UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re: Gold King Mine Release in San Juan County, Colorado on August 5, 2015 *This Document Relates to:* *No. 18-cv-00744-WJ*	No. 1:18-md-02824-WJ

DEFENDANTS SUNNYSIDE GOLD CORPORATION, KINROSS GOLD U.S.A. INC., AND KINROSS GOLD CORPORATION'S COMBINED MOTION TO DISMISS THE ALLEN PLAINTIFFS' COMPLAINT AND SUPPORTING MEMORANDUM

I. INTRODUCTION:

Pursuant to the Special Master's October 1, 2018 Order Regarding the Allen Plaintiffs' Unopposed Motion for a Status Conference (Doc. 87), Defendants Sunnyside Gold Corporation ("SGC"), Kinross Gold U.S.A., Inc. ("KGUSA"), and Kinross Gold Corporation ("KGC") move to dismiss the Allen Plaintiffs' claims against each of them.[1]

Like the complaints that have preceded it in this MDL action, the Allen Complaint arises from the August 5, 2015 Blowout at the Gold King Mine, when EPA and its contractors released over three million gallons of mine-impacted water into a tributary of the Animas River above Silverton, Colorado. Once again, SGC, KGUSA, and KGC find themselves in this case not

[1] The Allen Plaintiffs initially allege that "Plaintiffs are members of the Navajo Nation and residents of New Mexico, *Colorado*, Arizona and Utah." Compl. at ¶ 1 (emphasis added). They then allege that this matter "is between citizens of different states given the fact that no Plaintiffs are citizens of the same state as any Defendants." *Id*. at ¶ 15. They proceed to allege that "Andy Begay is a member of the Navajo Nation residing in *Cortez, Colorado*." *Id*. at ¶ 32 (emphasis added). The Complaint then identifies defendant Gold King Mines Corporation as a "Colorado Corporation with its principal office" in Silverton, Colorado, defendant Salem Minerals, Inc. as a "Colorado Corporation with headquarters" in Golden, Colorado, and defendant SGC as a Delaware Corporation with its principal office in Denver, Colorado. *Id*. at ¶¶ 300, 302, 306. Based on the allegations in the Complaint, complete diversity is lacking.

because they had anything to do with the EPA Blowout or the Gold King Mine, but because SGC successfully reclaimed the nearby Sunnyside Mine. SGC operated the Sunnyside Mine from 1986 until 1991, and thereafter legally closed it in accordance with its permits and the law. Although the Sunnyside Mine was fully closed by 2003, the Plaintiffs nevertheless allege that SGC bears responsibility for the Gold King Blowout that EPA and its contractors caused in 2015.

Like the State of New Mexico and the Navajo Nation, the plaintiffs in this case contend that the 2015 Blowout damaged their property in New Mexico. SGC's closure of the Sunnyside Mine was designed and engineered to capture and retain mine-impacted water in Colorado and thereby improve water quality. SGC's closure of the Sunnyside Mine was done under the supervision of the State of Colorado and in accordance with a Consent Decree entered and enforced by a Colorado court.[2] SGC fully complied with the Consent Decree and lived up to its obligations to the State of Colorado and its regulatory agencies. Plaintiffs nevertheless claim that SGC somehow bears responsibility for alleged damage to Plaintiffs' New Mexico property, which occurred years later when EPA and its contractors caused the 2015 Gold King Blowout.

Like the plaintiffs in the related cases, the Plaintiffs here have also joined KGUSA and KGC as defendants in this case. Like SGC, neither KGUSA nor KGC had anything to do with the Gold King Blowout. Additionally, neither KGUSA nor KGC had anything to do with SGC's

[2] Consent Decree and Orders, *Sunnyside Gold Corporation v. Colorado WQCD* (D. Colo. May 8, 1995) (Case No. 94 CV 5459), Doc 42-1 (hereinafter "Consent Decree"). The Court may consider the Consent Decree in addressing a Rule 12 motion, without converting it to one for summary judgment, because the document is incorporated by reference in the Complaint. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In addition, the Consent Decree constitutes a document of which the Court may take judicial notice. *Id.* Doc 42-1 includes the Consent Decree, petitions for its amendment, orders granting those petitions, and the Notice of Termination of the Court's jurisdiction. Lengthy attachments are not included.

closure and reclamation of the Sunnyside Mine. The Plaintiffs claim that KGUSA and KGC belong in this case because they indirectly own and somehow control SGC, but in fact, the relationships are attenuated at best. KGC owns stock in the corporation that owns KGUSA, and since 2003, KGUSA has owned the outstanding shares in the corporation that owns SGC. Before 2003, however, neither KGUSA nor KGC had any interest in SGC nor in any entity that owned or was in any way affiliated with SGC. Obviously, neither KGUSA nor KGC played any role, directly or indirectly, in the operation of the Sunnyside Mine, the closure of the Sunnyside Mine, or the design and installation of bulkheads to isolate the interior workings of the Sunnyside Mine and prevent water flow from the interior workings to the Animas River.

The plaintiffs claim that their property was damaged by the 2015 Gold King Blowout. Neither SGC, KGUSA, nor KGC has ever owned any interest in the Gold King Mine, and neither SGC, KGUSA, nor KGC did anything to cause the 2015 Gold King Blowout. The Plaintiffs allege that a connection somehow exists between SGC's reclamation and closure of the Sunnyside Mine and the Blowout, but in doing so they ignore the fact that SGC closed the Sunnyside Mine years before the Blowout. Similarly, they ignore the fact that the Sunnyside Mine is in Colorado, it was closed and reclaimed entirely within Colorado, all in accordance with a plan that was designed and engineered to capture and retain mine water in Colorado. They also ignore the fact that SGC closed and reclaimed the Sunnyside Mine under the direct supervision of the state of Colorado, a Colorado court, and Colorado regulatory agencies. Most importantly, Plaintiffs ignore the fact that EPA and its contractors caused the 2015 Gold King Blowout, and EPA has admitted as much.

The activities of EPA and its contractors were the only possible cause of any injuries the Plaintiffs may have suffered. The Plaintiffs have alleged nothing directly connecting the

Blowout to SGC's closure of the Sunnyside Mine, and they have alleged nothing that suggests that either SGC, KGUSA, or KGC is subject to jurisdiction in New Mexico. They have not explained how SGC "purposefully directed" its activities toward New Mexico when SGC captured and retained mine water in Colorado. They have failed to explain how KGUSA directed any activity toward New Mexico merely by acquiring the entity that owns SGC, or how KGC directed any activity toward New Mexico merely by owning the entity that owns KGUSA.

