UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

ALLEN PLAINTIFFS' BRIEF IN OPPOSITION TO EPA CONTRACTOR DEFENDANTS' MOTION TO DISMISS ALLEN PLAINTIFFS' COMPLAINT AND MOTION TO STRIKE (DOC. 117)

Pursuant to the Special Master's October 1, 2018 Order Regarding the Allen Plaintiffs' Unopposed Motion for a Status Conference (Doc. 87), Plaintiffs Joe C. Allen, Jr. *et al*. (the "Allen Plaintiffs") submit this brief in opposition to the Motion to Dismiss and Motion to Strike of Defendants Environmental Restoration, LLC and Weston Environmental Solutions, Inc. (the "EPA Contractor Defendants") filed on November 1, 2018. (Doc. 117).

PROCEDURAL BACKGROUND

Pursuant to this Court's Initial Case Management Order, the EPA Contractor Defendants were permitted to file a single motion to dismiss all complaints. (Doc. 34) at 3. The Initial Case Management Order further provides that Plaintiffs State of New Mexico, Navajo Nation and State of Utah (the "Sovereign Plaintiffs") could file a single, joint response to each motion to dismiss. (Doc. 34) at 4. The Initial Case Management Order further provides that the McDaniel Plaintiffs could join in the Sovereign Plaintiffs' responses and/or file a supplement to the Sovereign Plaintiffs' responses. *Id*. In addition, the Initial Case Management Order provides that it would "govern the practice and procedure in any tag-along actions transferred to this Court." *Id*. at 1.

- The EPA Contractor Defendants filed their motion to dismiss and motion to strike the Sovereign Plaintiffs' complaints on July 25, 2018, prior to the Allen Plaintiffs joinder in this action. (Docs. 45 and 46).
- The Sovereign Plaintiffs filed their response to the EPA Contractors Defendants' motion to dismiss on August 24, 2018. (Doc. 58).
- The McDaniel Plaintiffs filed a joinder and supplement to the Sovereign Plaintiffs' response on September 7, 2018. (Doc. 66).
- The EPA Contractor Defendants filed a reply in support of their motion to dismiss on September 21, 2018. (Doc. 80).

The Special Master's October 1, 2018 Order provides that the joinder rulings contained in the Initial Case Management Order (Doc. 34) will apply to the briefing of the Motions to Dismiss, Responses and Replies involving the Allen Plaintiffs' Complaint. (Doc. 87).

This brief, therefore, constitutes the Allen Plaintiffs' joinder and supplement to the Sovereign Plaintiffs' response to the EPA Contractor Defendants' motion to dismiss under the Special Master's October Order (Doc. 87) and the Initial Case Management Order (Doc. 34).

JOINDER AND SUPPLEMENTATION OF ARGUMENTS

I. The Allen Plaintiffs' Claims were Filed Properly and within the Statute of Limitations

A. The Statute of Limitations is not Governed by Colorado Law

As an initial matter, the Court should decline the EPA Contractor Defendants' suggestion to find that the laws of Colorado govern the Allen Plaintiffs' state law claims. A determination of which State's substantive law governs the Allen Plaintiffs' tort claims is not necessary for a determination of the motion to dismiss. As for which State's law governs the statute of limitations, the EPA Contractor Defendants are incorrect that the Colorado statute of limitation applies here.

The general rule in federal court in New Mexico is that statutes of limitations are procedural rules requiring courts to apply New Mexico statutes of limitations. *MTGLQ Investors, LP v. Wellington*, 2018 WL 1997293, *6 (D.N.M. April 27, 2018) (citing *Sierra Life Ins. Co. v. First Nat'l Life Ins.*, 1973-NMSC-079, ¶ 14, 85 N.M. 409) ("The trial court properly ruled that under New Mexico law statutes of limitations are procedural and that the law of the forum governs matters of procedure.") The cases cited by the EPA Contractor Defendants, *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) and *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), are not relevant to this analysis and the EPA Contractor Defendants have provided no other authority for why the general rule should not apply.

In *Ouellette*, 479 U.S. 481, 483 (1987), the issue presented was, "whether the [Clean Water] Act 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. In *Arkansas*, the issue arose from permitting under the Clean Water Act—the permit stage before any effluent discharge. *Arkansas*, 503 U.S. at 100. In *Arkansas*, the Court briefly cited to *Ouellette* in referring to the quality standards applicable to issuance of the permit. *Id*. at 92. Both *Ouellette* and *Arkansas* are entirely silent as to choice of law issues regarding statute of limitations matters or other procedural matters. Indeed, the concurrence in *Ouellette* specifically notes that the decision applies to substantive law. *Ouellette*, 479 U.S. at 509 (Stevens, J., concurring in part) (noting that, "[t]he Court, however, goes further and ventures its opinion on whether the District Court must apply the substantive law of the State in which the source of water pollution is located.")

