IN THE 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

No. 1:18-md-02824-WJ

This Document Relates to All Cases

MEMORANDUM OF LAW IN SUPPORT OF EPA CONTRACTOR DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE

GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP

Terry D. Avchen (*pro hac vice*)
Peter C. Sheridan (*pro hac vice*)
Andriy R. Pazuniak (*pro hac vice*)
10250 Constellation Blvd., 19th Fl.
Los Angeles, California 90067
Telephone: (310) 553-3000
Email: tavchen@glaserweil.com
Email: psheridan@glaserweil.com
Email: apazuniak@glaserweil.com

MOSES, DUNN, FARMER & TUTHILL, P.C.

Terry D. Farmer
612 First Street NW
P.O. Box 27047
Albuquerque, New Mexico
87125-7047
Telephone: (505) 843-9440
Email: terry@moseslaw.com

Attorneys for Defendant
Environmental Restoration, LLC

MONTGOMERY & ANDREWS, P.A.

Jeffrey J. Wechsler
Louis W. Rose
Kari E. Olson
Kaitlyn A. Luck
325 Paseo de Peralta (87501)
P.O. Box 2307
Santa Fe, NM 87504-2307
Telephone: (505) 986-2637
Email: jwechsler@montand.com
Email: lrose@montand.com
Email: kolson@montand.com
Email: kluck@montand.com

Attorneys for Defendant
Weston Solutions, Inc.

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AMD:	Acid Mine Drainage
BPMD:	Bonita Peak Mining District
BPMD Site:	Bonita Peak Mining District Superfund Site
CERCLA:	Comprehensive Environmental Response, Compensation, and Liability Act
DRMS:	Colorado Division of Reclamation, Mining, and Safety
EPA:	United States Environmental Protection Agency
ER:	Environmental Restoration, LLC
ERRS:	Emergency Rapid Response Services
McD:	McDaniel Plaintiffs' Second Amended Complaint for Personal Injuries and Damages
NN:	Navajo Nation's First Amended Complaint
NCP:	National Contingency Plan
NPL:	National Priorities List
OSC:	On-Scene Coordinator

PRP:	Potentially Responsible Parties
RCRA:	The Resource Conservation and Recovery Act
SNM:	State of New Mexico's First Amended Complaint
START:	Superfund Technical Assessment and Response Team
USHWA:	Utah Solid and Hazardous Waste Act
UT:	State of Utah's First Amended Complaint
UWQA:	Utah Water Quality Act
Weston:	Weston Solutions, Inc.

INTRODUCTION

In four complaints seeking hundreds of millions of dollars in alleged damages from an August 5, 2015 release from the Gold King Mine in Silverton, Colorado ("Gold King") during an EPA clean-up action (the "Release"), Plaintiffs ignore decades when billions of gallons of acid mine drainage ("AMD") were released from nearly 50 other inactive and abandoned mines in the Upper Animas River watershed and traveled to and through their lands. The decades-long contamination is mentioned only in passing by two of the Plaintiffs, *see* New Mexico Plaintiff's First Amended Complaint ("SNM"), No. 1-18-md-02924-WJ (D.N.M. May 11, 2018), ECF No. 8, ¶ 21; Navajo Nation Plaintiff's First Amended Complaint ("NN"), No. 1:18-md-02824-WJ (D.N.M. May 11, 2018), ECF No. 7, ¶ 36, as if it was a minor aside. That decades-long contamination from numerous mines, however, (a) compelled EPA to designate the area as a Superfund Site on the National Priorities List ("NPL") and study the ongoing releases of AMD in order to determine future clean-up actions in the same locations that Plaintiffs allege were impacted by the Release, (b) originally brought EPA with its contractors, Weston Solutions, Inc. ("Weston") and Environmental Restoration LLC ("ER," collectively with Weston, the "EPA Contractor Defendants"), to the area to clean-up the mess created by others, and (c) compels the EPA Contractor Defendants to ask: what did the "Sovereign Plaintiffs" (State of New Mexico, Navajo Nation and State of Utah) and the "Individual Plaintiffs" (the McDaniel Plaintiffs, collectively with the Sovereign Plaintiffs, the "Plaintiffs") do previously to address the decades-long contamination or to seek damages incurred as a result of it? A number of critical legal flaws arise as a result of Plaintiffs singling out an effort by EPA and its contractors to stem a relatively small amount of the decades-long flow of contamination.