Pursuant to Federal Rule of Civil Procedure 12(b)(2), (6), (7), SGC, KGUSA, and KGC, collectively the "Mining Defendants,"[3] respectfully urge the Court to dismiss all claims asserted against them because:

A. the Courts of New Mexico lack personal jurisdiction over the Mining Defendants;

B. the Clean Water Act preempts the Plaintiffs' claims against the Mining Defendants;

C. the State of Colorado is a required party to this lawsuit but cannot be joined; and

D. punitive damages are not available as against the Mining Defendants based on the allegations in the Plaintiffs' Complaint.

II. BACKGROUND ALLEGATIONS AND FACTS:

A. Plaintiffs' Allegations:

This litigation arises out of EPA's August 5, 2015 Gold King Blowout. According to the Plaintiffs' Complaint:

> On the morning of August 5, 2015, the Defendant United States Environmental Protection Agency ("EPA") and its contractors caused a blowout of the Gold King Mine while excavating it….EPA has conceded it is responsible for the spill and its impacts.

[3] As separate and distinct legal entities, SGC, KGUSA, and KGC all have unique jurisdictional and substantive defenses to the claims asserted against them. Where the defenses overlap, this memorandum combines the arguments. Where the positions are distinct, this memorandum makes that distinction.

Compl. at ¶¶ 2, 4. The Plaintiffs continue, "The intentional actions of EPA and the Contractor Defendants caused a breach in the adit, resulting in the blowout." *Id*. at ¶ 351.

The Plaintiffs do not allege that any of the Mining Defendants had anything to do with the events of August 5, 2015. They do allege that SGC "is a Delaware corporation with its principle office" in Denver, Colorado and that SGC "owns the Sunnyside Mine and other properties near Silverton." *Id*. at ¶ 306. They acknowledge that SGC closed and reclaimed the Sunnyside Mine years before the Blowout and did so in accordance with the Consent Decree:

> "In 1991, Defendant Sunnyside Gold owned the Sunnyside Mine and closed it, operating a treatment facility for its contaminated wastewater."
>
> In 1996, SGC "signed a consent decree with the Colorado Department of [Public] Health and Environment purportedly allowing it to cease treating contaminated wastewater if it would undertake reclamation of other acid sources in the area."
>
> As part of the Consent Decree, SGC "installed hydraulic bulkheads in the American Tunnel and other locations" and "the bulkheads blocked the drainage from the American Tunnel and reduced the discharge there, but caused acid drainage to flood the Sunnyside Mine."

Id. at ¶¶ 310-311.

With respect to KGUSA, Plaintiffs allege that KGUSA "is a Nevada corporation with its principal office" in Denver, that KGUSA is "a wholly owned subsidiary of KGC," that KGUSA "directly owns Defendant Sunnyside Gold," and that KGUSA "conducted business and had a registered agent for service of process in New Mexico." *Id*. at ¶ 305.

Regarding KGC, Plaintiffs allege that KGC "is a Canadian corporation with its principal office" in Toronto, and that KGC "currently owns the Sunnyside Mine and neighboring properties near Silverton, Colorado through its subsidiaries." *Id*. at ¶ 304. The Plaintiffs acknowledge that KGC did not acquire any interest in SGC or its assets, including the Sunnyside Mine, until 2003. *Id*. at ¶ 314. The allegation that KGC "controlled and directed Sunnyside

Gold's activities at the Sunnyside Mine" lacks any supporting facts and is based only "upon information and belief." *Id*. at ¶ 314.

B. Jurisdictional Facts:

Notwithstanding the Plaintiffs' allegations, the following facts are established by the declarations on file with the Court:

1. SGC: SGC is a Delaware corporation with its principal place of business in Colorado. SGC does not do business in New Mexico, is not licensed to do business in New Mexico, does not have a registered agent in New Mexico, and does not own, lease, or maintain any property in New Mexico. SGC has no employees in New Mexico. Decl. of Kevin Roach, Doc. 42-2 at ¶¶ 6-8. SGC has never availed itself of the privilege of doing business in New Mexico. This suit does not arise out of or relate to SGC activities in New Mexico because there have been none. *Id.*

2. KGUSA and KGC: All of SGC's shares are owned by Echo Bay, Inc., a Delaware Corporation. Echo Bay, Inc. in turn, is a wholly-owned subsidiary of KGUSA, which is a wholly-owned subsidiary of Bema Gold (U.S.) Inc., a Nevada Corporation, which in turn is a wholly-owned subsidiary of KGC. Decl. of Martin Litt, Doc. 42-3 at ¶ 10; Decl. of Kathleen Grandy, Doc. 42-4 at ¶ 8. KGUSA acquired the Echo Bay, Inc. shares in 2003. KGUSA did not own any interest in Echo Bay, Inc. or SGC before 2003. Decl. of Martin Litt, Doc. 42-2 at ¶ 11.

a. KGUSA: KGUSA is a Nevada corporation with its principal place of business in Colorado. KGUSA does not do business in New Mexico, and is not licensed to do business in New Mexico. *Id.* at ¶ 8. KGUSA does not own, lease or maintain any property in New Mexico. *Id.* KGUSA had a registered agent in New Mexico for a short time beginning and ending in 1999, four years before acquiring ownership of SGC's parent, but did not conduct,

does not conduct, and has never conducted, any business in New Mexico. *Id.* KGUSA has no employees in New Mexico. *Id*. This suit does not arise out of or relate to KGUSA activities in New Mexico because, other than having a New Mexico registered agent in 1999, there have been none.

b. KGC: KGC is a Canadian corporation, and its principal place of business is in Toronto, Canada. KGC does not do business in New Mexico, is not licensed to do business in New Mexico, does not have a registered agent in New Mexico, and does not own, lease or maintain any property in New Mexico. KGC has no employees in New Mexico and has had no employees in New Mexico at any time related to the claims in these cases. Decl. of Kathleen Grandy, Doc. 42-4 at ¶¶ 5, 6. KGC has never availed itself of the privilege of doing business in New Mexico. This suit does not arise out of or relate to KGC activities in New Mexico because there have been none.

C. The Consent Decree:

The Plaintiffs complain about various SGC activities, but sidestep the fact that those activities were undertaken *in Colorado*, pursuant to *Colorado* law and in accordance with specific *Colorado* directives issued through *Colorado* courts and *Colorado* regulatory agencies. SGC acted in compliance with the Consent Decree, which was entered and approved by a Colorado state District Court. The Plaintiffs essentially allege that SGC, KGUSA, and KGC contributed to EPA's Blowout by failing to violate the Consent Decree and SGC's reclamation obligations reflected therein.