The Allen Plaintiffs could not find a single case applying *Ouellette* or *Arkansas* to procedural issues, nor do the EPA Contractor Defendants cite to such a case. Given the absence of any language in these opinions suggesting their holdings should be applied to procedural law and given the absence of any case law in the thirty-plus years since these decisions were handed down expanding their holdings to procedural law, these opinions should not be read to apply to traditional choice of law rules regarding procedural issues.

Since *Arkansas* and *Ouellette* do not apply, this Court should proceed on the statute of limitations issue with a standard choice of law and forum-state analysis. "Federal courts apply the choice of law rules of their forum states." *MTGLQ Investors, LP v. Wellington*, 2018 WL 1997293, *5 (D.N.M. April 27, 2018) (quoting *Carl Kelley Const. LLC v. Danco Technologies*, 656 F. Supp. 2d 1323, 1337 (D.N.M. 2009)). "Furthermore, a federal court sitting in diversity, as in this case, should apply the statute of limitations of the forum state." *Id*. (citing *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 110 (1945)); *see also Dow Chemical Corp. v. Weevil-Cide Co*., 897 F.2d 481, 483-484 (10th Cir. 1990) ("A federal court hearing a diversity action applies the statute of limitations which would be applied by a court of the forum state ... even when the action is brought under the law of a different state.")

"In New Mexico, statutes of limitations are procedural rules generally requiring New Mexico courts to apply New Mexico statutes of limitations." *MTGLQ Investors, LP v. Wellington*, 2018 WL 1997293, *6 (D.N.M. April 27, 2018), citing *Sierra Life Ins. Co. v. First Nat'l Life Ins*., 1973-NMSC-079, ¶ 14, 85 N.M. 409 ("The trial court properly ruled that under New Mexico law statutes of limitations are procedural and that the law of the forum governs matters of procedure."). In a case concerning New Mexico and Colorado, the District Court for

the District of New Mexico held, "While the Court has concluded that Plaintiff's tort claims are governed by the substantive law of New Mexico, even if the Court were to hold that the claims were governed by the substantive law of Colorado, the Court would nevertheless apply New Mexico's general three-year statute of limitations." *Mims v. Davol, Inc.*, 2017 WL 3405559, * 3 (D.N.M. March 28, 2018). This was because "[p]ursuant to New Mexico's choice of law rules, statutes of limitation are procedural, and therefore governed by the law of the forum state…In New Mexico, a general three-year statute of limitations applies to tort claims. NMSA 1978 § 37-1-8." *Id.*

The same result occurred in *Anderson Living Trust v. XTO Energy, Inc.*, 2014 WL 11511698 (D.N.M. November 24, 2014). There, the Court stated that, "A federal court sitting in diversity applies the statutes of limitations of the forum state, including the forum state's tolling rules." *Id.*, *11, citing *Elm Ridge Exploration Co., LLC v. Engle*, 721 F.3d 1199, 1210 (10th Cir. 2013). "And New Mexico's choice of law rules apply the statutes of limitations of the forum state even when another state's substantive law applies." *Id.* "Therefore, New Mexico's statutes of limitation govern even the claims under Colorado law." *Id.*

Under these authorities, even if the substantive law of a second state ends up controlling the substance of the action brought, the statute of limitations of the forum state still controls. Thus, even if Colorado nuisance and negligence law controls this suit under the holding of *Ouellette*, New Mexico statute of limitations law still applies because the forum of this case is New Mexico. Indeed, Judge Armijo's February 2018 Order, while not ruling on this issue, recognized that important distinction. *See New Mexico ex. rel. N. M. Env't Dep't v. U.S. Envtl. Prot. Agency*, Case No. 1:16-cv-00465-WJ-LF, (D.N.M. Feb. 12, 2018), ECF No. 203. There,

the EPA Contractor Defendants had raised an issue of Colorado law and Judge Armijo answered, "[Environmental Restoration] asks this Court to apply a Colorado state procedural rule in the federal District Court of New Mexico. The Court will not do so absent argument or analysis." *Id*. at 1270.

Here, the EPA Contractor Defendants offer no argument or analysis why Colorado's procedural rules regarding statute of limitations should apply in the federal District Court of New Mexico. The cases cited by the EPA Contractor Defendants do not apply and, therefore, the Court should apply a standard choice of law analysis. Under such an analysis, New Mexico statute of limitations should apply.

B. The Allen Plaintiffs' Claims were Filed within New Mexico's Three-Year Statute of Limitations and Colorado's Two-Year Statute of Limitations

The New Mexico statute of limitations for personal injury claims, including negligence, is three years. NMSA 1978 § 37-1-8. The New Mexico statute of limitations for injury to property is four years. NMSA 1978 § 37-1-4. The mine blow-out here occurred on August 5, 2015, and the Allen Plaintiffs filed suit on August 3, 2018, within three years of the event. The Allen Plaintiffs filed their complaint within the New Mexico statute of limitations and their claims, therefore, are not barred.

