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. 16-cv-465-WJ/LF* *No. 16-cv-931-WJ/LF* *No. 18-cv-319-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 AND SUPPORTING MEMORANDUM

I. INTRODUCTION:

Pursuant to the Court's June 25, 2018 initial case management order, Defendants Sunnyside Gold Corporation ("SGC"), Kinross Gold U.S.A., Inc. ("KGUSA"), and Kinross Gold Corporation ("KGC") each move to dismiss the New Mexico, Navajo Nation, and State of Utah (collectively the "Sovereign Plaintiffs") Amended Complaints.

These cases arise from the August 5, 2015 Blowout at the Gold King Mine, wherein the EPA and its contractors released over three million gallons of mine-impacted water into a tributary of the Animas River above Silverton, Colorado. SGC finds itself in these cases because it owns a different mine, the Sunnyside Mine, which it operated from 1986 until 1991 and then closed in accordance with its permits and the law. Although the closure was sanctioned by the State of Colorado and carried out under Colorado's supervision in accordance with a Colorado state court Consent Decree (the "Consent Decree"), and although all of these efforts were fully implemented by 2003, the Sovereign Plaintiffs claim that SGC somehow contributed to the Blowout that occurred more than a decade later.

KGUSA and KGC, in turn, find themselves in these cases because of indirect corporate affiliations. Since 2003, KGUSA has owned the shares of a corporation that owns SGC, while KGC, a Canadian corporation, owns the shares of the corporation that owns KGUSA. Neither KGUSA nor KGC owned any interest in SGC, nor in any entity that owned an interest in SGC, before 2003, and neither KGUSA nor KGC played any role, directly or indirectly, in the operation or closure of the Sunnyside Mine.

Neither SGC, KGUSA, nor KGC owns or has ever owned any interest in the Gold King Mine, and, as all of the Amended Complaints acknowledge, neither SGC, KGUSA, nor KGC was on site at the Gold King Mine on August 5, 2015 when the Blowout occurred. None had anything to do with the activities of EPA and its contractors on August 5, 2015 or with any of the events leading up to the Blowout. Yet the Sovereign Plaintiffs nevertheless claim that SGC's closure of the Sunnyside Mine in Colorado, and its reclamation of associated mining property in Colorado, all of which were carried out in Colorado and at the behest of Colorado and its regulatory agencies, somehow contributed to the 2015 Blowout. Several steps further removed are the claims against KGUSA and KGC, wherein the Sovereign Plaintiffs assert that KGUSA and KGC contributed to the Blowout after KGUSA acquired its indirect interest in SGC in 2003 by allowing SGC to leave the Sunnyside Mine closed and the court ordered reclamation in place.

Neither SGC, KGUSA, nor KGC had anything to do with the Blowout at the Gold King Mine. Without question, SGC's mining and reclamation have improved the water quality of the Animas River, and, without SGC's efforts, downstream water quality would be demonstrably worse. The activities of EPA and its contractors were the only possible cause of any injuries suffered by any of the Sovereign Plaintiffs.

Pursuant to F. R. Civ. P. 12(b)(1), (2), (6), and (7), SGC, KGUSA, and KGC (collectively the "Mining Defendants")[1] respectfully request dismissal of all claims asserted against them because:

(1) the Courts of New Mexico and Utah lack personal jurisdiction over the Mining Defendants;

(2) the Clean Water Act preempts the Sovereign Plaintiffs' claims against the Mining Defendants;

(3) the State of Colorado is a required party to this lawsuit, but cannot be joined as a party;

(4) CERCLA Section 113(h) preempts any interference with the ongoing CERCLA response action;

(5) the Sovereign Plaintiffs fail to allege facts sufficient to establish that either KGUSA or KGC is or ever was an owner, operator, or arranger under CERCLA; and

(6) punitive damages are not available as against the Mining Defendants based on the allegations in the Amended Complaints.

Subjecting the Mining Defendants to litigation of these claims in either New Mexico or Utah would subject them to personal jurisdiction in states where they do not belong and toward which they have never directed any purposeful activities. Litigation of these claims in the absence of the State of Colorado, which governed, regulated, and approved SGC's mine operation, closure, and reclamation, would leave out a clearly indispensable party. The claims against the Mining Defendants are preempted by the Clean Water Act and CERCLA. Because KGUSA and KGC are not owners, operators, or arrangers, they can have no CERCLA liability. Finally, the notion that punitive damages could be imposed upon a defendant that did nothing other than adhere to

[1] 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.

the law, comply with the Consent Decree, and follow the directives of the appropriate regulatory agencies, defies logic. The Sovereign Plaintiffs' claims against the Mining Defendants should be dismissed.

II. BACKGROUND ALLEGATIONS AND FACTS:

A. Amended Complaint Allegations:

This litigation arises out of the August 5, 2015 Gold King Mine Blowout. According to the State of Utah:

> On the morning of August 5, 2015, the U.S. Environmental Protection Agency ("EPA") and its contractors triggered an uncontrolled blowout at the Gold King Mine located about five miles north of Silverton, Colorado (the "Blowout"). The disaster dumped over three million gallons of acid wastes and toxic metals into Cement Creek and the Animas River, turning the river into a vivid orange brown color. As the flow continued downstream, those hazardous wastes were deposited along the Animas and San Juan Rivers, until the plume reached Lake Powell in Utah on August 14, 2015.

Utah Amended Compl. ¶ 1. Moreover, as Utah notes: "EPA conceded it is responsible for the Blowout and its impacts;" "EPA takes responsibility for the Gold King Mine release and is committed to continue working hand-in-hand with the impacted local governments, states, and tribes;" and "[t]he intentional actions of the EPA and Contractor Defendants caused a breach in the adit, resulting in the Blowout." *Id*. ¶¶ 2, 59.

New Mexico's Amended Complaint contains similar allegations:

> On August 5, 2015, the United States Environmental Protection Agency ("EPA") and its contractors breached a collapsed portal of the Gold King Mine, releasing over three million gallons of acid mine drainage and 880,000 pounds of heavy metals into the Animas River watershed in southwestern Colorado. This massive release quickly overwhelmed Cement Creek, a tributary of the Animas River, and then snaked down the Animas through Colorado and into New Mexico, where the Animas joins the San Juan River. The sickly yellow plume of contamination then coursed through the San Juan River in New Mexico, the Navajo Nation, and into Utah. One week later the plume reached Lake Powell.

New Mexico Amended Compl. ¶ 1.