The Consent Decree is critical to this case. In it, a Colorado Court acknowledged that SGC held two Colorado discharge permits and numerous storm-water permits. Doc. 42-1 at 2-4. The Colorado Mined Land Reclamation Board adopted and approved a reclamation plan that

required SGC to construct several engineered, concrete bulkheads, including the specific bulkheads about which the Plaintiffs now complain. *Id.* at 4. An initial bulkhead was installed at the SGC property line in the American Tunnel. *Id.* at 13. Two additional bulkheads were installed down-gradient. *Id.* at 45, 49. The Consent Decree further noted that the Colorado Division of Minerals and Geology had concluded that "[H]ydraulic seals [bulkheads] offer the best alternative for final mine site reclamation" and "the physical setting of the Sunnyside Mine appeared to be ideal for a hydraulic sealing scheme." *Id.* at 5.

All parties to the Consent Decree, including the State of Colorado, specifically contemplated that "installation of these bulkhead seals will impound water behind the bulkheads, eventually flooding the [Sunnyside] Mine, and at some time subsequent to initial Mine flooding, water, which is now discharged through the American Tunnel and Terry Tunnel portals pursuant to the CDPS Permits, may flow through underground fractures and fault systems which may form seeps and springs which discharge into surface waters." *Id.* at 6. All parties envisioned bulkheading restoring the region's natural hydrology. The State of Colorado then covenanted "not to sue or to take administrative action against SGC for seeps or springs which may emerge or increase in the Upper Animas River or Cement Creek drainages following installation of bulkhead seals in the American or Terry Tunnels, during the terms of this Consent Decree *and thereafter*." *Id*. at 30 (emphasis added). The parties agreed that the Consent Decree would be governed by the laws of the State of Colorado and interpreted consistently therewith. *Id.* at 33. Finally, the Court "ordered, adjudged and decreed . . . that the settlement embodied in this Consent Decree is lawful under the Act, is consistent with the purposes of the Act, and *is intended to protect the waters of the State of Colorado*." *Id.* at 8 (emphasis added). SGC timely performed all of its obligations under the Consent Decree, and in 2003 the Colorado Water

Control Division notified the Court that there had been "a successful permit termination assessment, pursuant to paragraph 14 of the Consent Decree, as well as termination of permits and Agreement Completion." *Id.* at 54.

Thus, everything the Plaintiffs accuse SGC of doing was ordered by the Consent Decree, was carried out under the oversight and control of the State of Colorado, and was done "to protect the waters of the State of Colorado."

III. ARGUMENT:

The Mining Defendants bring this motion under the provisions of Federal Rule of Civil Procedure 12(b) and various legal standards apply to such a motion. As this Court has recognized, "[a] motion to dismiss is an appropriate procedural vehicle for resolving personal jurisdiction and venue issues." *See* Fed. R. Civ. P. 12(b)(2) & (3). *Thistlethwaite v. Elements Behavioral Health, Inc.*, 2014 U.S.Dist. LEXIS 187476 (D.N.M. 2014). Affidavits, declarations and similar evidentiary matter may be presented and are freely considered on a motion attacking jurisdiction. *Id.*, citing *Sunwest Silver, Inc. v. International Connection, Inc.*, 4 F.Supp. 2d 1284, 1285 (D.N.M. 1998); *Jones v. 3M Co.*, 107 F.R.D. 202, 204 (D.N.M. 1984). To overcome a motion to dismiss, a plaintiff must make a prima facie showing of jurisdiction and the allegations in a complaint need only be taken as true "to the extent they are uncontroverted by the defendant's affidavits." *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995) (quoting *Fed. Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992)); *see also Old Republic Insurance Company v. Continental Motors, Inc.*, 877 F.3d 895, 900 (10th Cir. 2017).

In addition, "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement

to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation omitted). "[T]he mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for these claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original). Although the Court must assume the truth of the properly alleged, or "well-pleaded" facts in a complaint, the Court has no obligation to accept conclusory allegations as true. *See Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009).

A. This Court lacks personal jurisdiction over each Mining Defendant.

The Fourteenth Amendment's Due Process Clause limits a court's authority over a nonresident defendant unless there are "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation omitted)). As the Supreme Court recently confirmed, "[T]he Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere." *BNSF R. Co. v. Tyrrell*, 137 S. Ct. 1549, 1554 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014)). "Due process requires both that the defendant 'purposefully established minimum contacts within the forum State' and that the 'assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Old Republic Ins. Co.*, 877 F.3d at 903 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (internal citations omitted)).

Federal law recognizes two kinds of personal jurisdiction: general or all-purpose jurisdiction; and specific or case-linked jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). In the instant cases, no allegation of general jurisdiction is made against any Mining Defendant, and, accordingly, only specific jurisdiction is at issue. Specific jurisdiction is jurisdiction over a specific claim based on the defendant's contacts with the forum that are closely connected to the claim itself or which gave rise to the claim. *Id.*

"[S]pecific personal jurisdiction requires (1) minimum contacts to show that (a) the defendant purposefully directed its activities at the forum state, and (b) the plaintiff's cause of action arose out of those activities; and (2) the exercise of jurisdiction would be reasonable and fair." *Old Republic Ins. Co.*, 877 F.3d at 909. In the instant case, no Mining Defendant has "purposefully directed" any activity toward New Mexico, and thus, there have been no activities out of which a cause of action in New Mexico could arise, making any assertion of personal jurisdiction inherently unreasonable.

1. There has been no purposeful direction of any activity toward New Mexico.

The threshold test for asserting specific jurisdiction in the tort context is whether the defendant "purposefully directed its activities at the forum." *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008). To establish specific personal jurisdiction, a plaintiff must present evidence of "three salient factors that together indicate 'purposeful direction.'" *Shrader v. Biddinger*, 633 F.3d 1235, 1239 (10th Cir. 2011). Those factors are: "(a) an intentional action … that was (b) expressly aimed at the forum state … with (c) knowledge that the brunt of the injury would be felt in the forum state." *Id.*; *Old Republic Ins. Co.*, 877 F.3d at 907. To sustain jurisdiction, the Plaintiffs must allege not only that each respective Mining Defendant "foresaw (or knew) that the effects of their conduct would be felt in the forum state,

but also that defendants undertook *intentional actions that were expressly aimed at that forum state*." *Dudnikov,* 514 F.3d at 1077 (emphasis in original). The Plaintiffs have alleged no such facts.