Even if the Colorado statute of limitations applies, which it does not, the Allen Plaintiffs' claims would still not be barred. As for continuing claims based on the Gold King Mine release, such as damages from economic losses related to the stigmatic effects of the release, which continue to this day, the Allen Plaintiffs adopt and reassert the response of the Sovereign Plaintiffs thereto. (Doc. 58) at 78-79.

C. The Statute of Limitations Does Not Bar Allen Plaintiffs' Claims Based on Past Contamination Prior to the Release

In response to the EPA Contractor Defendants' argument that the statute of limitations bars the Allen Plaintiffs' damage claims based on past contamination prior to the release, (Doc. 117) at 11, the Allen Plaintiffs adopt and reassert the response of the Sovereign Plaintiffs thereto. (Doc. 58) at 78-79. The Allen Plaintiffs also adopt and reassert the response of the McDaniel Plaintiffs thereto. (Doc. 66) at 2, fn. 2, 3.

II. The Allen Plaintiffs Do Not Seek to Recover the Same Damages as the Navajo Nation

A. The Allen Plaintiffs' Claims for Injury are not Asserted by the Navajo Nation as *Parens Patriae*

1. The Doctrine of *Parens Patriae* Provides Standing to a Governmental Entity to Protect Common Interests of Members, it does not Preclude Individual Claims

In their motion to dismiss, the EPA Contractor Defendants state that they "recognize that a *parens patriae* suit does not bar all subsequent suits by private individuals." (Doc. 117) at 14 (citing *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1181 (N.D. Okla. 2009)). This may seem like a generous concession of the EPA Contractor Defendants, however, to the extent that the EPA Contractor Defendants suggest that the doctrine of *parens patriae* acts as a bar on the right of private individuals to bring claims for purely private damages they are incorrect. In their motion, the EPA Contractor Defendants then go on to state that "[t]he interests of the Allen Plaintiffs are already being protected by the Navajo Nation, *parens patriae*." (Doc. 117) at 11. This is wrong as a matter of law, as the Navajo Nation cannot assert the individual claims of the Allen Plaintiffs in its status as *parens patriae*.

Parens patriae is a doctrine of standing that is meant to provide governmental entities with the standing to sue for common harms, it does not divest individual plaintiffs of their individual claims for individual harms. As stated by the Tenth Circuit, the doctrine of *parens patriae* "does not create any cause of action," and "is a standing concept rather than one of substantive recovery." *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243 (10th Cir. 2006) ("*G.E.*") (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. 592, 600-08, 102 S. Ct. 3260, 73 L.Ed.2d 995 (1982)).

The *parens patriae* doctrine allows a state or governmental entity to "act as the representative of its citizens in original actions where the injury alleged affects the general population of a state in a substantial way." *Maryland v. Louisiana*, 451 U.S. 725, 728, 101 S. Ct. 2114, 2124, 68 L. Ed. 2d 576 (1981). "In order to maintain [a *parens patriae*] action, the State must articulate **an interest apart from the interests of particular private parties**, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest." *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (emphasis added) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260, 3268, 73 L.Ed.2d 995 (1982)).

"*Parens patriae* standing has been explained on the ground that the plaintiff state is not merely advancing the rights of individual injured citizens but has an additional sovereign or quasi-sovereign interest." *Id*. (quoting 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4047 at 223 (1988)). "Although the Supreme Court has not expressly defined what is a 'quasi-sovereign' interest, it is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory; or of

interstate waters in which the state has rights.'" *Id*. (quoting 12 Moore's Federal Practice ¶ 350.02[3] at 3–20 (1993)).

"It is equally clear, however, that a state may not sue to assert the rights of private individuals." *Id*. (citing *Snapp*, 458 U.S. at 600). And, "[a] *parens patriae* suit by a natural resources trustee **does not bar a subsequent suit by private individuals**, but a necessary part of a natural resources trustee's case is to clearly delineate what damages the natural resources trustee may recover in a *parens patriae* suit and what damages belong to private citizens." *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1181 (N.D. Okla. 2009) (emphasis added).

The EPA Contractor Defendants assert that "[t]he Allen Plaintiffs are limited, however, to claims that are based on purely private interests that the Navajo Nation has no standing to raise." (Doc. 117) at 14 (citing *Satsky v. Paramount Communications, Inc*., 7 F.3d 1464, 1470 (10th Cir. 1993) ("*Satsky I*")). This statement is a tautology, and, therefore, true: The Navajo Nation has no standing to sue for private harms to the individual plaintiffs, and the individual plaintiffs have no standing to sue for common harms to the Navajo Nation. Indeed, the EPA Contractor Defendants' motion to dismiss creates confusion where there is none. The Navajo Nation's standing under *parens patriae* does not change the essential nature of the individual plaintiffs' claims, nor does it turn these individual claims into some new and strange type of claims.

