

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

**In re: Gold King Mine Release in San Juan
County, Colorado on August 5, 2015**

THIS DOCUMENT RELATES TO:

**Allen et al. v. United States et al.
Case No. 1:18-cv-00744**

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) MDL No. 1:18-md-02824-WJ
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**FEDERAL DEFENDANTS’ REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS**

The Federal Defendants – the United States of America and the United States Environmental Protection Agency (“EPA”) – hereby file this reply memorandum in support of their motion to dismiss the claims against them in *Allen et al. v. United States et al.*, No. 1:18-cv-00744, for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

ARGUMENT

In response to the Federal Defendants’ motion to dismiss, the *Allen* Plaintiffs concede that the EPA is not an appropriate defendant for claims under the Federal Tort Claims Act (“FTCA”). Pl. Br. at 2. Accordingly, the *Allen* Plaintiffs “stipulate to a dismissal of their claims against the EPA, as named defendant.” *Id.*

In response to the Federal Defendants’ argument that the FTCA’s discretionary function exception bars the *Allen* Plaintiffs’ claims against the United States as a defendant, the *Allen* Plaintiffs simply “adopt and reassert the response of the Sovereign Plaintiffs thereto.” *Id.* Accordingly, the Federal Defendants, pursuant to Fed. R. Civ. P. 10(c) and D.N.M. Local Civ. Rule 7.1(a), hereby incorporate the arguments set forth in their September 21, 2018 Gold King

Mine MDL Reply Brief to the Sovereign Plaintiffs' Response on the Federal Defendants' motion to dismiss regarding the application of the FTCA's discretionary function exception. *See In re Gold Kint Mine Release in San Juan County, Colorado on August 5, 2015*, MDL No. 1:18-md-02824-WJ, Dkt. 76 at 18-30.¹

Specifically, the Federal Defendants incorporate MDL Dkt. 76 at 18-26, regarding whether the *Allen* Plaintiffs have demonstrated that a specific and mandatory provision removed EPA's discretion under the first part of the discretionary function exception test. The Federal Defendants additionally note that, contrary to the implication of the *Allen* Plaintiffs' response at paragraphs A.4 and A.5, the Sovereign Plaintiffs, in their response, did not specifically argue that the Clean Water Act or state regulatory provisions removed EPA's discretion. Further, the Federal Defendants incorporate MDL Dkt. 76 at 26-31, with respect to whether the *Allen* Plaintiffs have demonstrated that EPA's conduct was not policy-oriented under the second part of the discretionary function exception test. The Federal Defendants additionally note that, contrary to the implication of the *Allen* Plaintiff's response at paragraph B.3, the Sovereign Plaintiffs, in their response, did not specifically argue that the discretionary function exception was inapplicable because EPA's conduct involved scientific or technical considerations.

Simply put, none of the plaintiffs in the MDL has met the burden of establishing subject-matter jurisdiction for FTCA claims against the United States for EPA's conduct at the Gold King Mine in 2015. Under the Supreme Court's two-part test, plaintiffs have not demonstrated, under the first part of the test, that an applicable specific and mandatory provision controlled

¹ In their response, the *Allen* Plaintiffs apparently reference the Docket page number from the top of the filed document rather than the page number of the brief, at the bottom of the brief. Here, the Federal Defendants reference the page number at the bottom of their MDL reply brief to the Sovereign Plaintiffs' response.

conduct of any EPA employees. Further, because EPA's conduct regarding the Gold King Mine was pursuant to the Comprehensive Environmental Response Compensation and Liability Act, there is a "strong presumption" that EPA's conduct was grounded in policy under the second part of the test. *See United States v. Gaubert*, 499 U.S. 315, 324 (1991). Plaintiffs have not met their heavy burden of showing that any challenged conduct "was actually not policy-orientated" to overcome this presumption. *See Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1222 (10th Cir. 2016).

For the foregoing reasons, the Court should grant the Federal Defendants' motion and dismiss the *Allen* Plaintiffs' Complaint against the Federal Defendants.

DATED: November 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2018, I electronically filed the foregoing Federal Defendants' Reply in Support of their Motion to Dismiss using the Electronic Case Filing ("ECF") system of this Court. The ECF system will send a "Notice of Electronic Filing" to the attorneys of record.

/s/ Adam Bain
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