The Navajo Nation's Amended Complaint is again similar:

> On August 5, 2015, the USEPA and other responsible parties caused an unprecedented environmental disaster when they recklessly burrowed into an abandoned gold mine ("Gold King Mine") and released more than three million gallons of toxic acid mine waste into the waters upstream of the Nation. For nearly two days, the USEPA did not call, alert or notify the Nation that this toxic sludge had been released and was headed into their waters and land. At least 880,000 pounds of heavy metals poured out and coursed through downstream waterways, including approximately two hundred miles of the San Juan River (the "River"). One of the Navajo people's most important sources of water for life and livelihood was poisoned with some of the worst contaminants known to man, including lead and arsenic.

Navajo Amended Compl. ¶ 1.

Notably absent from all three Amended Complaints is any allegation that any of the Mining Defendants had anything to do with the events of August 5, 2015. Instead, the Amended Complaints allege that SGC owned another mine, the Sunnyside Mine, and that SGC closed and reclaimed the Sunnyside Mine years earlier in accordance with the Consent Decree. Utah alleges: "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." Utah Amended Compl. ¶¶ 20- 21.

Similarly, New Mexico alleges:

> In 1996, Sunnyside Gold Corporation ("Sunnyside Gold"), the owner of the vast Sunnyside Mine network, persuaded the State of Colorado to let it install bulkheads in two drainage tunnels below the Sunnyside Mine. These bulkheads impounded possibly billions of gallons of acid mine drainage and waste water in Bonita Peak

> Mountain and caused the water to flood several adjacent mines. Sunnyside Gold had been spending up to a million dollars annually to operate a water treatment facility in Gladstone that processed acid mine drainage and waste from the Sunnyside Mine and its other legacy mining sites in the Animas River watershed. Sunnyside Gold wanted to stop treating the acid mine drainage, use the mountain to essentially store its waste, and abandon its lingering environmental liabilities inside Bonita Peak. Despite understanding the inevitable consequences of plugging the Sunnyside Mine and closing the Gladstone water treatment plant, Sunnyside Gold ultimately convinced Colorado that its plan was feasible, culminating in a consent decree in 1996.

New Mexico Amended Compl. ¶ 5.

The Navajo Nation repeats similar allegations and also acknowledges: the Sunnyside Mine "closed for good in 1991;" "Sunnyside Gold plugged the American Tunnel using two bulkheads—massive plugs in the mine openings designed to hold back the reservoir of toxic waste that would inevitably accumulate within the mine behind them;" SGC and the State of Colorado "eventually entered into a consent decree;" and in 2003, "the consent decree was terminated." Navajo Amended Compl. ¶¶ 39, 45, 46, 47.

As to corporate ownership, with respect to KGUSA, Utah alleges that KGUSA "has transacted business in Colorado since 2003" and, with no facts to support it, that KGUSA "directly owns Defendant Sunnyside Gold." Regarding KGC, Utah alleges that KGC owns the Sunnyside Mine "through its subsidiaries" and that KGC "acquired Sunnyside Gold and its assets, including the Sunnyside Mine, [in 2003]." Utah's claim that KGUSA and KGC "controlled and directed Sunnyside Gold's activities at the Sunnyside Mine" again lacks any supporting facts and is based "upon information and belief." Utah Amended Compl. ¶¶ 13, 14, 24.

New Mexico similarly alleges: KGC "currently owns the Sunnyside Mine and neighboring properties near Silverton, Colorado, through its subsidiaries Kinross Gold U.S.A. Inc. and Sunnyside Gold;" KGUSA is a Nevada corporation, is a wholly-owned subsidiary of

KGC and "has transacted business in Colorado since 2003;" and, on information and belief, KGUSA "conducted business and had a registered agent for service of process in New Mexico." New Mexico Amended Compl. ¶¶ 18, 19. New Mexico further alleges that KGUSA "began transacting business in Colorado on January 31, 2003" and that KGUSA "directed or controlled the conduct of Sunnyside Gold and operations at the Sunnyside Mine." *Id.* ¶¶ 44, 45. The Navajo Amended Complaint again contains similar allegations. *See* Navajo Amended Compl. ¶¶ 19, 20, 40, 49.

B. Jurisdictional Facts:

1. SGC: SGC is a Delaware corporation, and its principal place of business is in Colorado. Utah Amended Compl. ¶ 15; New Mexico Amended Compl. ¶ 20, Navajo Amended Compl. ¶ 18. SGC does not do business in Utah or New Mexico, is not licensed to do business in Utah or New Mexico, does not have a registered agent in Utah or New Mexico, and does not own, lease or maintain any property in Utah or New Mexico. SGC has no employees in Utah or New Mexico. Decl. of Kevin Roach, ¶¶ 6-8. SGC has never availed itself of the privilege of doing business in Utah or New Mexico. This suit does not arise out of or relate to SGC activities in Utah or New Mexico because there have been none.

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 ¶ 10; Decl. of Kathleen Grandy ¶ 8. KGUSA acquired the Echo Bay, Inc. shares in 2003. KGUSA did not own any direct or indirect interest in Echo Bay, Inc. or SGC before 2003. Decl. of Martin Litt ¶ 11.

a. KGUSA: KGUSA is a Nevada corporation, with its principal place of business in Colorado. Utah Amended Compl. ¶ 14; New Mexico Amended Compl. ¶ 19; Navajo Amended Compl. ¶ 20. KGUSA does not do business in Utah or New Mexico, and is not licensed to do business in Utah or New Mexico. KGUSA is registered as a foreign corporation in Utah, because, between 2012 and 2014, KGUSA was the lessee under four mineral leases in Beaver County, Utah. KGUSA conducted limited exploration but no development work on those leases, and all of them were expressly terminated in 2014. Decl. of Martin Litt ¶¶ 5-8. Other than these four leases, KGUSA does not own, lease, or maintain, and has not owned, leased or maintained any property in Utah or New Mexico. KGUSA has one employee, assigned to its office in Denver, Colorado, who resides in Utah and works remotely from there from time to time. KGUSA had a registered agent in New Mexico for a short time beginning in 1999, four years before acquiring ownership of SGC's parent, but did not conduct, does not conduct, and has never conducted, any business there. *Id.* KGUSA has no employees in New Mexico. *Id*. To the extent that KGUSA ever availed itself of the privilege of doing business in either Utah or New Mexico, it obviously did so for a limited time and for limited purposes unrelated to any aspect of the Sovereign Plaintiffs' claims. This suit does not arise out of or relate to KGUSA activities in Utah or New Mexico, and the claims do not arise from or relate to any action that KGUSA has ever purposefully directed at either Utah or New Mexico.

b. KGC: KGC is a Canadian corporation, and its principal place of business is in Toronto. Utah Amended Compl. ¶ 13; New Mexico Amended Compl. ¶ 18; Navajo Amended Compl. ¶ 19. KGC does not do business in Utah or New Mexico, is not licensed to do business in Utah or New Mexico, does not have a registered agent in Utah or New Mexico, and does not own, lease, or maintain any property in Utah or New Mexico. Between

1993 and March of 2004, KGC was registered in Utah as a foreign corporation, but KGC did not conduct business in Utah during that time or at any other time. KGC has no employees in Utah or New Mexico and has had no employees in Utah or New Mexico at any time related to the claims in these cases. Decl. of Kathleen Grandy ¶¶ 5, 6. In fact, KGC has never availed itself of the privilege of doing business in either Utah or New Mexico. This suit does not arise out of or relate to KGC activities in Utah or New Mexico because there have been none.

