.*, those judgments "based on considerations of public policy." *Id.* at 536-37. Only if both elements of this test are met is the government shielded from tort liability.

Here, neither element of the discretionary function exception test "appears plainly" in the Complaint. *See Miller*, 345 F.2d at 893. *First*, courts have long recognized that "the government's voluntarily assumed contractual obligations can impose nondiscretionary duties on government employees," so as to preclude the application of the discretionary function exception. *Bell v. U.S.*, 127 F.3d 1226, 1229 (10th Cir. 1997) (reversing a district court's grant of a motion to dismiss based on the discretionary function exception because the government allowed a contractor to leave a pipeline in place which, pursuant to the contract, should have been removed or buried); *Routh v. U.S.*, 941 F.2d 853, 856 (9th Cir. 1991) ("[D]iscretion may be removed if the government incorporates specific safety standards in a contract which imposes duties on the government's agent.").[8] Here, the Complaint pleads that agreements between the EPA and ER required

[8] The discretionary function cases cited by ER are distinguishable on this point, as they arise not from situations where the government was contractually obligated to abide by particular safety standards, but instead from situations in which government employees balanced safety against competing policy objectives or acted pursuant to non-mandatory safety requirements. *See, e.g.*, *U.S. Fid. & Guar. Co. v. U.S.*, 837 F.2d 116, 122-23 (3d Cir. 1988) (government released toxic waste at a time at odds with a nonbinding recommendation but in pursuit of other policy objectives); *Spillway Marina, Inc. v. U.S.*, 445 F.2d 876, 878 (10th Cir. 1971) (government operated dam not pursuant to contract); *Johnson v. U.S. Dep't of Interior*, 949 F.2d 332, 338 (10th

compliance with particular safety regulations and standards and that "those conducting the work [at the Gold King Mine] were to use best management practice and engineering specifications." (Complt. ¶¶ 66-67, 69.) But in fact, the EPA and ER's actions in connection with the spill "violated applicable safety and other industry standards for conducting activities." (*Id.* ¶ 94.).[9] The EPA did not have the discretion to violate safety standards, but, as pled, it—and ER—did so anyway. *See Berkovitz*, 486 U.S. at 536. The first prong of the test is therefore not met.

Second, even if the EPA or ER exercised discretion, it was not the kind of discretion the discretionary function exception was "designed to shield." *See id*. In particular, the Nation alleges that the EPA and ER negligently disregarded safety protocols and best practices and bored into the mine in an unsafe manner. (Complt. ¶¶ 67, 69, 75-82; 91-94, 143-144 (describing violations of safety standards and regulations and alleging that the opening of the Gold King Mine in violation of safety requirements "amounted to reckless, careless, and otherwise negligent action that was not driven by policy considerations").) "[M]atters of scientific and professional judgment—particularly judgments involving safety—are rarely considered to be susceptible to social, economic, or political policy." *See Myers v. U.S.*, 652 F.3d 1021, 1032 (9th Cir. 2011). ER conjures up "numerous policy considerations" it claims "EPA had to weigh . . . when deciding what to do at Gold King." (ER Brief at 21.) But even if these offerings were not outside the pleadings (they are), they entirely miss the point.

Cir. 1991) (noting that rangers conducting rescue efforts made "individual" decisions based on "balancing . . . safety objectives against [] practical considerations"); *Elder v. U.S.*, 312 F.3d 1172, 1178 (10th Cir. 2002) (describing relevant safety manuals as defining only "general policy goals"); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1177 (10th Cir. 2008) (holding that non-mandatory standards in a "field guide" did not divest the government of discretion).

[9] The Nation also alleges that the EPA and ER "blatantly disregarded explicit instructions" from the Original OSC—instructions that, according to the Complaint, removed the crew's discretion with regard to the project. (*See* Complt. ¶ 79.)