First, the Court lacks subject matter jurisdiction over Plaintiffs' claims under CERCLA Section 113(h) (42 U.S.C. § 9613(h)), which strips federal courts of jurisdiction in cases challenging an ongoing EPA remedial action, such as the one EPA is currently conducting at Gold King and other inactive and abandoned mines in the Bonita Peak Mining District. Over the course of decades, these mines have discharged (and are continuing to discharge) large amounts of AMD into waterways that flow into the Animas and San Juan Rivers.

Second, CERCLA's comprehensive remedial scheme preempts Plaintiffs' damage claims, which are in part based on alleged damages to natural resources (the Animas and San Juan Rivers and Lake Powell).

Third, Plaintiffs have not alleged—and cannot allege—any facts showing that the EPA Contractor Defendants are potentially responsible parties ("PRPs") under CERCLA Section 107(a) (42 U.S.C. § 9607(a)). Plaintiffs fail to allege any facts showing that the EPA Contractor Defendants (a) had the requisite control at Gold King in order to be "operators," (b) entered into a contract with another party to transport or dispose of allegedly hazardous substances from Gold King (and that such party released the allegedly hazardous substances), which negates Plaintiffs' "arranger" allegations, or (c) selected the disposal site for the AMD that flowed out of Gold King during the uncontrolled Release, which negates Plaintiffs' "transporter" allegations. Even if Plaintiffs had alleged such facts (and they have not and cannot), Plaintiffs admit that the EPA Contractor Defendants are "response action contractors" under CERCLA § 119 (42 U.S.C. § 9619)) and, therefore, can only be liable under CERCLA if their conduct was negligent. Plaintiffs, however, have not alleged—and cannot allege—sufficient facts showing that the EPA Contractor Defendants were negligent while performing a

clean-up under the direction and constant supervision of an EPA On-Scene Coordinator ("OSC") who was on-site and "in charge" at all relevant times.

Fourth, Plaintiffs' state law claims against the EPA Contractor Defendants must be dismissed because the EPA Contractor Defendants are entitled to derivative sovereign immunity under the "Government Contractor Defense," which shields federal government contractors, such as Weston and ER, from state law liability while working under the direction of a federal agency that was performing a "discretionary function," like EPA as it was conducting the clean-up at Gold King.

Fifth, Plaintiffs fail to allege sufficient facts that the EPA Contractor Defendants are liable for negligence, trespass, or nuisance under applicable Colorado state law. Plaintiff State of Utah also improperly asserts claims against the EPA Contractor Defendants under two Utah state statutes, which statutes are inapplicable to alleged acts and omissions that occurred hundreds of miles away in another state (Colorado).

Sixth, Plaintiffs improperly seek damages for contamination that occurred over the course of decades as a result of AMD discharges from nearly 50 inactive and abandoned mines in the Upper Animas River watershed. Accordingly, Plaintiffs' damage claims are barred by the applicable statutes of limitation.

Seventh, Plaintiffs incorrectly allege that the EPA Contractor Defendants are "jointly and severally" liable with the other defendants for Plaintiffs' state law claims. Plaintiffs' "joint and several" liability allegations should be stricken because joint and several liability has been abolished under Colorado law, which, under Supreme Court precedent, applies in this case as the law of the "point source" (Gold King).

BACKGROUND

The following facts are derived from the allegations in Plaintiffs' Complaints and are assumed to be true for purposes of this motion to dismiss. *See Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

A. The Deterioration of Gold King and Prior Failed State Government Clean-Up Efforts

Gold King is one of nearly 50 inactive or abandoned mines located in the "Bonita Peak Mining District" of the San Juan Mountains in southwestern Colorado that have been discharging AMD into the Upper Animas River watershed long before the Release. SNM ¶ 5; NN ¶¶ 5, 36; Utah Plaintiff's First Amended Complaint ("UT"), No. 2:17-cv-00866-TS (D. Utah Jan. 4, 2018), ECF. No. 93, ¶ 18. As Navajo Nation admits, it "is well-known that water discharged from the mines and the surrounding areas leads to the Animas and San Juan Rivers" and into Plaintiffs' land. NN ¶ 36.