Here, as alleged in the Complaint, the event complained of is EPA's August 5, 2015 Blowout. EPA and its contractors admittedly caused the Gold King Blowout. The ostensible connection to the Mining Defendants arises from the fact that SGC successfully impounded water *in Colorado*. The "purposeful or intentional action" undertaken by SGC was performance of its Consent Decree obligations, which were undertaken "to protect the waters of the State of Colorado." In other words, SGC designed and constructed the engineered, concrete bulkheads years before the Blowout, in Colorado, under Colorado's supervision, to impound mine water in Colorado and thereby improve water quality in Colorado. SGC's activities were aimed at Colorado and clearly not at New Mexico. The Plaintiffs do not allege any facts that suggest any kind of purposeful action by SGC directed toward any state other than Colorado.

There is also no suggestion that either KGUSA or KGC undertook any purposeful action directed at New Mexico. In fact, beyond KGUSA's acquisition of an indirect ownership of SGC in 2003, and KGC's indirect ownership of KGUSA, neither KGUSA nor KGC undertook any action at all. Plaintiffs do not allege facts to demonstrate *any* purposeful action by KGUSA or KGC, let alone any purposeful action directed at New Mexico.

Beyond failing to allege any purposeful action on the part of the Mining Defendants, the Complaint fails to establish the second prong of the minimum contacts test, i.e. that Plaintiffs' cause of action arose out of conduct that the Mining Defendants purposefully-directed toward the forum state. Because there was no purposeful action directed toward New Mexico, the Plaintiffs' claims could not arise out of any action directed toward New Mexico. The simple fact

that Plaintiffs were allegedly injured in New Mexico does not establish personal jurisdiction. "The proper question is not where the plaintiff experienced a particular injury or effect, but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden*, 571 U.S. at 283. In other words, "a plaintiff's injuries must 'arise out of [the] defendant's forum-related activities.'" *Anzures v. Flagship Restaurant Group*, 819 F.3d 1277, 1280 (10th Cir. 2016) (quoting *Dudnikov*, 514 F.3d at 1071) (internal citation omitted).

In this case, "forum-related activities" would be activities by the Mining Defendants directed at New Mexico. There have been none. The Mining Defendants are not responsible for the activities of EPA and its contractors, and therefore those activities cannot create personal jurisdiction over the Mining Defendants. "[S]pecific jurisdiction must be based on actions by the defendant and not on events that are the result of unilateral actions taken by someone else." *Bell Helicopter Textron, Inc. v. Heliqwest Intern., Ltd.*, 385 F.3d 1291, 1296 (10th Cir. 2004); *see also Dudnikov*, 514 F.3d at 1072 ("The defendant's only contact, the presence of its product in the forum, is the result of the act of someone else and not the defendant's own intentional conduct.").

All of SGC's conduct and activities, everything it did or did not do, occurred in Colorado. Indeed, the only affirmative conduct Plaintiffs allege is that SGC signed a Colorado Consent Decree and thereafter complied with that Decree by installing engineered concrete bulkheads in Colorado. SGC's actions were directed exclusively toward Colorado and were done "to protect the waters of the State of Colorado." SGC did nothing in or aimed at New Mexico.

KGUSA and KGC are several steps further removed from jurisdiction in New Mexico. Neither KGUSA nor KGC owned any interest in SGC's parent when the bulkheads were installed, and neither KGUSA nor KGC has ever owned any interest in the Sunnyside Mine.

Compl. ¶¶ 306, 310. Rather, as Plaintiffs' acknowledge, KGUSA, an indirect subsidiary of KGC, acquired an interest in SGC's parent in 2003, *after* the bulkheads were installed in Colorado. *Id*. at ¶ 314.

Notwithstanding that SGC is a separate corporate entity, KGUSA and KGC are accused of failing to control SGC. Indeed, Plaintiffs claim that KGUSA should have directed SGC, an indirect corporate subsidiary, to disregard Colorado's agency-sanctioned, court-ordered reclamation plan. Failing that, they allege that KGC, through yet another level of corporate subsidiaries, should have directed KGUSA to ensure that SGC undertook such unauthorized actions. To support specific jurisdiction, however, there must be a purposeful *act*, not a *failure to act*. "[T]here must be 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' This requirement of 'purposeful availment' for purposes of specific jurisdiction precludes personal jurisdiction as the result of 'random, fortuitous, or attenuated contacts." *Bell Helicopter Textron, Inc. v. Heliqwest Intern.*, 385 F.3d at 1296 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Burger King*, 471 U.S. at 475 (1985) (internal citations omitted)).

Plaintiffs' claim against KGUSA arises out of KGUSA's acquisition and ownership of SGC's corporate parent. Their complaint against KGC is simply that KGC owns KGUSA. Neither claim suggests any action or activity directed toward New Mexico. There is no suggestion in the Complaint that either KGUSA or KGC purposefully directed any activity toward any downstream state, let alone a claim that any injuries arose from any such purposeful activity.

The Ninth Circuit's recent decision in *Pakootas v. Teck Cominco Metals, Ltd*, 905 F.3d 565 (9th Cir. 2018) ("*Pakootas*") does not change the outcome. Although *Pakootas* arguably stands for the proposition that an intentional discharge of pollutants into a river may be sufficient to establish personal jurisdiction over a foreign source, several critical facts clearly distinguish *Pakootas* from the instant case. First, *Pakootas* involved an unregulated, unpermitted, intentional, international Canadian discharge ten miles upstream from the United States border. Here, any SGC discharge was regulated, permitted, and authorized by the State of Colorado pursuant to the Clean Water Act. Second, *Pakootas* involved an intentional "dumping" of waste from one country into another. SGC's conduct, as dictated by the Consent Decree, involved the intentional improvement of water quality by bulkheading in Colorado and thereby restoring the natural hydrology. Third, *Pakootas* involved injuries allegedly arising directly from the discharges in question. Here, the alleged injuries arise from EPA's August 5, 2015 Blowout, an event the Mining Defendants had nothing to do with.

In addition to these important distinctions, in the interstate pollution context, the Clean Water Act and its federalism impacts must be considered when evaluating any assertion of personal jurisdiction. As discussed below, any claim of personal jurisdiction over the Mining Defendants is intertwined with the Clean Water Act and its preemptive effect. When evaluating personal jurisdiction, "The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *see also Bristol-Myers Squibb Co. v. Superior Ct. of CA*, 137 S.Ct. 1773, 1780-1781 (2017). With interstate water, the Clean Water Act changes the jurisdictional assessment:

> We agree that, given the existence of a federal common-law claim at the commencement of the suit, *prior to the enactment of the 1972 Amendments*, personal jurisdiction was properly exercised and venue was also proper.