The Nation is not only alleging that the EPA and ER should have chosen a different course at Gold King, but also that *once they selected* that course, they failed to act with due care. The discretionary function exception can protect only the government's *choice* of an action that is guided by policy considerations, not its negligent *execution* of that action (which here caused a massive release), unguided by policy judgments. *See Indian Towing v. U.S.*, 350 U.S. 61, 69 (1955) (holding the government liable for negligence in operating a lighthouse because although it was not obligated to build the lighthouse, once it did it was "obligated to use due care" to keep the light turned on); *Smith v. U.S.*, 546 F.2d 872, 877 (10th Cir. 1976) (although the government's decision to designate certain Yellowstone areas as "undeveloped" may have been influenced by policy considerations, its decision not to post warning signs in those areas was not); *Coffey v. U.S.*, 906 F. Supp. 2d 1114, 1162 (D.N.M. 2012) (holding that the FTCA does not permit the government to "ignore basic tort duties in performing" even activities that were selected with policy considerations in mind); *see also Myers*, 652 F.3d at 1032 ("[I]mplementation of a course of action is not a discretionary function."). Moreover, ER cannot argue that the failure to have an emergency plan in place, or failure to warn downstream communities, served any policy ends. *See Boyd v. U.S. ex rel U.S. Army, Corps of Engineers*, 881 F.2d 895, 898 (10th Cir. 1989) ("An alleged failure to warn swimmers of dangerous conditions in a popular swimming area does not implicate any social, economic, or political policy judgments[.]"); *Marlys Bear Med. v. U.S. ex rel. Sec'y of Dep't of Interior*, 241 F.3d 1208, 1216-17 (9th Cir. 2001) ("[A] failure to adhere to accepted professional standards is not susceptible to policy analysis.").[10] Thus, regardless of whether the

[10] Here again, ER's caselaw is not on point, as it pertains to situations where the government's deliberate choice of a plan was being challenged, not its negligent, non-policy-oriented execution of a plan. *See, e.g.*, *Spillway Marina*, 445 F.2d at 878; *Elder*, 312 F.3d at 1182-83; *Daigle v. Shell Oil Co.*, 972 F.2d 1427, 1542 (10th Cir. 1992). *Daigle* is particularly instructive. There, the

plan at the mine on August 5 was guided by policy considerations (it was not), the Nation properly alleges that the botching of that plan was not so guided. (*E.g.,* Complt. ¶¶ 78-82.) ER cannot, therefore, rely on the discretionary function exception, particularly before discovery.

4. The Complaint Does Not Allege That ER Complied With Reasonably Precise Specifications

Finally, even if it had met the threshold requirements of identifying a federal interest, a conflict, and a discretionary function, ER may only invoke the GCD if the Complaint alleges that (1) the EPA gave ER "reasonably precise specifications," (2) ER's performance "conformed to those specifications," and (3) ER warned the EPA of any "dangers" associated with its proposed plan that were known to ER but not the EPA. *See Boyle*, 487 U.S. at 512. The Complaint plainly does not allege these elements. [11]

ER cannot identify on the face of the Complaint any reasonably precise specification that the EPA gave to ER. Its best effort is to point to paragraphs 67 and 79, but neither is sufficient. Paragraph 67 alleges only that work would be "conducted by qualified contractors" in compliance with various safety rules and a yet-to-be-approved work plan. That does not even begin to

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plaintiffs made only "general allegations of deficient planning and execution" of an Army clean-up project which, the Tenth Circuit said, amounted to "an assertion that the Army could have done a better job in planning for and attaining . . . public health and safety." *Daigle*, 972 F.2d at 1542. Here, by contrast, the Nation has alleged that the EPA and ER recklessly executed the Gold King Mine excavation, causing the blowout. ER cannot rely on cases like *Daigle*, which consider whether the government acted with discretion in *designing* a plan and then executing that plan, to cast its bungling of the Gold King work as somehow discretionary.

For the same reasons (and also because it was at summary judgment), *White v. U.S., Dept. of Interior*, 656 F. Supp. 25 (M.D. Pa. 1986), is inapposite. In that case, the plaintiffs' theories of liability also focused on the *planning* of the project; namely, the government failed to disclose the hazards of the project, failed to mandate and enforce the contractor's compliance with safety regulations, and chose to mandate complete removal of a concrete cap. *Id.* at 28-29, 35 ("Essentially, plaintiffs charge negligent planning of a federal government project.").