Gold King was once a "virtually dry" mine that did not meaningfully contribute to the amount of AMD that was discharging into the Animas and San Juan Rivers from the Bonita Peak Mining District. SNM ¶¶ 6, 52. That changed, however, in 1996, after Defendant Sunnyside Gold Corporation ("Sunnyside"), with the approval of the State of Colorado, installed a bulkhead in the "American Tunnel," which served as a passageway to the nearby Sunnyside Mine (another mine located in the Bonita Peak Mining District) and drained AMD from Gold King and other mines in the area. NN ¶ 48; UT ¶¶ 21, 22. As a result of Sunnyside installing a bulkhead in the American Tunnel, "billions of gallons" of AMD and waste water built up inside the mountain and flooded into Gold King and other mines of the Bonita Peak Mining District. SNM ¶ 5. The rate of AMD discharging from Gold King surged and by 2005 Gold King had become one of the

worst polluting mines in Colorado. SNM ¶ 52; NN ¶ 56.

By 2007, between 150 to 200 gallons per minute (approximately 8 million gallons per month, or 105 million gallons per year) of AMD was pouring out of Gold King. NM ¶ 62. The conditions worsened when the increased flows at the site caused a landslide that blocked the opening to the Gold King adit. SNM ¶ 62; NN ¶ 65; UT ¶ 31. Waste water that continued to flood into Gold King was now trapped behind an earthen plug, which resulted in a "dangerous" build-up of AMD inside the Gold King adit. SNM ¶¶ 4, 62, 64; NN ¶¶ 6, 45, 55; UT ¶ 31.

Due to the environmental threat that Gold King posed, the Colorado Division of Reclamation, Mining and Safety ("DRMS") attempted "partial reclamation work" at Gold King in 2008 and 2009. SNM ¶ 66; NN ¶ 66. These efforts failed. In 2008, DRMS redirected the flow of AMD from Gold King to a "diversion structure," but DRMS closed the Gold King adit "in a way that increased the potential for a blowout." SNM ¶ 66. DRMS returned to Gold King in 2009 and planned to install a drainage pipe, but the Gold King portal collapsed while DRMS was performing the work and "loose material completely covered the observation and drainage pipes." SNM ¶ 68; NN ¶ 66. As a result, "DRMS was concerned that this collapse would raise the water pressure within the Gold King Mine workings, making a blowout even more likely than before." SNM ¶ 69. DRMS attempted to drive a "stinger" through the drainage pipe to relieve water pressure inside Gold King, but it is unclear if the "stinger" reached the impounded water. *See* SNM ¶¶ 69–70. DRMS then abandoned the site without installing proper drainage and the threat of a blowout remained. UT ¶¶ 33-34.

B. EPA's Removal Actions at Gold King in 2014 and 2015.

After failing to remedy the "dangerous conditions" at Gold King in 2008 and 2009,

DRMS requested EPA's assistance with reopening and stabilizing Gold King in 2014. SNM ¶ 77; NN ¶ 67; UT ¶ 34. EPA agreed and began a "removal site evaluation to investigate the possibility of opening the collapsed mine portal" at Gold King in 2014. UT ¶ 35. A "removal site evaluation" is the initial step in conducting a removal action under CERCLA. *See* 40 C.F.R. §§ 300.410, 300.415. The work at Gold King began "under the direction" of "EPA project leader and lead On-Scene Coordinator ('OSC')" Steve Way. SNM ¶ 81; UT ¶ 42.

In order to assist with its efforts, EPA engaged its Emergency and Rapid Response Services ("ERRS") contractor (ER) and its Superfund Technical Assessment and Response Team ("START") contractor (Weston). UT ¶ 35. Both contractors worked under time and material contracts with EPA that authorized EPA to engage and direct the work of its ERRS and START contractors on a project-by-project basis by issuing project-specific "task orders." SNM ¶¶ 16, 17, 78, 83, 88, 94; NN ¶¶ 5, 67–72, 87; UT ¶¶ 10, 35–38. Weston and ER were only onsite at Gold King because EPA contracted with them to be part of a group of experienced contractors assisting with a removal assessment at a site with pre-existing environmental contamination. *See* McDaniel Plaintiffs' First Amended Complaint for Personal Injuries and Damages ("McD"), No. 1:17-cv-00710-KBM-SCY (D.N.M. Aug. 2, 107), ECF No. 3, ¶ 14; SNM ¶¶ 16, 17, 132; NN ¶¶ 16, 21; UT ¶¶ 10, 11, 71.