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 312, n.5 (emphasis added). Once the Clean Water Act was put into place, property owners like SGC, operating in a source state like Colorado, should reasonably expect to be subject to the laws and jurisdiction of Colorado, not to jurisdiction in any downstream state. To conclude otherwise would mean that any regulated entity, lawfully operating in accordance with permits and regulations in a source state, is potentially subject to personal jurisdiction in any downstream or downwind state, no matter how far the particular discharge goes.

SGC reclaimed the Sunnyside Mine in accordance with its permits, the dictates of the relevant Colorado regulatory agencies, and the obligations imposed in the Consent Decree. SGC should not now be subjected to indeterminate tort claims from and personal jurisdiction in every downstream entity through whom its regulated discharges might have reason to pass.

> "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless." 731 F.2d, at 414. It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.

International Paper Co. v. Ouellette, 479 U.S. 481, 496-497 (1987) (quoting *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403, 404 (7th Cir. 1984)). Congress certainly did not intend for SGC to comply with Colorado regulators and a Colorado Court only to face personal jurisdiction and tort liability in New Mexico. Because the claims against KGUSA and KGC derive solely from the claims against SGC, these claims are also impermissible.

2. The assertion of personal jurisdiction over the Mining Defendants would be unreasonable.

Beyond minimum contacts and purposeful direction, due process also requires that the exercise of jurisdiction must be "reasonable and fair." *Old Republic Ins. Co.*, 877 F.3d at 909. According to the Tenth Circuit, "[T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1280 (10th Cir. 2005) (citations omitted). Here, there are *no* minimum contacts between the Mining Defendants and New Mexico. As a result, the "sliding scale" requires only a minimal showing to find the assertion of jurisdiction unreasonable.

To assess the "reasonableness" of jurisdiction, courts consider the following factors:

> (1) The burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental social policies.

OMI Holdings, Inc. v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1095 (10th Cir. 1998).

Analysis of each of these five factors demonstrates the "unreasonableness" of jurisdiction over the Mining Defendants in New Mexico. As set forth by declaration, none of the Mining Defendants have any meaningful presence in New Mexico. New Mexico's interest in resolving this dispute is clearly less than Colorado's where the Gold King Mine is located and the Blowout occurred. While Plaintiffs may have an interest in resolving this dispute, the most convenient and effective relief available to them is in Colorado. There is no reason why Colorado would be any less inconvenient for the Plaintiffs than New Mexico would be for the Mining Defendants.

The fact that KGC is a Canadian corporation must also be heavily considered. "The burden on the defendant of litigating the case in a foreign forum is of primary concern in

determining the reasonableness of personal jurisdiction." *OMI Holdings, Inc.*, 149 F.3d at 1096 (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 292*).* "When the defendant is from another country, this concern is heightened and 'great care and reserve should be exercised' before personal jurisdiction is exercised over the defendant." *Id.* at 1096 (quoting *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 114 (1987)).

The fourth and fifth factors are reflected in the Clean Water Act and the required application of the law of the forum state to the events in question. Colorado, as the "source state" charged with regulating mining, reclamation, and potential discharges in Colorado, is the appropriate forum. As the Supreme Court found in *Ouellette*, and as discussed more fully below, the Clean Water Act reflects a congressional decision and social policy that disputes involving interstate waters must be decided according to the law of the source state—Colorado—and *in* Colorado. 479 U.S. 481. Exercising personal jurisdiction over any Mining Defendant in New Mexico would simply not be reasonable.

In short, Plaintiffs have failed to allege facts sufficient to show purposeful direction, because such facts do not exist. None of the Mining Defendants has undertaken any purposeful activity directed toward New Mexico, and none of the claims asserted against any Mining Defendant arises from any purposeful activity directed toward New Mexico. The assertion of personal jurisdiction over any Mining Defendant would be patently unreasonable. As a result, this Court lacks personal jurisdiction over each Mining Defendant.

B. The Clean Water Act preempts the Plaintiffs' claims.

The Clean Water Act preempts application of downstream state tort law to upstream regulated discharges. Here, the Consent Decree notes that SGC held two permits authorizing discharges from the Sunnyside Mine--Colorado Discharge Permit System (CDPS) permit Nos.

Co-0027529 and CO-0036056. Doc 42-1 at 2. Further, the Consent Decree recognized that the bulkheading would restore the region's natural hydrology and that "installation of these bulkhead seals will impound water behind the bulkheads, eventually flooding the [Sunnyside] Mine, and at some time subsequent to initial Mine flooding, water, which is now discharged through the American Tunnel and Terry Tunnel portals pursuant to the CDPS Permits, may flow through underground fractures and fault systems which may form seeps and springs which discharge into surface waters." *Id*. at 6. As part of the Consent Decree, the State of Colorado specifically covenanted "not to sue or to take administrative action against SGC for seeps or springs which may emerge or increase in the Upper Animas River or Cement Creek drainages following installation of bulkhead seals in the American or Terry Tunnels, during the terms of this Consent Decree and thereafter." *Id*. at 30. Colorado administers CDPS permits like those held by SGC under delegated EPA authority and 33 U.S.C. § 1342(b) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"); 40 Fed. Reg. 16713 (April 14, 1975) (EPA approval of Colorado's program). In addition, Colorado also regulates SGC conduct pursuant to a Mined Land Reclamation Permit. Doc 42-1 at 4.

For decades, the Supreme Court has consistently held that the CWA preempts downstream tort claims like those asserted in the Complaint that allegedly arise from upstream regulated discharges. In *City of Milwaukee v. Illinois and Michigan*, the Supreme Court analyzed a common law nuisance claim brought by the state of Illinois arising out of pollution the City of Milwaukee discharged into Lake Michigan. The Court held that Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee*, 451 U.S. at 317. The Court then reviewed the comprehensive notice and comment and public hearing process implicit in the

CWA and held, "It would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them." *Id.* at 326.

The Court expanded on these holdings in *Ouellette*, when Vermont landowners brought Vermont common law nuisance claims against a New York mill that discharged into a lake forming part of the New York – Vermont border. The issue was whether the CWA "pre-empts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York." *Ouellette*, 479 U.S. at 483. The Court first analyzed the CWA's impact on any choice of law decision.

> We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located.

Id. at 487. The Court then concluded that regulation or litigation downstream would conflict with the CWA regime Congress established and so was preempted:

> After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'

Id. at 493 (quoting *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)).