[11] Here again, the *Richland-Lexington* case on which ER so heavily relies, is distinguishable. *See* 854 F. Supp. at 424 (finding that the contractor had "conformed to the EPA's directives" and "merely implemented the remedy that the EPA had previously determined was appropriate").

approach the "reasonably precise" bar. *See In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 461 (5th Cir. 2010) (holding that reasonably precise specifications require governmental discretion over "significant details and all critical design choices"). And while Paragraph 79 alleges that the EPA gave ER "explicit instructions," this allegation is of no help to ER, since paragraph 79 goes on to allege that ER "blatantly disregarded" these instructions. ER cannot establish that its performance conformed to the EPA's specifications, as required by *Boyle*.[12]

C. The Weight Of Authority Limits The Government Contractor Defense To Military Procurement Contracts

The GCD does not apply here for two additional reasons. *First*, properly construed, the defense is limited to military contractors. The Supreme Court held in *Boyle* that the GCD displaces state laws that would otherwise impose tort liability on government contractors who manufacture U.S. military equipment. *Boyle*, 487 U.S. at 512. *Boyle*—a case about helicopter hatches—relied on policy considerations unique to the military. *See In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 810 (9th Cir. 1992) (explaining that cabining *Boyle* to military cases is consistent with its rationales). A number of courts have held that the defense is only available in the military context. *See, e.g.*, *id.* at 811-13; *In re Chateuagay Corp.*, 146 B.R. 339, 348 (S.D.N.Y. 1992). *But see, e.g.*, *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120-22 (3d Cir. 1993).[13] Given *Boyle*'s stated rationales, this Court should not expand the reach of the GCD.

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[12] ER encourages the Court to infer from its disregard for the Original OSC's explicit instructions that it must have received newer instructions from the Substitute OSC, with which it faithfully complied. (ER Brief at 8.) But the Nation merely alleged that "excavation began" in a manner inconsistent with the Original OSC's instructions. (Complt. ¶¶ 79-80.) The inference ER seeks, even if it were reasonable (it is not), would violate the requirement that all elements of an affirmative defense "appear plainly" on the face of a complaint for dismissal on the pleadings. *See Miller*, 345 F.2d at 893.

[13] The Tenth Circuit has described the defense in military terms. *See Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 n.2 (10th Cir. 1990) ("The government contractor defense allows a supplier of weapons to the government to escape liability [in certain circumstances]."). And only

Second, the GCD is independently unavailable to ER because it properly applies only to procurement contracts, not service or performance contracts. *See In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1000 (9th Cir. 2011) (defense applies to "claims challenging the physical design of a military product" and "the process by which such equipment is produced"); *Gaona v. US Invest. Servs. Prof. Servs. Div., Inc.*, 2013 WL 1748361, at *4 (D. Ariz. 2013) (holding that the GCD did not apply to a service contract).[14] The Nation is aware of no court in the Tenth Circuit applying the GCD to a service contract (such as ER's), and this Court should not be the first, particularly not on a 12(b)(6) motion.

V. The Nation's Joint And Several Liability And Punitive Damages Claims Are Proper

ER asserts that Colorado law applies because "Colorado is the 'point source' of the alleged harm," (ER Brief at 23), without any analysis of the governing choice-of-law rules. ER also argues that the Nation's claims for joint and several liability and punitive damages should be stricken. ER is wrong on all counts.

A federal district court "exercis[ing] supplemental jurisdiction over state law claims in a federal question lawsuit" applies "the substantive law, including choice of law rules, of the forum state." *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999) (internal citations omitted). As the forum state, New Mexico's choice-of-law rules apply here.

"The first step in a New Mexico choice-of-law analysis is to characterize the claim by 'area of substantive law—e.g., torts, contracts, domestic relations—to which the law of the forum

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two district courts in this Circuit—both addressing tort claims related to a letter-sorting machine manufactured for the U.S. Postal Service, and both at summary judgment—have determined that the defense applies to non-military contractors. *See Andrew*, 936 F. Supp. 821, 830 (W.D. Okla. 1996); *Wisner v. Unisys Corp.*, 917 F. Supp. 1501, 1509 (D. Kan. 1996).

[14] This principle too is in dispute in the federal courts. *See, e.g.*, *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1344 (11th Cir. 2003). But here again *Boyle* is instructive and its rule is limited to equipment. *See Boyle*, 487 U.S. at 512.

assigns a particular claim or issue.'" *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 663 F. Supp. 2d 1138, 1150 (D.N.M. 2009) (citing *Terrazas v. Garland & Loman, Inc.*, 140 N.M. 293, 296 (2006)). If the claim sounds in tort, "New Mexico courts follow the doctrine of *lex loci delicti commissi*—that is, the substantive rights of the parties are governed by the law of the place where the wrong occurred." *Terrazas*, 140 N.M. at 296. The place of the wrong is "the state where the last event necessary to make an actor liable for an alleged tort takes place." *Guidance Endodontics*, 663 F. Supp. 2d at 1151 (citing *Zamora v. Smalley*, 68 N.M. 45, 47 (1961)). "Where the elements of the underlying claim include harm, the place of the wrong is the place where the harm occurred." *Hunt v. N. Carolina Logistics, Inc.*, 2016 WL 4035342, at *7 (D.N.M. June 23, 2016).