C. The Consent Decree:

The Sovereign Plaintiffs complain about SGC activities, but sidestep the fact that those activities were undertaken pursuant to the law and in accordance with specific directives from Colorado and its regulatory agencies. SGC acted in compliance with the Consent Decree, which was entered and approved by a Colorado state District Court.[2] The Sovereign Plaintiffs seem to suggest that SGC, KGUSA, and KGC contributed to the Blowout by failing to violate the Consent Decree and SGC's reclamation obligations.

The Consent Decree is critical to this case. In it, the Court acknowledged that SGC held two Colorado discharge and numerous storm-water permits. Consent Decree at 2-4. It noted that the Colorado Mined Land Reclamation Board had adopted and approved a reclamation plan that required SGC to design, engineer and install several concrete bulkheads, including the specific bulkheads about which the Sovereign Plaintiffs now complain. *Id.*, at 4. The Consent

[2]Consent Decree and Orders, *Sunnyside Gold Corporation v. Colorado WQCD* (D. Colo. May 8, 1995) (Case No. 94 CV 5459) attached as **Exhibit A** (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 Complaints. *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.* Exhibit A 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.

Decree further notes 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 and the Court, specifically contemplated that "installation of these bulkhead seals will impound water behind the bulkheads, eventually flooding the 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. Finally, in the Consent Decree, 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 ultimately 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." Exhibit A Consent Decree, at 54.

Thus, everything the Sovereign Plaintiffs accuse SGC of doing was ordered by the Consent Decree, was done pursuant to the oversight and control of the State of Colorado through its regulatory agencies, and was done "to protect the waters of the State of Colorado." Until EPA and its contractors triggered the August 5, 2015 Blowout, there had been no complaints of any kind, by any of the Sovereign Plaintiffs, regarding the Sunnyside Mine, SGC, KGUSA, or KGC. There were no complaints about Colorado's oversight or any terms of SGC's reclamation,

and there were no complaints about any discharges that might have occurred as the groundwater returned to its natural flow paths. Instead, the work ordered by and successfully completed under the Consent Decree was applauded, and rightfully so.

III. ARGUMENT:

The Mining Defendants bring this motion under the provisions of F. R. Civ. P. 12(b). Numerous 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). The Court has wide discretion to consider affidavits and other documents in determining jurisdictional issues under Rule 12(b)(1), without converting the motion to one for summary judgment. *See Holt v. U.S.*, 46 F.3d 1000, 1003 (10th Cir. 1995). 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 Insurance Company*, 877 F.3d at 903 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)) (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.*, 877 F.3d at 909. In the instant case, no Mining Defendant has "purposefully directed" any activity toward New Mexico or Utah, and thus, there have been no activities out of which a cause of action in New Mexico or Utah could arise.

The threshold test for asserting specific jurisdiction in the tort context is whether the defendant "purposefully directed its activities at the forum state." *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. Company*, 877 F.3d at 907. To sustain jurisdiction, the Sovereign 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 Sovereign Plaintiffs have alleged no such facts.

Here, as each Amended Complaint makes clear, the event complained of is the August 5, 2015 Blowout. The Blowout was caused by the conduct of EPA and its contractors. The purported 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 done to impound water in Colorado and "to protect the waters of the State of Colorado." In other words, SGC designed, engineered, and installed the concrete bulkheads more than a decade 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 or Utah. The Sovereign 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 either New Mexico or Utah. 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. The Sovereign Plaintiffs do not allege facts to demonstrate any purposeful action by KGUSA or KGC, let alone any purposeful action directed at New Mexico or Utah.

In addition to failing to allege any purposeful action on the part of the Mining Defendants, the Amended Complaints fail to establish the second prong of the minimum contacts test, i.e. that the Sovereign Plaintiffs' cause of action arose out of conduct that the Mining Defendants purposefully-directed toward the forum states. To the extent that the Sovereign Plaintiffs were injured by the Blowout, they were injured in either New Mexico or Utah. The proper question, however, "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*, 134 S.Ct. at 1125 (emphasis added). In other words, to meet the second prong of the specific jurisdiction test, the Sovereign Plaintiffs must show that their injuries "'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 either New Mexico or Utah. The activities of EPA and its contractors do not qualify and cannot create personal jurisdiction over any Mining Defendant because they were not Mining Defendant activities. "[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 the Amended Complaints allege SGC undertook was to sign a Consent Decree and thereafter comply with that Decree by installing engineered concrete bulkheads in Colorado. SGC did nothing in or aimed at New Mexico or Utah. To the contrary, SGC's actions were directed exclusively toward Colorado and were done "to protect the waters of the State of Colorado." SGC's conduct connects it with Colorado and an effort to improve water quality there, not with some geographically remote injury that resulted from EPA's misconduct more than a decade later.

KGUSA and KGC are even more removed from any jurisdiction in New Mexico or Utah. They are accused of not directing SGC, an indirect corporate subsidiary, to contravene a court

ordered and agency sanctioned reclamation plan. Importantly, neither KGUSA nor KGC owned any interest in SGC at the time the bulkheads were installed, and neither KGUSA nor KGC has ever owned the Sunnyside Mine. *See* Utah Amended Compl. ¶¶ 13, 14; New Mexico Amended Compl. ¶¶ 18, 19, 44; Navajo Amended Compl. ¶ 40. Rather, the Amended Complaints establish that KGUSA and KGC acquired indirect interests in SGC *long after* the bulkheads were installed in Colorado. *See* New Mexico Amended Compl. ¶ 45; Navajo Amended Compl. ¶ 40. Apparently, the Sovereign Plaintiffs complain that KGUSA and KGC somehow injured them by allowing SGC to leave in place the reclamation efforts required under the Colorado Consent Decree. Those reclamation efforts were, however, designed and intended to protect Colorado water by impounding water *in Colorado*. There is no suggestion in any of the Amended Complaints 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.[3]

The Sovereign 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 or Utah, and none of the claims asserted against any Mining Defendant arises from any purposeful activity directed toward New Mexico or Utah.