The Court recognized that absent preemption, a downstream plaintiff could effectively override regulatory decisions made by an upstream state:

> *If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State*. The affected State's nuisance laws would subject the point source to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected State…. In suits such as this, an affected-state court also could require the source to cease operations by ordering immediate abatement. *Critically, these liabilities would attach even though the*

> *source had complied fully with its state and federal permit obligations*. The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.

Id. at 495 (emphasis added). In conclusion, the Court held, "[T]he [CWA] pre-empts state law to the extent that the state law is applied to an out-of-state point source." *Id*. at 500.

Finally, in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), the Supreme Court addressed EPA's issuance of a discharge permit to an upstream water treatment plant in Arkansas that downstream Oklahoma objected to. The unanimous Court found that in cases involving controversies between upstream discharge states and downstream objecting states, the CWA preempted downstream claims. "[T]aken 'as a whole, its [the CWA] purposes and its history' pre-empted an action based on the law of the affected State and that the only state law applicable to an interstate discharge is 'the law of the State in which the point source is located.'" 503 U.S. at 100 (quoting *Ouellette*, 479 U.S. at 493).

These principles were recently reaffirmed by the Fourth Circuit in the Deepwater Horizon litigation. Once again, the Court held that federal law preempted Louisiana and various Parishes' state law pollution claims and penalties identical to those asserted by the Plaintiffs now. *In re Deepwater Horizon*, 745 F.3d 157 (4th Cir. 2014). Noting that the spill occurred in Texas coastal waters, the Court held:

> Put in starkest terms, had the blowout occurred in Texas state waters and caused pollution in Louisiana, the Parishes' Louisiana law claims would be squarely foreclosed. Federal preemption of interstate water pollution claims has been a feature of United States law for over a hundred years.

Id. at 166-167. Rejecting the application of state tort laws to a federally regulated activity, the Court held, "Allowing up to five states along the Gulf Coast to apply their individual laws to discharges arising on the Shelf would foster the legal chaos described by *Ouellette*." *Id.* at 170.

The same concerns apply here. SGC operated pursuant to Colorado regulated CWA permits, and then reclaimed in accordance with its permits, under the supervision of Colorado and its regulatory agencies, and pursuant to the Colorado Consent Decree. The work was complete by 2003 when KGUSA acquired its interest in SGC's parent. The notion that downstream individuals can now, years later, second guess the State of Colorado and its regulatory decisions through tort claims directed against the Mining Defendants is inconsistent with and undermines the comprehensive CWA regulatory regime.

Such judicial second guessing is precisely what comprehensive environmental programs like the CWA were intended to foreclose. As the Fourth Circuit has recognized, "[I]f courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern. Energy policy cannot be set, and the environment cannot prosper, in this way." *North Carolina, ex. rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 298 (4th Cir. 2010). In that case, which involved air quality issues, the Court explained:

> Dissatisfied with the air quality standards authorized by Congress, established by the EPA, and implemented through Alabama and Tennessee permits, North Carolina has requested the federal courts to impose a different set of standards. The pitfalls of such an approach are all too evident. It ill behooves the judiciary to set aside a congressionally sanctioned scheme of many years' duration—a scheme, moreover, that reflects the extensive application of scientific expertise and that has set in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements. To replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country.

Id. at 301.

Here, SGC complied with its obligations in Colorado. Those obligations were imposed by Colorado regulatory agencies, pursuant to authority delegated to Colorado under the CWA.

The CWA preempts the Plaintiffs' downstream claims against SGC, and because the claims against KGUSA and KGC derive from the claims against SGC, those claims are also preempted.

This Court has already held that because Colorado is the source state, Colorado law applies. In its February 12, 2018 ruling on Environmental Restoration's Motion to Dismiss, this Court held, "When a court considers a state-law claim concerning interstate water pollution that is subject to the [Clean Water Act (CWA)] the court must apply the law of the State in which the point source is located." Doc. 203[4] at 60 (citing *Ouellette*, 479 U.S. at 487). Following *Ouellette*, this Court also held, "The CWA, which allows states to permit certain discharges into waters within their borders, preempts tort claims under state law when the source of the alleged injury is located in another state." Doc. 203 at 62 (citing *Ouellette*, 479 U.S. at 497).

Quoting *Ouellette*, this Court concluded:

> [I]f affected States [or individuals] were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress…Because we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause, we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

Doc. 203 at 65 (quoting *Ouellette*, 479 U.S. at 493-494). Applying these principles to this case, this Court held that while there may not have been a discharge permit for EPA's August 5, 2015 Blowout, "allowing affected state tort law to apply to non-permitted discharges in source states would conflict with the CWA's citizen suit provisions." *Id.* (citing to *Ouellette* and *Deep Water Horizon*). Thus, according to this Court, "the lack of a permit for the August 5, 2015 release does not alter the conclusion that the CWA preempts application of New Mexico law to a

[4] "Doc 203" refers to Document 203 in the original docket, the Memorandum Opinion and Order, *State of New Mexico v. US EPA et al.*, No. 1:16-cv-00465-MCA-LF (N. N.M. Feb. 12, 2018), ECF No. 203.

discharge with a point source in Colorado." Doc. 203 at 65-66. These holdings are all now the law of this case. *Entek Grb, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1241 (10th Cir. 2016).

Because SGC's conduct and discharges clearly *were* regulated and permitted, these principles even more clearly preclude the claims against SGC, as well as the derivative claims against KGUSA and KGC.

C. The claims against the Mining Defendants should be dismissed because the State of Colorado is a required party and cannot be joined.

The Complaint assigns fault to SGC for constructing engineered, concrete bulkheads in Colorado, and to SGC, KGUSA and KGC for failing to remove those bulkheads. It is undisputed, however, that the bulkheads were designed, constructed, and maintained in place pursuant to Colorado law and specific directives of the State of Colorado and the court approved Consent Decree. Consequently, any adjudication of possible fault associated with the installation of the bulkheads must, of necessity, include the State of Colorado.

1. Colorado is a required party to this suit.

Federal Rule of Civil Procedure 19(a)(1) states that parties are "required" and must be joined in the action if either:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; ***or***
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; ***or***
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(A)-(B)(emphasis added).

As to the Mining Defendants, Colorado is a required party. Colorado clearly claims an interest relating to the subject of this action. Fed. R. Civ. P. 19(a)(1)(B). Colorado issued discharge permits to SGC and required the bulkheads as a permit obligation and as part of the court approved reclamation plan for the Sunnyside Mine. As the Consent Decree notes, the bulkheads were the best alternative for final mine reclamation, the physical setting of the Sunnyside Mine was ideal for hydraulic sealing, and the bulkheads would protect the waters of the State of Colorado. Doc. 42-1 at 4-5.