In this case, the harm to the Nation occurred in New Mexico, where the Nation suffered the effects of the spill. (*E.g.*, Complt. ¶¶ 10-13, 97-98.) Thus, New Mexico law applies.[15]

With regard to joint and several liability, ER is incorrect in asserting that "New Mexico has . . . abolished the doctrine of joint and several liability." (*See* ER Brief at 23 n.6.) New Mexico has carved out exceptions in which the "doctrine imposing joint and several liability shall apply." N.M. Stat. Ann. § 41-3A-1[C]. Among those exceptions are situations "having a sound basis in public policy," *id.*, including inherently dangerous activities. *See, e.g., Enriquez v. Cochran*, 126 N.M. 196, 222 (Ct. App. 1998) (affirming trial court ruling that "felling large dead trees such as the one that injured Plaintiff is an inherently dangerous activity"); *Flowers v. Lea Power Partners,*

[15] ER's cases are inapposite and stand only for the proposition that the Clean Water Act preempts the common law of an affected State to the extent that the law seeks to impose liability on a point source in another State. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494-500 (1987); *see Arkansas v. Oklahoma*, 503 U.S. 91, 100-01 (1992) (recognizing the *Ouellette* Court's holding and limiting its reasoning to state-issued permits). Here, ER is not arguing that CWA preempts the Nation's tort claims, nor could it. Moreover, ER's statement that Colorado is the "'point source' of the alleged harm" makes little sense. A "point source" is a "discernible, confined and discrete conveyance," not an entire State. 33 U.S.C. § 1362(14).

LLC, 2012 WL 2055049, at *6 (D.N.M. Apr. 17, 2012) (finding that use of a 20-foot ladder at a construction site is inherently dangerous and denying motion for summary judgment on punitive damages). The determination of whether a particular activity is inherently dangerous is "highly fact specific" and must be conducted on a "case-by-case basis." *Enriquez*, 126 N.M. at 222.

Here, the facts as alleged plainly suggest that the activities associated with the work at Gold King Mine and the blowout are inherently dangerous, (*e.g.,* Complt. ¶¶ 1-4, 7-8, 80-81), and ER has not even attempted to argue otherwise.

Finally, ER's argument under Colorado law that punitive damages are impermissible in initial pleadings is inapplicable because, as discussed, New Mexico law applies here.[16] Accordingly, ER's motion to strike fails.

CONCLUSION

For the reasons stated, the Nation respectfully requests that the Court deny ER's motion to dismiss and motion to strike.[17]

[16] Notably, under New Mexico law, "punitive damages are often awarded when the activity at issue is inherently or highly dangerous, and the defendant exhibits indifference to safety measures designed to protect persons engaged in the activity." *Flowers*, 2012 WL 2055049, at *6; Complt. ¶¶ 67-69, 79-80, 94, 116, 144, 150; *see Enriquez*, 126 N.M. at 227 ("As the risk increases, conduct that amounts to a breach of duty is more likely to demonstrate a culpable mental state." (internal citations omitted)).

[17] To the extent the Court dismisses any of the Nation's claims, the Nation requests leave to amend. *See Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1189 (10th Cir. 2012) (courts should freely give leave to amend unless amendment would be futile). ER's reliance on *Las Vegas Ice & Cold Storage Co. v. Far W. Bank* for the proposition that the Nation should be denied leave to amend is inapposite, as it was decided based largely on "untimeliness." *See* 893 F.2d 1182, 1185 (10th Cir. 1990) (plaintiff failed to assert its punitive damages claim until a year-and-a-half after the complaint was filed, nine months after partial summary judgment was entered, and only a few months before the case was scheduled for trial on the sole remaining issue of good faith). Here, the case is still in an early stage, no discovery has been taken, and amendment would not be futile.

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The undersigned does hereby certify that a true and correct copy of the foregoing was served upon the following via CM/ECF Electronic Transmission on January 11, 2017.

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