[3] None of the allegations regarding KGUSA's unrelated interactions in New Mexico or Utah could establish minimum contacts sufficient for specific personal jurisdiction. "For specific jurisdiction, a defendant's general connections with the forum are not enough." *Bristol-Myers Squibb Company v. Superior Court of California*, 137 S.Ct. 1773, 1781 (2017) (defendant company's five research and laboratory facilities, 160 employees, and sales of product at issue in the forum state were insufficient to establish minimum contacts sufficient for specific personal jurisdiction). Therefore, although KGUSA held some unrelated mineral leases in Utah and had an agent for service of process in New Mexico back in the 1990's, those allegations had nothing to do with the Sovereign Plaintiffs' alleged injuries, and they fail to meet the minimum contacts test.

As a result, the courts of New Mexico and Utah lack personal jurisdiction over the Mining Defendants.

B. The Various State and Tribal Claims are Pre-empted by the Clean Water Act.

The United States Supreme Court has conclusively held that the Clean Water Act preempts application of downstream state tort law to upstream regulated discharges. When operating the Sunnyside Mine, SGC held two Colorado Discharge Permit System permits, CDPS Permit No. Co-0027529 and CDPS Permit No. CO-0036056, authorizing discharges from the Sunnyside Mine in accordance with numeric effluent limits and other conditions. Consent Decree at 2. In addition, Colorado continues to regulate SGC pursuant to a Mined Land Reclamation Permit. Consent Decree at 4. The State of Colorado administers CDPS permits under authority delegated to Colorado by EPA pursuant to 33 U.S.C. § 1342(b) of the Clean Water Act, "CWA"; 40 Fed. Reg. 16713 (April 14, 1975) (EPA approval of Colorado's program).

The Amended Complaints each contain state law tort claims of negligence, gross negligence, public and private nuisance, and trespass. Utah Amended Compl. ¶¶ 81-101; New Mexico Amended Compl. ¶¶ 163-209; Navajo Amended Compl. ¶¶ 172-210. The Sovereign Plaintiffs also claim that discharges in Colorado, after traveling through Colorado, New Mexico, the Navajo Nation, and Utah, cause harm that must be abated through injunctive relief. Utah Amended Compl. ¶ 137; New Mexico Amended Compl. ¶ 216; Navajo Amended Compl. Prayer for Relief ¶ 5. Finally, Utah alleges that those same Colorado regulated discharges subject the Mining Defendants to civil penalties under Utah's Water Quality Act and Utah hazardous waste laws. Utah Amended Compl. ¶¶ 102-114.

For decades, the United States Supreme Court has concluded that the CWA preempts downstream tort claims arising from upstream regulated discharges. In *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), the Supreme Court analyzed a common law nuisance claim brought by the state of Illinois arising out of Milwaukee pollution discharges into Lake Michigan. The Court concluded that Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee*, 451 U.S. at 317. The Court then reviewed the comprehensive notice and comment and public hearing process implicit in the Clean Water Act and concluded, "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." *Milwaukee*, 451 U.S. at 326.

The Court expanded upon these conclusions in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ("*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 central 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." *Id.* at 483. In the course of deciding the issue, the Supreme 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 in *Oullette* ultimately concluded that downstream regulation or relief through litigation would conflict with the comprehensive regime Congress established in the CWA 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 found that absent preemption, a downstream state could effectively override regulatory decisions made by an upstream state like Colorado.

> *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). The Court concluded its analysis by finding, "[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.'") *Arkansas*, 503 U.S. at 100 (quoting *Ouellette*, 479 U.S. at 493).[4]

These principles were recently re-affirmed by the Fourth Circuit in the context of the Deepwater Horizon litigation. Again, the Court concluded that the CWA preempted Louisiana and various Parishes' state law pollution claims and penalties identical to those asserted by the Sovereign 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. The Court specifically rejected application of state tort laws to a federally regulated activity. "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 precise concerns apply here. SGC discharged pursuant to CWA permits, and 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 indirect interest in SGC. The notion that downstream States or Tribes can now second guess the State of Colorado and its regulatory agencies through statutory and tort

[4] EPA's interpretation of the Clean Water Act was consistent with the Court's conclusion. "The Government's amicus curiae brief in *Ouellette* stated that 'the affected neighboring state [has] only an advisory role in the formulation of applicable effluent standards or limitations. The affected state may try to persuade the federal government or the source state to increase effluent requirements, but *ultimately possesses no statutory authority to compel that result, even when its waters are adversely affected by out-of-state pollution*." *Arkansas v. Oklahoma*, 503 U.S. 91, 100 n.6 (emphasis in original).

claims directed against the Mining Defendants is inconsistent with and fatally 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 recently 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 noted:

> 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.

In sum, 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 Sovereign Plaintiffs' downstream claims against SGC, and because the claims against KGUSA and KGC derive from the claims against SGC, those claims are also preempted. Federal law precludes the downstream claims because all of SGC's conduct and discharges were regulated and supervised by Colorado.

This Court has already held that Colorado law applies. In its February 12, 2018 ruling on Environmental Restoration's Motion to Dismiss, this Court recognized that because Colorado is the source state, Colorado law must apply. The Court held that "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[5] at 60 (citing to *Oullette*). This Court also adopted the holding of *Oullette* that "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 to *Oullette* at 497. The Court's order accurately stated the law, and its decision is now the law of this case. *Entek Grb, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1241 (10th Cir. 2016).

In the February 12, 2018 Order, this Court also addressed the CWA process, and recognized that when a downstream state disagrees with a permit issued by an upstream source state, the downstream state is entitled to notice and an opportunity to object to the proposed standard. Doc. 203 at 63. This Court noted, however, that "an affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards." *Id.*, (quoting *Oullette* at 490). Finally, "after examining the CWA as a whole," as well as "its purpose and its history," this Court was convinced of the following:

> [I]f 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…Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause, we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

[5] "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.

Doc. 203 at 65 (quoting *Oullette* at 493-494). Applying these principles to this case, this Court held that while there may not have been a permit for the discharge caused by the 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 *Oullette* 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 discharge with a point source in Colorado." Doc. 203 at 65-66. For the same reasons, Utah law is also preempted. Because SGC's conduct and discharges clearly *were* regulated and permitted, these same principles even more clearly preclude the claims against SGC, as well as the derivative claims against KGUSA and KGC.