Colorado has a direct interest in seeing that its laws, regulations, and decrees are followed, and Colorado's presence is clearly essential when downstream plaintiffs attempt to impose liability based on upstream reclamation measures implemented pursuant to Colorado law. Colorado has authority over SGC and all mining activities and water quality issues in Colorado. *See, e.g.*, Colo. Rev. Stat. § 34-32-101 *et seq*. (establishing a comprehensive regulatory scheme for mine reclamation); Colo. Rev. Stat. § 25-8-101 *et seq.* (establishing a comprehensive regulatory scheme for water quality issues); Colo. Rev. Stat. § 34-32-109(1)-(9) (providing that parties cannot conduct reclamation-related activities on a mine site in Colorado without a reclamation permit issued by Colorado); 2 Colo. Code Regs. § 407-1 (2016) (dictating that all activities relating to mining, reclamation, and hydrologic activities on mine sites in Colorado must be approved through the Colorado Division of Reclamation Mining & Safety). Allowing the Plaintiffs' suit to proceed without Colorado would seriously undermine Colorado's ability to regulate the mining industry in Colorado and Colorado must have the opportunity to defend its regulatory decisions.

Colorado has recognized and clearly articulated its comprehensive regulatory oversight of SGC's conduct:

> The Water Quality Control Division (WQCD) of Colorado's Department of Public Health and Environment regulates pollutant discharges from certain abandoned or inactive mines through permits issued to mine owners and operators. *These permits regulate discharges into the State's river systems and ensure that pollutant levels in those rivers remain within regulatory limits….Regulating surface water pollution 'point sources' is the backbone of the federal Clean Water Act (CWA)*. Colorado has been delegated permitting, monitoring, and enforcement authority to implement CWA requirements within Colorado, subject to federal oversight. *See* 33 U.S.C. Section 1342(b)…. Colorado regulators approved the private owners' and operators' proposed remediation activities at the mine[]. After mining operations at the Sunnyside . . . ceased in the early 1990's, [SGC], the operator of the Sunnyside Mine, proposed to install three bulkheads in the 'American Tunnel' that drained the mines in order to manage the flow of water from the mines. Use of bulkheads is a common remediation step, and bulkheads have been installed at dozens of mines in the western United States. [SGC] eventually filed a state court declaratory judgment against the WQCD seeking judicial approval of its plan. After months of litigation, the parties settled the case and memorialized their agreement in *a 1996 judicial consent decree that required [SGC] to install the bulkheads, conduct other reclamation activities, and comply with monitoring and water treatment obligations*. In 2003, [SGC] presented evidence that it had satisfied its obligations. [SGC's] CWA discharge permit was therefore terminated in accordance with the court-ordered consent decree. (citations omitted).

Colorado's Brief in Opposition to Motion for Leave to File Complaint at 4-6, *State of New Mexico v. State of Colorado*, No. 220147 (2016) (emphasis added).[5]

Because Colorado is the state in charge of regulating SGC's conduct, disposing of this action without Colorado's presence would seriously impair or impede Colorado's ability to protect that interest, making Colorado a necessary party to this action. *See, e.g.*, *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885, 896 (W.D. Wash. 1990) (providing that if a third party is attacking the actions of a defendant which were allowed or otherwise prescribed under state law, then the state is a necessary party whose joinder is required); *Liberles v. Cook Cty.*, 709 F.2d 1122, 1134 (7th Cir. 1983) (explaining that if

[5] The Court can take judicial notice of pleadings filed in other cases on a Rule 12 motion. *Pace v. Swerdlow*, 519 F.3d 1067, 1072-73 (10th Cir. 2008).

state regulation requires a named defendant to act in the manner complained of, then the state cannot be a "joint tortfeasor," but is instead a necessary and indispensable party).

As set forth in the above discussion of the Clean Water Act, Congress has already determined that Colorado, as the source state, has a significant interest in regulating Colorado water quality. Just as the *Ouellette* court concluded that applying Vermont law to a New York source would "effectively override…the policy choices made by the source State" (*Ouellette*, 479 U.S. at 495), adjudicating liability allegedly arising from Colorado regulated and Colorado court-ordered conduct without the presence of Colorado would seriously interfere with Colorado's interests and regulatory primacy.

In addition, without Colorado in the lawsuit, the Mining Defendants would be left "subject to a substantial risk of incurring . . . inconsistent obligations . . . ." Fed. R. Civ. P. 19(a)(1)(B)(ii). It is undisputed that the bulkheading at issue was done pursuant to State of Colorado directives and a Colorado state court Consent Decree. SGC could not then, and neither SGC nor KGUSA nor KGC can now, ignore the clear directives established by that Consent Decree. Bulkheading was a key element of Colorado's reclamation plan for the area. Per the Consent Decree, the engineered concrete bulkheads were put in place and are to remain in place. To subject the Mining Defendants to liability in New Mexico for adhering to Colorado's regulatory scheme would be to effectively implement a completely different water management strategy and impose inherently inconsistent obligations on the Mining Defendants. As this Court has held, "Rule 19's inconsistent obligations standard is not designed to shelter parties from the rigors of litigating in several forums; rather it is designed to protect a party from serving conflicting masters." *Hernandez v. Chevron U.S.A., Inc.*, 2018 WL 4188458 *34 (August 30, 2018 D. N.M.) The Mining Defendants cannot reasonably be expected to simultaneously leave

the Colorado court-ordered bulkheads in place and be subject to New Mexico court-ordered damages for that precise behavior. As a result, Colorado is a required party to this litigation.

2. Colorado cannot be joined as a party, and therefore, the case against the Mining Defendants must be dismissed.

The Eleventh Amendment precludes federal suits against nonconsenting states. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). The Eleventh Amendment and state sovereign immunity protect not only states but "state agents and state instrumentalities." *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997). With this law in mind, Federal Rule of Civil Procedure 19(b), entitled "When Joinder Is Not Feasible," provides:

> If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief;
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

In this case, "equity and good conscience" do not allow this lawsuit against the Mining Defendants to go forward without Colorado. A judgment granting the relief the Plaintiffs' seek in Colorado's absence would prejudice both Colorado and the Mining Defendants.