Here the Allen Plaintiffs are asserting claims for personal and property damage caused by the Gold King Mine spill. (Case 1:18-cv-00744, Doc. 1) at ¶ 5. The Gold King Mine spill prevented these individual plaintiffs from using water from the Animas and San Juan River to

water their crops and care for their animals. *Id*. at ¶ 6. As a result, these individual plaintiffs were forced to locate alternative water sources at great expense of money, time and labor. *Id*. Even where individual plaintiffs were able to locate alternate water sources, these were inadequate to irrigate crops and the individual plaintiffs lost all or most of their harvests. *Id*. In addition, even where individual plaintiffs were able to salvage some of their harvest, public stigma resulting from the spill resulted in the them being unable to sell their crops and livestock or being forced to sell at vastly reduced prices. *Id*. The individual plaintiffs also depended on the Animas and/or San Juan River for household and personal use. *Id*. at ¶ 7. As a result of the spill, the individual plaintiffs were unable to use the water for drinking, cooking, gardening and bathing and had to purchase and haul water for replacement. *Id*. Many individual plaintiffs also raised livestock on land adjacent to the Animas and/or San Juan River which depended on those rivers for irrigation. *See e.g.*, *Id*. at 24. As a result of the spill, these plaintiffs were unable to graze their livestock or let them drink from the rivers and had to purchase water and feed for them. *Id*. Many of these plaintiffs also lost livestock due to dehydration or from drinking contaminated water, and some had to sell their livestock at reduced prices due to the stigma of the Gold King Mine spill. *Id*.

As will be discussed below, the EPA Contractor Defendants conflation of these individual claims with those of the Navajo Nation is based on a misreading of caselaw developed in the context of *res judicata*. To the extent that courts have found that individual plaintiff's claims have been barred as a result of prior *parens patriae* litigation, those claims have been barred by the application of principles of *res judicata*, not *parens patriae*.

The Allen Plaintiffs do not assert any claims on the basis of the common welfare of the Navajo Nation. Their claims are straightforward claims for injury and damages to the individual plaintiffs themselves. A *parens patriae* analysis is unnecessary to their claims and a red herring. However, as the issue has been raised by the EPA Contractor Defendants, the Allen Plaintiffs address it below.

2. The Allen Plaintiffs' Claims are not precluded under *Satsky*

The assertion by the EPA Contractor Defendants' that *parens patriae* precludes the Allen Plaintiffs' claims under *Satsky v. Paramount Communications, Inc*., 7 F.3d 1464, 1470 (10th Cir. 1993) ("*Satsky I*") turns that decision on its head. In that case, the Tenth Circuit Court of Appeals, in overruling the district court's summary judgment dismissal of the individual plaintiffs' claims, was finding **in favor** of the individual plaintiffs' argument that their individual claims for damages were not barred by the consent decree in the district court. *Id*. (finding that "[t]he State could not have recovered under either CERCLA or the *parens patriae* doctrine for injuries to Plaintiffs' private interests.")

In *Satsky I*, Colorado property owners brought action against a mine owner seeking to recover property damage and economic losses which allegedly arose as result of hazardous waste produced from mining. *Id*. The defendant moved for summary judgment arguing that the plaintiffs' claims were barred by *res judicata* due to a consent decree in an earlier case between the defendant and the State of Colorado. *Id*. at 1467. The district court granted the motion for summary judgment finding that the individual plaintiffs were privies of the State of Colorado under the *parens patriae* doctrine. *Id*. at 1468. The Tenth Circuit overruled the district court, holding that the State could not have recovered under either CERCLA or the *parens patriae*

doctrine for injuries to plaintiffs' private interests. *Id*. at 1470. It then remanded for the district court to determine which claims were barred by the consent decree as having already been recovered by the State. *Id*. (remanding to the district court "to determine which claims asserted by plaintiffs are truly private, and which claims are based on common public rights, in accordance with the analysis set out in this opinion.")

The EPA Contractor Defendants' assertion that the district court's analysis of the claims on remands provides important guidance is true, but their discussion leaves out a number of important points. (Doc. 117) at 15. First, the district court was deciding whether the claims were precluded under the doctrine of *res judicata*, not *parens patriae*. *Satsky v. Paramount Communications, Inc.*, 1996 WL 1062376 (D. Colo. Mar. 13, 1996) ("*Satsky II*"). Indeed, the district court's decision on remand does not even mention the term "*parens patriae*." *Id*. This is a distinction with an important difference. As stated above, *parens patriae* is not a doctrine of preclusion: In *Satsky II*, the plaintiffs' claims were precluded by *res judicata*, not *parens patriae*. Second, by the time the individual plaintiffs brought their claims, there had been years of extensive prior litigation. *Id*. As noted by the district court in originally granting the motion for summary judgment:

> Extensive scientific studies were done during the Paramount I litigation. Health studies were performed to determine any human health hazards. Public meetings were held at which public comment was invited. Many scientific experts, government agencies, and citizen groups participated in the investigation, studies, and negotiations. The experts assessed numerous remedial programs before settling on the 15-year Remedial Action Plan (RAP) incorporated in the Consent Decree . . . .
>
> The Paramount I court approved appointment of a special master for adjudication of further disputes and contempt after entry of the Consent Decree. The judgment for monetary damages has been paid and the RAP has been under way for approximately three years.