SGC's activities were specifically regulated, permitted, and authorized by Colorado. Colorado is the source state, and Colorado law applies. The Sovereign Plaintiffs' claims under common law, New Mexico law, Utah law, or the law of any state other than Colorado, are preempted.

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

Each of the Amended Complaints assigns fault to SGC for installing the 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, engineered, installed and maintained in place pursuant to 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.

Rule 19(a)(1) of the Federal Rules of Civil Procedure 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. Without Colorado, "the court cannot accord complete relief among existing parties." *Id.* at 19(a)(1)(A). Colorado issued discharge permits to SGC and required the bulkheads as a permit obligation and through the court approved reclamation plan for the Sunnyside Mine. As the Consent Decree notes, the bulkheads offered 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. Consent Decree at 4-5.

Because Colorado has a direct interest in seeing that its laws, regulations, and decrees are followed, Colorado's presence is clearly essential when downstream states request "abatement" of any measures implemented pursuant to Colorado law. Colorado has authority over SGC and any abatement action within its boundaries. *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). Indeed, the State of New Mexico has explicitly recognized Colorado's critical role in creating the conditions about which New Mexico now complains. In its Bill of Complaint in the United States Supreme Court, *New Mexico v. Colorado*, No. 220147 (June 20, 2016), New Mexico alleged that "*Colorado has directed, authorized, and allowed* the generation and discharge of pollution into interstate waterways, which has caused, and continues to cause, injury to and in New Mexico." New Mexico's Brief in Support of Motion to File Complaint, 12, *New Mexico v. Colorado*, No. 220147 (June 20, 2016) (emphasis added). New Mexico continued, "*Colorado is directly responsible* for the hazardous conditions that preceded the catastrophe [of the Gold King Blowout]." Bill of Compl. ¶ 8 (emphasis added).

Colorado has also recognized 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).[6]

Because Colorado is the state in charge of regulating SGC's conduct, none of the regulatory relief the Sovereign Plaintiffs seek can be granted without Colorado's presence in this litigation, 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); *Davies v. Lane Cty.*, 2010 WL 1010613 at *3 (D. Or. Mar. 15, 2010) (finding that if a plaintiff seeks injunctive relief that would require a defendant to disregard the proscriptions of a state regulatory agency, then the defendant "cannot accord plaintiff complete relief in the [agency's] absence"); *Liberles v. Cook Cty.*, 709 F.2d 1122, 1134 (7th Cir. 1983) (explaining that if 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).

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

[6] 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).

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 implement a different water management strategy would violate the Colorado Consent Decree and subject SGC, KGUSA, and KGC to inconsistent legal obligations. As a result, under both Fed. R. Civ. P. 19(a)(1)(A) and (B), 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, Fed. R. Civ. P. 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 Sovereign Plaintiffs' seek in Colorado's absence would not be possible and any attempt at reaching a judgment without Colorado would prejudice both Colorado and the Mining Defendants.

Colorado would be prejudiced because a judgment here could require it to take action (if it chose to comply or if it even could comply) contrary to its own regulations, validly issued permits, and the court sanctioned Consent Decree. The Mining Defendants would be prejudiced because they would be subject to inconsistent legal obligations. SGC designed and installed the bulkheads and carried out its obligations under the Consent Decree as part of its Colorado-administered mine reclamation plan. For this Court to order abatement as the Sovereign Plaintiffs demand would undermine Colorado's Consent Decree and regulatory authority. *Begay v. Pub. Serv. Co. of N.M.*, 710 F.Supp.2d 1161, 1183 (D.N.M. 2010) ("Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident.")

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). Accordingly, the Sovereign Plaintiffs' claims against the Mining Defendants should be dismissed.

D. CERCLA Section 113(h) bars any interference with a CERCLA response action.

EPA and the State of Colorado began working at the Gold King Mine long before the Blowout. *See, e.g.*, Utah Amended Compl. ¶¶ 34-41 (detailing extensive "Reclamation Activities"). These actions were undertaken by EPA's "Superfund Technical Assessment and Response Team" under "EPA Emergency and Rapid Response Service (ERRS) contracts." *Id.* ¶ 35. EPA's efforts since the Blowout constitute part of the larger CERCLA cleanup process designed to address releases from abandoned mines in the headwaters of the Animas River within the so-called Bonita Peak Mining District ("BPMD"). EPA included the BPMD on the National Priorities List ("NPL") on September 9, 2016. Decl. Rebecca J. Thomas, ¶ 6, Doc. 183-1.[7] The BPMD specifically encompasses 48 historic mining sites, including the Gold King Mine, located in three separate drainages of the Animas River in Colorado. Doc. 183-4 at EPAH0000193, EPAH0000201.

Following the Blowout on August 7, 2015, EPA commenced an emergency removal action. *See* EPA's Gold King Mine Website press releases for August 8, 9, 2015. *See* Doc. 183-19. In January 2016, EPA sought not to only address physical infrastructure at the Gold King

[7] Doc. 183, and associated attachments (183-1 through 183-19) refer to Document 183 in the original docket, filed in response to the Court's request for information on the scope of the ongoing response action, *State of New Mexico v. US EPA et al.*, No. 1:16-cv-00465-MCA-LF (N. N.M. Feb. 12, 2018), ECF No. 183. The documents are Bates Stamped with the prefix "EPAH" in the filings and as referred to in this brief.

Mine site but also to provide alternate water supplies for downstream communities and feed for livestock where use of water from the Animas and San Juan Rivers was restricted. *See* Doc. 183-19 at EPAH0000290--91, EPAH0000297. Significantly, EPA maintains that the impact of the Blowout has stretched downstream to areas of the Animas River in New Mexico, the San Juan River in New Mexico and Utah, and even to Lake Powell. EPA's response actions have included sampling in those areas. *See Id*. at EPAH0000292-93. EPA's 2017 Gold King Mine Transport and Fate Study further demonstrates the scope of EPA's investigation and the breadth of information EPA has collected on the Blowout. *See* Doc. 183-2. Specifically, this study was intended to quantify the metals from the Blowout and determine the fate of those metals after the release, as well as the geographic extent of their dispersion. Doc. 183-3 at EPAH0002229.