Any New Mexico judgment imposing liability on the Mining Defendants for adhering to Colorado's regulations, validly issued permits, and court ordered Consent Decree would seriously prejudice Colorado's ability to effectively regulate the Colorado mining industry. Colorado cannot effectively regulate if the consequences of adhering to Colorado regulations and a Colorado Consent Decree is unlimited tort liability in New Mexico. The Mining Defendants would be prejudiced because they would be subject to inconsistent legal obligations as set forth above. SGC designed and installed the bulkheads and carried out its obligations under the Consent Decree as part of its Colorado-directed mine reclamation plan. For this Court to award money damages to the Plaintiffs would force SGC to bear the cost of installing bulkheads in Colorado only to be financially punished in New Mexico for that same conduct.

Other than dismissal of the claims against the Mining Defendants, no remedy could be tailored that would prevent the unfairness and inequity that would result from a lawsuit challenging Colorado's conduct and laws without Colorado's presence. Without Colorado, this lawsuit cannot go forward as against the Mining Defendants. *See Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d. 49, 52-57 (D.D.C 1999) (dismissing case because New Mexico had an interest in seeing its required "revenue sharing" law enforced and could not be joined); *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 632-33 (5th Cir. 2009) (dismissing suit because Tennessee had an interest in the apportionment and use of its water and could not be joined); *Center for Biological Diversity v. Pizarchik*, 858 F.Supp. 2d 1221, 1229 (D. Colo. 2012) (dismissing suit because Navajo Tribe was a required party whose sovereign immunity precluded joining them in the lawsuit).

This lawsuit can still proceed, just without Colorado and the Mining Defendants. Plaintiffs would still have claims against those defendants whose conduct was not Colorado

regulated and Colorado court-ordered. As the 10th Circuit has held, "When, as here, a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing of other factors' set out in Rule 19(b), because immunity 'may be viewed as one of those interests compelling by themselves.'" *Enterprise Mgt. Consultants v. U.S. Ex Rel. Hodel*, 853 F.2d 890, 894 (10th Cir. 1989) (citations omitted). Because Colorado is both required and immune from suit, the Plaintiffs' claims against the Mining Defendants should be dismissed.

D. Based on the allegations in the Complaint, punitive damages are not available against the Mining Defendants and that claim must be dismissed.

The Plaintiffs seek an award of punitive damages against the Mining Defendants. Compl. Prayer for Relief (3). No State law, however, allows for punitive damages against any of the Mining Defendants in this action.

Colorado has specific requirements for a punitive damages claim. Colorado requires a showing of "fraud, malice, or willful and wanton conduct." Colo. Rev. Stat. Ann. § 13-21-102(1)(a). Willful and wanton conduct "means conduct purposefully committed which the actor must have realized was dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff." Colo. Rev. Stat. Ann. § 13-21-102(1)(b). In addition, punitive damages may not be included in an initial claim for relief. Instead, they must be added by amendment only after the exchange of initial disclosures if the plaintiff can establish prima facie proof of a triable issue on such a claim. Colo. Rev. Stat. Ann. § 13-21-102(1.5)(a). Colorado's punitive damages statute should apply because it reflects a "substantive decision which federal courts should apply" and the failure to do so "would contravene an important state interest, tend to promote forum shopping, and result in inequitable administration of the laws." *Jones v. Krautheim*, 208 F.Supp. 2d 1173, 1180 (D. Colo. 2002); *see also Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1541

(10th Cir. 1996). Applying Colorado law as the law of the source state, the punitive damages allegations should be stricken.

Even applying New Mexico law, the punitive damages allegation should be dismissed. In New Mexico, "To be liable for punitive damages, a wrongdoer must have some culpable mental state, and the wrongdoer's conduct must rise to a willful, wanton, malicious, reckless, oppressive, or fraudulent level." *Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 124 N.M. 549, 563 (N.M. App. 1997). Neither negligence, nor even gross negligence, will satisfy this "culpable mental state" requirement and justify the imposition of punitive damages. *See Paiz v. State Farm Fire & Cas. Co.*, 880 P.2d 300, 309-10 (N.M. 1994).

The Plaintiffs have not plead any aggravating circumstances that would allow for the imposition of punitive damages against the Mining Defendants. They have failed to allege that the Mining Defendants' actions created any element of outrage whatsoever. SGC's actions were all taken in compliance with and at the direction of the State of Colorado, in accordance with the law, and pursuant to Colorado issued permits and the court approved Consent Decree. Colorado, of course, was acting within its capacity as an EPA-approved governmental entity with authority to administer the CWA discharge permit program and within its authority to administer its mine reclamation laws. *See Pub. Serv. Co. of Colorado, Fort St. Vrain Station v. U.S. E.P.A.*, 949 F.2d 1063, 1065 n.2 (10th Cir. 1991).

The allegations in the Complaint establish that SGC never acted with the intent required for punitive damage liability. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) (explaining that private parties following governmental orders should not be punished for complying with the orders); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (declaring the axiom that legislatures wish to prevent

"judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," and for this reason it "necessarily follows that acts of [individuals] in accordance with official directions cannot be actionable").

It is even more clear that the allegations against KGUSA and KGC do not meet the requirements for the imposition of punitive damages. By the time KGC acquired an indirect interest in SGC's parent in 2003, the relevant Court ordered bulkheads were already in place. The bulkheads were functioning as designed and as required by the Consent Decree and continue to do so. The only event allegedly causing injury to anyone was EPA and its contractors' conduct on August 5, 2015. A review of the allegations in the Complaint confirms that the Court should dismiss the request for punitive damages against all the Mining Defendants.[6]

IV. CONCLUSION:

The Mining Defendants respectfully request that the claims against them be dismissed with prejudice for the following reasons:

(A) New Mexico courts lack personal jurisdiction over any Mining Defendant;

(B) The Clean Water Act preempts the Plaintiffs' claims against the Mining Defendants;

(C) The State of Colorado is a required party to this suit and Colorado cannot be joined; and

[6] The Allen Plaintiffs allege that all Defendants "are jointly and severally liable for the harm caused by their tortious conduct." Allen Compl. ¶ 377. Colorado has abolished joint and several liability. Colo. Rev. Stat. § 13-21-111.5(1); s*ee also Barton v. Adams Rental, Inc*., 938 P.2d 532, 536 (Colo. 1997) (*en banc*), and *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F.Supp. 1465, 1467 (D. Colo. 1989). This Court considered an identical joint and several liability claim advanced by New Mexico and the Navajo Tribe and concluded that allegations of joint and several liability should be stricken. Doc. 203 at 68. The same result should apply here.

(D) The allegations in the Complaint, even if taken as true, do not allow for an award of punitive damages.

DATED this 1st day of November, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2018, the foregoing was filed via the U.S. District Court of New Mexico's CM/ECF electronic filing system and a copy thereof was served via the CM/ECF upon all counsel of record.

/s/ *Neil G. Westesen*
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