Satsky v. Paramount Communications, Inc., 778 F. Supp. 505, 510–11 (D. Colo. 1991), *rev'd*, *Satsky I*. In *Satsky II*, therefore, the district court was not determining whether the plaintiffs' claims were precluded at the onset of the lawsuits, but after years of extensive litigation. Third, the district court was deciding which claims were barred based on whether they were covered under the consent decree, noted above, that had been created in the prior litigation. *Satsky II*, 1996 WL 1062376, at *6. The court was not analyzing whether the claims were barred under general principles of law, but rather by analyzing whether they fell under specific provisions of the consent decree.

Fourth, the EPA Contractor Defendants fail to note that the district court allowed certain individual claims to proceed. On remand, the district court observed that the plaintiffs did specifically articulate one business interest in their complaint, which was that of a recreational rafting company. *Satsky II*, 1996 WL 1062376, at *7. The rafting company alleged that the contamination caused diminution in "its business and business value" in the form of "loss of revenue, increased operating costs, damages to capital assets, or other damages." *Id*. The court found that the business was not seeking to recover for these common damages, but for "direct loss of income and other economic losses including loss of asset value and increased operating expenses." *Id*.

The significance of these factors is shown by two Ninth Circuit decisions related to litigation stemming from the 1989 Exxon Valdez oil spill in Prince William Sound, Alaska. In those cases, the United States and the State of Alaska filed suit against Exxon in their capacities as "trustees for the public." *Alaska Sport Fishing Ass'n v. Exxon Corp*., 34 F.3d 769 (9th Cir. 1994) (per curiam); *see also In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001). The

governments sought damages for restoration of the environment and compensation for lost public use of natural resources. *Id*. Exxon eventually agreed to a settlement and consent decree under which it would pay the governments at least $900 million for "natural resource and other damages" and the governments released Exxon "with respect to any and all civil claims," including all claims for natural re- source damages. *Id*. Facing hundreds of private suits arising from the oil spill, Exxon argued that all private claims were barred by the consent decree in the government suit. *Id*. The Ninth Circuit, in which most of the cases were filed, responded by invoking the distinction between public and private interests. *Id*. It held, for example, that a class action on behalf of recreational sport fishers seeking damages for the public's loss of use and enjoyment of Prince William Sound was precluded by the government suit because the governments "ha[d] already recovered damages on behalf of the public" for those harms. *Id*. at 774.

On the other hand, the court permitted a class of commercial and subsistence fishers, Native Americans, and landowners to pursue compensatory and punitive damages for harm to their private land and to their ability to fish commercially and for subsistence. *In re Exxon Valdez*, 270 F.3d 1215, 1225, 1227–28 (9th Cir. 2001). The Ninth Circuit rejected Exxon's argument that punitive damages were barred by *res judicata* as a result of its settlement with the government trustees who acted as *parens patriae* for natural resource damage claims brought on behalf of the public pursuant to the Clean Water Act. *Id*. at 1227-28. The court reasoned that the individual claims regarding lost harvests and lower incomes were distinct from the public interest in protecting natural resources. *Id*. Because the latter category of private claims was not at issue in the government suit, the claimants could not be considered "parties" to the consent

decree and could not be bound by it. *See id*. The court distinguished *Alaska Sport Fishing Ass'n*, 34 F.3d 769:

> The sport fishermen there [in *Alaska Sport Fishing Ass'n*] did not claim any damages to any property they owned or economic interests, just to the *ferae naturae*, the natural resource of fish in the wild. The sport fishermen's claims made were on behalf of the general public as to the lost use of unowned natural resources, and we held that the state acted as *parens patriae* to protect its sovereign interest in these natural resources, so the plaintiffs were in privity with the state and were barred by the consent decree.
>
> By contrast, here the plaintiffs sued to vindicate harm to their private land and their ability to fish commercially and fish for subsistence. The consent decree was expressly not "intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement." The consent decree did not affect claims regarding private land. It also did not affect the individual claims of commercial and subsistence fishermen involving lost income and lower harvests, which are distinguishable from the rights of recreational fishermen.

Id. at 1227-28.

Given these factors, the EPA Contractor Defendants' attempt to use *Satsky* as support for the proposition that individual claims cannot be found where the individual's "damages are associated with having to use alternative sources of water" or where the individual has not alleged a "privately adjudicated water right," (Doc. 117) at 16, should be rejected. Given that those courts were analyzing the individual claims in the context of deciding whether these claims were barred by *res judicata* under the specific language of a consent decree created after years of litigation, *Satsky I* and *II* simply do not create a general principle as to what an individual claim must or must not allege.