The geographic scope of EPA's response is not limited by the NPL listing. As EPA noted in its NPL Listing Support Document for the BPMD, the BPMD boundaries are not restricted but extend downstream of the mines to areas "where hazardous substance has been 'deposited, stored, placed or *otherwise come to be located*.'" Doc. 183-4 at EPAH0000200 (emphasis added). EPA will not finalize the BPMD boundaries until additional investigation is conducted. *Id*. ("Until the site investigation process has been completed and a remedial action (if any) selected, the EPA can neither estimate the extent of contamination at the NPL site, nor describe the ultimate dimensions of the site.") EPA contends, "The 'come to be located' language gives the EPA broad authority to clean up contamination when it has spread from the original source." *Id*. Notably, according to EPA, the contamination from the BPMD includes the "commingled release of metals originating from numerous mines and mine-related activities in the Animas River watershed," i.e., it is not limited solely to the release of contaminants associated with the Gold King Mine Release. *Id*.

CERCLA strictly circumscribes attempts to challenge or interfere with the cleanup of a site once EPA has started a response action. "Congress concluded that the need for [EPA] action was paramount, and that peripheral disputes, including those over 'what measures actually are necessary to clean-up the site and remove the hazard,' may not be brought while the cleanup is in process." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (citation omitted). "To ensure that the cleanup of contaminated sites will not be slowed or halted by litigation, Congress enacted section 113(h) in its 1986 amendments to CERCLA." *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995).

Section 113(h) of CERCLA expressly prohibits interference with on-going CERCLA response actions. The statute provides in relevant part:

> No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title[.]

42 U.S.C. § 9613(h). This section is "clear and unequivocal" and "amounts to a blunt withdrawal of federal jurisdiction" for "any challenges" to an on-going CERCLA response action, including any attempt, through litigation, to interfere with, strengthen, or control the cleanup. *McClellan*, 47 F.3d at 328. Section 113(h) reflects an affirmative Congressional choice to ensure that on-going cleanup actions under EPA oversight will be shielded from lawsuits that might interfere with them. *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011) ("Congress made a choice to 'protect[ ] the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort.'") (quoting *McClellan*, 47 F.3d at 329) (emphasis in original).

For purposes of the Section 113(h) bar, the CERCLA response action need not be far advanced, and, even if it is in its preliminary stages, any challenge is nonetheless barred. *See*

Boarhead Corp. v. Erickson, 923 F.2d 1011, 1018, 1023 (3d Cir. 1991) (on-going preliminary remedial investigation sufficient to bar a lawsuit). Indeed, the Section 113(h) bar applies even when the government "has only begun to 'monitor, assess, and evaluate the release or threat of release of hazardous substances.'" *Cannon v. Gates*, 538 F.3d 1328, 1334 (10th Cir. 2008) (quoting *Razore*, 66 F.3d at 239).

The Sovereign Plaintiffs' claims seeking Court ordered abatement of the alleged trespass and nuisance, as well as the prayers for relief seeking a declaration that the Mining Defendants are liable for all costs incurred and costs that may be incurred to abate the nuisance and cure the trespass, are foreclosed by federal law. EPA has initiated a response action that extends all the way to Lake Powell. The BPMD, which includes the Gold King Mine and the interim treatment plant addressing Gold King discharges, has been placed on the NPL. EPA now directs and oversees CERCLA related environmental investigation and response action activities associated with the Blowout and the BPMD, including any alleged contamination in New Mexico, the Navajo Nation, and Utah. *See* 81 FR 62397-01.

Because granting any relief in New Mexico, within the Navajo Nation, or in Utah would conflict and interfere with EPA's exclusive jurisdiction over its on-going response action activities and cleanup remedies, claims for court-ordered abatement or any type of injunctive relief implicating these response actions" are prohibited by Section 113(h). *See, e.g., Shea Homes Ltd. Partnership v. United States*, 397 F.Supp.2d 1194 (N.D.Cal. 2005) (claims for abatement of migrating landfill gas sought to improve a CERCLA cleanup and were barred by Section 113(h)); *Reynolds v. Lujan*, 785 F.Supp. 152 (D.N.M. 1992) (pleading seeking an order compelling defendant to engage in a "comprehensive cleanup" of a Superfund site would "alter the [EPA's] ongoing response activities," which "is exactly what § 113(h) prohibits"). As a

result, all claims for abatement or injunctive relief are prohibited by Section 113(h) and should therefore be dismissed.

E. The Sovereign Plaintiffs Fail to State a Claim against KGUSA or KGC for Liability as CERCLA Owners, Operators or Arrangers.

The Sovereign Plaintiffs' claims against KGUSA and KGC are premised on the notion that these entities are "owners," "operators," or "arrangers" of the Sunnyside Mine under CERCLA. Utah Amended Compl. ¶¶ 66, 69. New Mexico and the Navajo Nation allege only that KGUSA and KGC are "owners" or "operators." New Mexico Amended Compl. ¶ 126; Navajo Nation Amended Compl. ¶ 158. None of the Sovereign Plaintiffs allege sufficient facts to support these notions, and no such facts exist.

1. The Sovereign Plaintiffs have failed to state a claim against either KGUSA or KGC for CERCLA Owner Liability.

The Sovereign Plaintiffs allege that both KGUSA and KGC are liable as "owners" under CERCLA. However, an actual ownership interest in the facility from which disposal of hazardous substances occurred is a prerequisite to trigger CERCLA "owner" liability. *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (imposing liability on "any person who at the time of disposal of any hazardous substance "owned" . . . any facility at which such hazardous substances were disposed of"); *compare Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1273 (10th Cir. 2017) (for purposes of asserting "owner liability" under CERCLA, "[t]he ordinary or natural meaning of 'owner' includes, at a minimum, a legal title holder.") (citing CERCLA § 107(a)). The Amended Complaints not only fail to allege that KGUSA or KGC own any real property interest at the Sunnyside Mine, they actually *concede* that *SGC* "owns the Sunnyside Mine…." Utah Amended Compl. ¶ 15. *See also* New Mexico Amended Compl. ¶ 20; Navajo Amended Compl. ¶ 38.