B. The Allen Plaintiffs Have Asserted Damage to Purely Private Interests

According to the EPA Contractor Defendants, the Allen Plaintiffs' claims are "held in common by all members of the Navajo Nation, and not 'purely private interests' upon which

Plaintiffs may recover in an individual suit." (Doc. 117) at 17. The EPA Contractor Defendants argue that the Allen Plaintiffs are seeking the "same damages for injuries 'based on' alleged contamination to the San Juan River" as the Navajo Nation. (Doc. 117) at 16. They further argue that the Allen Plaintiffs' injuries are to the same "common rights anyone has along the river to use a minimum amount of water for domestic irrigation." *Id*. at 17. The EPA Contractor Defendants further argue that, under *Satsky II*, the Allen Plaintiffs need to allege ownership of an individual private well or an individually owned or adjudicated water right in order to assert an individual claim. *Id*. These arguments are unavailing.

First, as the authorities above acknowledge, it is entirely possible for both public and private damages to stem from the same environmental injury. *See Satsky v. Paramount Commc'ns*, 7 F.3d 1464 (10th Cir. 1993) (acknowledging that private and public damages may be recovered based on the same environmental injury); *see also Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994) (same). As succinctly stated by the Supreme Court of New Hampshire, "simply because water is a public resource does not mean that there can be no 'private damages' associated with that resource." *Hess*, 161 N.H. 426, 437, 20 A.3d 212, 221 (2011), *as modified on denial of reconsideration* (Mar. 22, 2011). In *Hess*, the State of New Hampshire had brought action against gasoline suppliers, refiners and chemical manufacturers, seeking damages for groundwater contamination allegedly caused by a gasoline additive, methyl tertiary butyl ether (MTBE) in its capacity as *parens patriae*. *Hess*, 161 N.H. 426, 437, 20 A.3d 212, 221 (2011), *as modified on denial of reconsideration* (Mar. 22, 2011). On the defendant's motion for summary judgment on the State's capacity to bring suit in *parens patriae*, the court noted that questions over whether the private well contamination's harm went beyond individual

well owners to affect the entire citizenry was one that was a factual issue for the finder of fact at trial. *Id*. at 438.

Second, as discussed above, *Satsky* cannot be read for the proposition that any claim based on damage to a water resource requires the assertion of a privately adjudicated water right. Neither the fishers in *Exxon Valdez* nor the rafting company in *Satsky* had any privately adjudicated water rights to the ocean or the river.

Finally, the EPA Contractor Defendants attempt to transfer legal principles based on property interests developed in English common law to the claims of members of a tribe without considering the unique nature of a tribal members' property interests. As stated by the Tenth Circuit, "[t]he relationship between the Tribe and the individual members and with the United States is different from other property relationships." *Pueblo of Isleta ex rel. Lucero v. Universal Constructors, Inc.*, 570 F.2d 300, 302 (10th Cir. 1978). In that case, the Tenth Circuit reversed the district court's dismissal of a suit brought by the tribe on behalf of its members based on the district court's conclusion that "the property rights of the Tribe were not involved; that it was the individual Indians who were affected." *Id*. The Tenth Circuit disagreed, finding that, "[t]o attempt to draw a distinction based upon English common law real property concepts is not persuasive." *Id*. The Court held that "[t]he damage here, as in the other cases, is to tribal rights as well as individual rights." *Id*.

The Allen Plaintiffs' rights to irrigation from the San Juan and Animas Rivers are distinct from both the general public and from other members of the Navajo Nation as a whole. They are not hikers or fishers, enjoying the river on a weekend jaunt. The individual plaintiffs reside on, farm and graze their land adjacent to these rivers under assignments from the Navajo Nation.

The Gold King Mine spill caused specific damages to each of the Allen Plaintiffs that are distinct from damages to the general public or the Navajo Nation as a whole. They have asserted claims, therefore, to purely private interests and should not be dismissed as duplicative of those asserted by the Navajo Nation in *parens patriae*.

C. The Allen Plaintiffs Do Not Need to Provide a More Definite Statement

The EPA Contractor Defendants assert that the Allen Plaintiffs must provide a more definite statement of their alleged damages in order to provide the EPA Contractor Defendants with a "reasonable opportunity to respond to such claims" and to prevent duplicative claims. (Doc. 117) at 19. The EPA Contractor Defendants' fears as to any risk of double recovery are premature.

When faced with the issue of the risk of overlapping damage recoveries in *parens patriae* actions, courts have determined that any such risks can be dealt with after trial, not during pleadings. *See e.g., State of Maine v. M/V Tamano*, 357 F. Supp. 1097, 1102 (D. Me. 1973) (holding that letting State sue *parens patriae* did not lead to risk of double recovery as "there may be excluded from its recovery any monetary damages that might be claimed by her citizens individually or as part of a properly constituted class. That problem, like uncertainty of damages, is better answered after trial than on the pleadings."); *see also State v. Hess Corp*., 161 N.H. at 438 (finding that defendants' concerns about double recovery in *parens patriae* action "is more appropriate to be resolved after trial than on the pleadings. At that stage, any monetary damages claimed by citizens individually may be excluded from the State's recovery.")