Recognizing that SGC owns the Sunnyside Mine, the Sovereign Plaintiffs allege that KGUSA "directly owns" SGC, that KGUSA is a subsidiary of KGC, and that KGC owns the Sunnyside Mine "through" SGC and KGUSA. Utah Amended Compl. ¶¶ 13-14; New Mexico Amended Compl. ¶¶ 18-19; Navajo Amended Compl. ¶ 40.[8] None of these allegations are relevant to the Sovereign Plaintiffs' claims for "owner" liability under CERCLA. To establish ownership liability, the Sovereign Plaintiffs must plead, and prove, that KGUSA and KGC own or owned an actual interest in the real property that constitutes the alleged "facility." *See State of N.Y. v. Solvent Chemical Co., Inc.*, 880 F. Supp. 139, 142-143 (W.D.N.Y. 1995) (motion to dismiss "CERCLA owner" claim granted based on a lack of any allegations in Complaint that defendant owned the site during the time of disposal of hazardous substances); *see also Chevron*, 863 F.3d at 1273 (citing proposition that "the PRP inquiry rests on the relationship between the defendant and the facility itself") (internal quotation omitted). The Amended Complaints fail to meet this test. They contain nothing more than assertions that KGUSA and KGC "directly own" the Sunnyside Mine facility. This claim is conclusory and unsupported, and more importantly, it is refuted by the facts alleged elsewhere in the Amended Complaints that SGC actually owns the Sunnyside Mine.

Rather than alleging facts to support the suggestion that KGUSA and KGC "own" the Sunnyside Mine, the Sovereign Plaintiffs allege facts that would, if true, establish only indirect ownership of the subsidiary, SGC. The Sovereign Plaintiffs allege that KGUSA is a subsidiary of KGC, and that KGC acquired SGC in 2003. Based on these facts, they jump to the conclusion that KGUSA and KGC "controlled and directed" SGC's activities at the Sunnyside Mine. In other words, they claim that KGUSA is a "parent" of SGC, that KGC is an "indirect parent" of

[8] These allegations are taken as true for purposes of this Motion to Dismiss, but, as discussed above, the allegations are, in fact, incorrect.

SGC, and that these relationships are sufficient to establish ownership liability of the Sunnyside Mine facility under CERCLA.[9] The Supreme Court squarely rejected this type of claim in *United States v. Bestfoods*, 524 U.S. 51 (1998), holding that "a parent corporation (so-called because of control through ownership of another corporation's stock) is *not* liable for the acts of its subsidiaries[,]" and that "[n]othing in CERCLA purports to rewrite this well-settled rule[.]" 524 U.S. at 61, 63 (emphasis added)[10].

The allegation that KGUSA or KGC may own SGC or some of its shares does not establish CERCLA ownership liability, and no factual support exists for the Sovereign Plaintiffs' claim that KGUSA and KGC "currently own" the Sunnyside Mine. The CERCLA "owner" claims against KGUSA and KGC must be dismissed.

2. The Sovereign Plaintiffs Have Failed to State a Claim Against Either KGUSA or KGC for CERCLA Operator Liability.

The Sovereign Plaintiffs have failed to allege any cognizable basis for classifying KGUSA or KGC as CERCLA "operators." For an entity to be directly liable as an "operator" under CERCLA, the entity must exercise control over the operations of the *facility*, not the subsidiary.

In *Bestfoods,* the Supreme Court held that operator liability under CERCLA is for those who "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance

[9] Notably, while KGC is the ultimate parent company, neither KGC nor KGUSA own shares of SGC, the actual owner of the Sunnyside Mine. Rather, 100% of the shares of SGC during the relevant period have been owned by Echo Bay Inc., a Delaware corporation. *See* Decl. of Kathleen Grandy ¶ 8.

[10] The Supreme Court essentially held that a parent company's derivative liability as a CERCLA owner or operator—for the activities of a subsidiary that is the actual owner or operator of a contaminated facility—can only arise from piercing the corporate veil. *Bestfoods*, 524 U.S. at 63 (discussing the law of veil piercing). The Sovereign Plaintiffs do not seek to pierce any corporate veil here, and have not alleged facts sufficient to support such a claim.

with environmental regulations." 524 U.S. at 66-67. In other words, "[t]he question is not whether the parent operates the subsidiary, but rather whether it operates the *facility*, and that operation is evidenced by participation in the activities of the *facility*, not the subsidiary." *Id.* at 68 (citations omitted) (emphasis added). *See also Raytheon Constructors, Inc. v. Asarco Inc.*, 368 F.3d 1214, 1218-19 (10th Cir. 2003).

Under *Bestfoods*, a parent may be liable as a CERCLA operator when: (i) it directly operates the subsidiary's facility; or (ii) the subsidiary departs so far from the norms of parental influence as to serve the parent, instead of the subsidiary, in operating the facility; or (iii) an agent of the parent acting solely on the parent's behalf directs or manages activities at the facility. *Bestfoods*, 524 U.S. at 71. "For one to be considered an operator, then, there must be some nexus between that person's or entity's control and the hazardous waste contained in the facility." *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 928 (5th Cir. 2000) (abrogated on other grounds) (internal quotation omitted). The Sovereign Plaintiffs have failed to allege any facts that would suggest, let alone demonstrate, that any such circumstances exist here.

The Sovereign Plaintiffs claim only that KGUSA and KGC "controlled and directed" SGC's activities and directed SGC to leave the court ordered bulkheads in place. This allegation is conclusory, and the Amended Complaints allege no facts to support it. The Sovereign Plaintiffs have failed to allege any facts that would show, if proven, that either KGUSA or KGC ever actually operated the Sunnyside facilities. The only affirmative conduct asserted regarding SGC is the bulkheading and that conduct took place before either KGUSA or KGC had any indirect interest in SGC. Without such facts, the Sovereign Plaintiffs cannot establish that either KGUSA or KGC has ever "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution, that is, operations having to do with the leakage or

disposal of hazardous waste, or decisions about compliance with environmental regulations" at the Sunnyside Mine facility. *Bestfoods*, 524 U.S. at 66-67. Alleging that KGUSA or KGC "directed" SGC to leave the court ordered bulkheads in place fails to establish "operation" of the Sunnyside Mine. As a result, the CERCLA operator claims against KGUSA and KGC must be dismissed.

3. Utah has Failed to State a Claim Against Either KGUSA or KGC for CERCLA Arranger Liability.

Utah's claim that KGUSA and KGC qualify as "arrangers" under CERCLA fails for similar reasons.

In the Tenth Circuit, arranger liability requires satisfaction of three requirements:

> First, the party must be a "person" as defined in CERCLA. Second, the party must "own" or "possess" the hazardous substance at issue. Third, the party must, by contract, agreement or otherwise, arrange for the transport or disposal of such hazardous substances.

Raytheon Constructors, 368 F.3d at1219 (citing 42 U.S.C. § 9607(a)(3)). Knowledge alone is not sufficient for arranger liability. A party "must have taken intentional steps to dispose of a hazardous substance." *Chevron*, 863 F.3d at 1279 (internal quotation omitted). Utah's Amended Complaint lacks any facts, let alone well-pleaded facts, that would support claims that KGUSA or KGC owned or possessed hazardous substances and then arranged for their disposal.

Utah alleges that all Defendants are "arrangers" because they owned or possessed the hazardous substances that were released in the "Blowout;" and because "they by contract, agreement or otherwise, intentionally arranged for the disposal, treatment, and/or transport of hazardous substances released from the Gold King Mine and other nearby mines." Utah Amended Compl. ¶69. The Utah Amended Complaint contains no facts to support these conclusions. In fact, the Utah Amended Complaint fails to sufficiently allege any facts to

support even one of the three factors that might create arranger liability, let alone all three. Without more, the allegation does nothing more than provide "a formulaic recitation of the elements of a cause of action, [which] will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell A. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Under both *Iqbal* and *Twombly*, Utah has failed to allege facts to support an "arranger" claim against KGUSA or KGC, and that claim should also be dismissed.

4. Absent owner, operator or arranger liability, declaratory relief is not available.

Each Amended Complaint's first cause of action, which seeks cost recovery under CERCLA, is predicated upon a defendant being either an owner, an operator, or an arranger. 42 U.S.C. § 9607(a). Because the Amended Complaints second causes of action seek declaratory relief under 42 U.S.C. § 9613(g)(2), those too must be dismissed. The availability of declaratory relief is predicated on a valid claim § 9607. Because the Sovereign Plaintiffs have not met the standards for establishing a valid claim under § 9607, they are also not entitled to declaratory relief. *See* 42 U.S.C. § 9613(g)(2).[11]

F. Based on the allegations in the Complaints, punitive damages are not available against the Mining Defendants and those claims must be dismissed.

The Sovereign Plaintiffs all seek an award of punitive damages against the Mining Defendants and others. Utah Amended Compl. ¶¶ 88, 101; New Mexico Amended Compl. ¶¶ 209, 214; Navajo Amended Compl. Prayer for Relief (3). No State's law, however, allows for

[11] Dismissal of the Sovereign Plaintiffs' federal claims also warrants dismissal of their claims under state law. *See* 28 U.S.C. § 1367(c)(3) (district courts may decline to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction."). The Tenth Circuit has "generally held that if federal claims are dismissed . . . , leaving only issues of state law, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Brooks v. Gaenzle*, 614 F.3d 1213, 1229 (10th Cir. 2010) (citations omitted).

punitive damages against any of the Mining Defendants in this action.

The Utah punitive damages statute provides:

> [P]unitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

Utah Code § 78B-8-201. The Utah statute requires very specific conduct to justify punitive damages: "(1) willful and malicious or intentionally fraudulent conduct or (2) a knowing and reckless indifference toward, and a disregard of, the rights of others." *Daniels v. Gamma W. Brachytherapy, LLC*, 221 P.3d 256, 269 (Utah 2009) (internal quotation omitted).

To establish that an action was knowing and reckless, the party must demonstrate the "tortfeasor knew of a substantial risk and proceeded to act or failed to act while consciously ignoring that risk." *Id.* Punitive damages may also be awarded where the defendant's conduct was "willful or malicious." Punitive damages are always "reserved for the most unusual and compelling circumstances. There must be some element of outrage normally present in the commission of crimes or intentional torts." *Trugreen Companies, L.L.C. v. Scotts Lawn Serv.*, 508 F. Supp. 2d 937, 962 (D. Utah 2007) (internal quotations omitted). This element of outrage is necessary because "'[p]unitive damages constitute an extraordinary remedy' that 'should be applied with caution,'" and thus are "only appropriate in exceptional cases." *Farm Bureau Life Ins. Co. v. Am. Nat. Ins. Co.*, 408 Fed. App'x. 162, 166 (10th Cir. 2011) (unpublished) (quoting *First Sec. Bank of Utah, N.A. v. J.B.J. Feedyards, Inc.*, 653 P.2d 591, 598 (Utah 1982)) (internal citations omitted).

New Mexico law is similar in its requirements for a punitive damages claim. "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).

Colorado law is even more restrictive. Colorado requires a showing of "fraud, malice, or willful and wanton conduct" to support punitive damages. Colo. Rev. Stat. Ann. § 13-21-102(1)(a). Willful and wanton conduct "means conduct purposefully committed which the actor must have realized as 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, under Colorado law, punitive damages may not even be included in an initial claim for relief. Instead, they must be added by amendment only after the exchange of initial disclosures where the Plaintiffs can establish prima facie proof of a triable issue on such a claim. Colo. Rev. Stat. Ann. § 13-21-102(1.5)(a). For this reason alone, applying Colorado law as the law of the source state, the punitive damages allegations should be stricken.

No Sovereign Plaintiff has plead any aggravating circumstances that would allow for the imposition of punitive damages against any Mining Defendant. They have all failed to allege that any Mining Defendant's 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 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 Clean Water Act 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 Amended Complaints 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").

The allegations against KGUSA and KGC are even more tangential. By the time KGC acquired 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 Amended Complaints confirms that the Court should dismiss the Sovereign Plaintiffs' request for punitive damages against each of the Mining Defendants.

IV. CONCLUSION:

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

(A) New Mexico and Utah courts lack personal jurisdiction over any Mining Defendant.

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

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

(D) CERCLA Section 113(h) bars any interference with an ongoing CERCLA response action.

(E) The Sovereign Plaintiffs Fail to State a Claim against KGUSA or KGC for liability as CERCLA Owners, Operators, or Arrangers.

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

DATED this 25th day of July, 2018.

Respectfully submitted

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen

Neil G. Westesen *(admitted pro hac vice)*
1915 South 19th Street
PO Box 10969
Bozeman, MT 59719-0969
Telephone: (406) 556-1430
Facsimile: (406) 556-1433
nwestesen@crowleyfleck.com

Jeffery J. Oven *(admitted pro hac vice)*
490 North 31st Street, Suite 500
PO Box 2529
Billings, MT 59103-2529
Telephone: (406)252-3441
Facsimile: (406) 252-5292
joven@crowleyfleck.com

Attorneys for Defendant Sunnyside Gold Corporation

HOLLAND & HART LLP

/s/ Bradford C. Berge
Bradford C. Berge
P.O. Box 2208
110 N. Guadalupe, Ste. 1
Santa Fe, NM 87504-2208
TEL: 505-988-4421
FAX: 505-983-6043
bberge@hollandhart.com

Attorneys for Defendants Kinross Gold U.S.A., Inc. and Kinross Gold Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 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*
Neil G. Westesen