Here, as the Allen Plaintiffs' claims are well-pled and distinct from any claims asserted by the Navajo Nation on behalf of its members, the Court should not require them to provide a more definite statement.

III. CERCLA § 113(h) Does Not Prohibit This Court from Exercising Jurisdiction Over Allen Plaintiffs' State Law Claims.

In response to the EPA Contractor Defendants' argument that CERCLA Section 113(h) prohibits this Court from exercising jurisdiction over the Allen Plaintiffs' state law claims, (Doc. 117) at 19-22, the Allen Plaintiffs adopt and reassert the response of the Sovereign Plaintiffs thereto. (Doc. 58) at 25-36.

A. CERCLA § 113(h) Does Not Apply to the Allen Plaintiffs' Claims for Monetary Damages

In response to the EPA Contractor Defendants' specific argument that CERCLA Section 113(h) applies to the Allen Plaintiffs' claims for money damages, (Doc. 117) at 19-20, the Allen Plaintiffs adopt and reassert the response of the Sovereign Plaintiffs thereto. (Doc. 58) at 30-34.

B. CERCLA § 113(h) Does Not Preempt the Allen Plaintiffs' Claims

The Allen Plaintiffs do not argue that CERCLA § 113(h) does not apply to actions brought "under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction)." 42 U.S.C. § 9613(h). The Allen Plaintiffs believe that the EPA Contractor Defendants' arguments that the Allen Plaintiffs' claims are preempted or otherwise barred by CERCLA have been thoroughly and comprehensively rebutted by the Sovereign Plaintiffs in their response thereto. (Doc. 58) at 30-34. The Allen Plaintiffs have not supplemented with any additional arguments in regard to the application of CERCLA to the Allen Plaintiffs' claims.

The EPA Contractor Defendants' suggestion that the Court should rule on the issue of whether the Allen Plaintiffs have properly invoked the Court's diversity jurisdiction in deciding the CERCLA issue should be rejected. Such a ruling has not been fully briefed and is not necessary to a determination of the EPA Contractor Defendants' motion to dismiss.

IV. The EPA Contractor Defendants are not Shielded from State Tort Liability under the Government Contractor Defense

In response to the EPA Contractor Defendants' argument that the EPA Contractor Defendants are shielded from state tort law liability under the government contractor defense, (Doc. 117) at 22, the Allen Plaintiffs adopt and reassert the response of the Sovereign Plaintiffs thereto. (Doc. 58) at 54-72.

V. The Allen Plaintiffs Have Stated a Claim for Negligence, Negligence Per Se, and Gross Negligence

In response to the EPA Contractor Defendants' argument that the Allen Plaintiffs have failed to state a claim for negligence, negligence per se, and gross negligence, (Doc. 117) at 22-24, the Allen Plaintiffs adopt and reassert the response of the Sovereign Plaintiffs thereto. (Doc. 58) at 75-78. The Allen Plaintiffs also adopt and reassert the response of the McDaniel Plaintiffs thereto. (Doc. 66) at 5-8.

VI. The Allen Plaintiffs' Joint and Several Liability Requests should not be Stricken

The EPA Contractor Defendants' argument that the Allen Plaintiffs' joint and several liability requests should be stricken (Doc. 117) at 24, is ultimately a question of whether New Mexico or Colorado law applies. New Mexico has kept joint liability in certain cases where the negligence of an independent contractor injures a third party. *See Saiz v. Belen School District*, 1992-NMSC-018. In turn, the choice of law question is dependent on a detailed analysis of

whether the holdings of *Ouellette* apply to all claims involving inter-state discharges, or whether *Ouellette* is limited to CERCLA claims and claims involving permitting. The issue of choice of law is not yet ripe for decision. The Allen Plaintiffs request the Court reserve ruling upon that issue until the issue is fully briefed. As it stands now, the EPA Contractor Defendants devote barely a footnote to it in their everything-but-the-kitchen-sink style motion to dismiss. That is not a sufficient basis on which to render a decision on this vitally important issue. Furthermore, the issue of choice-of-substantive-law is not dispositive to the issues of jurisdiction, and therefore may be delayed until a later date.

The Sovereign Plaintiffs, in their response to the Contractors' motion to dismiss, (Doc. 58) at 80, state, "the Sovereign Plaintiffs do not believe reconsideration of Judge Armijo's Order at this time is appropriate on any issue including those regarding conflict of laws." Indeed, once jurisdiction has been established, the Court may elect to examine the issue of what substantive law applies.

The Allen Plaintiffs, therefore, request the Court to reserve judgment on the EPA Contractor Defendants' motion to strike the Allen Plaintiffs' joint and several liability requests.

VII. Allen Plaintiffs' Emotional Distress Claims should not be Stricken

The EPA Contractor Defendants' argue that the Allen Plaintiffs' are not entitled to recover damages for emotional distress based on negligence and, therefore, emotional distress claims should be stricken. (Doc. 117) at 25. The EPA Contractor Defendants' argument misses the distinction drawn by Colorado courts as to the difference between emotional distress damages, *per se*, and annoyance and discomfort damages intended to compensate for the loss of a plaintiff's peaceful occupation and enjoyment of damaged property. Their argument also fails

to recognize the claims advanced by the Allen Plaintiffs for emotional distress arising from the damage done to their property, livelihood and spiritual life.

The EPA Contractor Defendants misstate the holding of *Webster v. Boone*, 992 P.2d 1183 (Colo. App. 1999). In *Webster*, the Colorado Court of Appeals noted the general rule that "pure" emotional distress damages are not available on negligence claims, but went on to apply the principle, laid out by the Supreme Court of Colorado in *Board of County Commissioners v. Slovek*, 723 P.2d 1309 (Colo.1986), that damages available on trespass and nuisance claims can include loss of use and enjoyment of the property, and also discomfort and annoyance to the property owner as the occupant. *Webster*, 992 P.2d at 1185 (citing *Slovek*). These types of damages are allowed, according to the Supreme Court, because "the goal remains the compensation of the injured landowner for any and all losses that result from the conduct for which the defendant is liable, including the loss of the use of the property, if any, and any separate injuries in the nature of discomfort, annoyance or physical illness." *Slovek*, 723 P.2d at 1318.

Subsequent Colorado Court of Appeals have found that *Slovek's* holding is not limited to trespass and nuisance claims but includes claims solely for negligence. *See, e.g., Hendricks v. Allied Waste Transp., Inc.*, 2012 COA 88, ¶ 22, 282 P.3d 520, 525 (holding that "[t]he *Slovek* principles thus apply to the damages here, which resulted from Allied's negligence.") In *Hendricks*, the Court of Appeals reinforced the *Slovek* principle that, while pure emotional distress damages are precluded for claims to physical injury to property, "damages for loss of enjoyment, annoyance, discomfort, and inconvenience are not emotional distress damages." *Id.* ¶ 18 (emphasis added). In *Hendricks*, the Court of Appeals held that the trial court did not err in

allowing plaintiff's testimony of, among other things, being happy in her home before the incident, in contrast to the worry and loss of security she and her husband felt after the incident, as relevant to show her loss of enjoyment of her property. *Id*. ¶ 28 (distinguishing annoyance and discomfort damages from damages for mental and emotional distress, and explaining that the former are intended to compensate for the loss of a plaintiff's peaceful occupation and enjoyment of the damaged property)

A particularly relevant Colorado Court of Appeals decision is that of *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007). In that case, homeowners brought a toxic tort action against local manufacturers for releasing toxic chemicals which the homeowners alleged had migrated into their neighborhood groundwater, soil and gas. *Id*. at 590. At trial, the jury found the manufacturer liable for negligence and awarded homeowners solely noneconomic damages based on the homeowners' testimony that their families used their basements less, felt less comfortable inviting guests over because of the stigma associated with homes in their neighborhood, and kept windows open because of their fear of the contamination. *Id*. at 610-611. The Court of Appeals found that the jury's award was not for emotional distress but for loss of use and enjoyment of their properties, which included "inconvenience and loss of peace of mind based on their fear that contaminants could be present in portions of their homes and the perceived stigma attached to homes in the neighborhood." *Id*. And, further that "homeowners' damages derived from their loss of well-being and physical or mental health." *Id*.

Here, as in *Antolovich*, the Allen Plaintiffs suffered fear that the toxic contaminants from the spill could cause them health problems, the illness and death of their animals, the stigma of not being able to sell crops and believing their land and water to be contaminated, the fear of

losing their livelihoods, all of which are not emotional distress damage claims but separate injuries arising from damage to their property. Furthermore, while the property at issue in *Antolovich* were houses in a newly built subdivision, here, the Allen Plaintiffs allege damage to land and water they consider sacred and upon which their families had lived and farmed and ranched for generations. The Allen Plaintiffs will provide further evidence that they consider their land more than mere "property," but an integral spiritual being of its own.

The Allen Plaintiffs' claims for emotional distress damages are equivalent to the type of injuries for "discomfort and annoyance" supported in *Hendricks*, and *Antolovich*. The Court, therefore, should not dismiss the Allen Plaintiffs' claims for emotional distress damages.

CONCLUSION

For the reasons discussed herein, the Allen Plaintiffs respectfully request that this Court deny the EPA Contractor Defendants' Motion to Dismiss in its entirety.

Respectfully Submitted,

EGOLF + FERLIC + HARWOOD, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2018, the foregoing document was filed via the Court's CM/ECF system and a copy thereof was served electronically upon all counsel of record, as reflected by the Court's CM/ECF system.

/s/ Kate Ferlic
Kate Ferlic