1. ER's ERRS Contract with EPA.

The ERRS contract between EPA and ER, which contract is referenced and relied upon by the Plaintiffs throughout their respective complaints, requires ER to follow directions from the acting EPA OSC, including oral directions given on-site at a project. For example, under the ERRS contract:

(i) EPA "OSCs are authorized and duly delegated to direct and coordinate the execution of the [Task Order] for each response action." Declaration of Peter C. Sheridan attached hereto as Exhibit 1 at Declaration Exhibit A, § B.5; Statement of Work, Pt. II.A.12.

(ii) The EPA "Project Officer" is "authorized to provide technical direction on contract performance," which includes "[d]irection to the Contractor which assists the Contractor in accomplishing the Statement of Work." Ex. 1 (Sheridan Decl.) at Decl. Ex. A, § H.3(a), (c).

(iii) "The Government shall make all final policy and regulatory decisions resulting from contractor-provided advice and assistance under this contract." Ex. 1 (Sheridan Decl.) at Decl. Ex. A, Statement of Work, Pt. I.E.)

(iv) "The Contractor shall take any response action, under the direction of the Ordering Officer, consistent with the terms and conditions of the contract, and in accordance with the directions of the [Task Order]." Ex. 1 (Sheridan Decl.) at Decl. Ex. A, Statement of Work Pt. I.E; *see also* Pt. III.B.

(v) "The OSC will determine the appropriate planning activity for each [Task Order]." Ex. 1 (Sheridan Decl.) at Decl. Ex. A, Statement of Work, Pt.III.D.

Plaintiffs admit that under the ERRS contract EPA had the authority to issue a "task order" to ER that "specified" the work that ER was "required" to perform at Gold King. UT ¶¶ 37, 38; NN ¶ 67.

2. Weston's START Contract with EPA.

In 2014, EPA awarded to Weston the Superfund Technical Assessment and Response Team ("START") contract for EPA Region 8. McD ¶ 14; SNM ¶¶ 17, 132; NN ¶ 21; UT ¶¶ 11, 71. Under the START contract:

(i) EPA required Weston, as a Response Action Contractor at Gold King, to provide "support on removal assessment activities, pursuant to EPA's obligations under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)" as directed by EPA. *See* Declaration of Jeffrey J. Wechsler, attached hereto as Exhibit 2 at Exhibit A, Attach. 1, Statement of Work, Pt. II.A.

(ii) Weston agreed to maintain 24-hour, seven day a week, response capability to respond, upon request by EPA, to discharges/releases by furnishing the necessary

personnel, material, equipment, services, and facilities to provide scientific/technical support for EPA-specific projects. Ex. 2 (Wechsler Decl.) at Decl. Ex. A, §§ B.9(b), C.1, I.4.

(iii) EPA was obligated to issue a Task Order that contained broad task areas in the Statement of Work ("SOW") and to detail specifications for site-specific work to Weston through a Technical Direction Document ("TDD"). Ex. 2 (Wechsler Decl.) at Decl. Ex. A, §§ C.1, H.17, I.4.

(iv) EPA's "Project Officer is the primary representative . . . authorized to provide technical direction on contract performance," including "[d]irection to [Weston] which assists [it] in accomplishing the [SOW]." Ex. 2 (Wechsler Decl.) at Decl. Ex. A, § H.4.

(v) EPA was required to provide to Weston all "data described in the contract" through a Task Order or TDD. Ex. 2 (Wechsler Decl.) at Decl. Ex. A, § G.7.

Given the nature of the START contract, Weston was at all times working at the direction of EPA, Ex. 2 (Wechsler Decl.) at Decl. Ex. A, § H.4, EPA was charged with providing Weston any information necessary to perform the work at Gold King, *Id.* Ex. A, § G.7, and EPA made all final regulatory and policy decisions resulting from Weston's technical support, *Id.* Ex. A, Attach. 1, Pt. III.

C. The August 5, 2015 Release.

"EPA began work at the Gold King Mine in September 2014 under the direction of OSC Steven Way." SNM ¶ 81. The work, however, was suspended after two hours of excavation because "seepage" appeared and the excavation uncovered "timber shoring sets" and the pipes that DRMS had previously installed in 2008 and 2009. SNM ¶¶ 81, 82; NN ¶¶ 79, 80; UT ¶ 39. EPA planned to continue working at Gold King the following year and directed the EPA Contractor Defendants to continue assisting. SNM ¶¶ 82-83; UT ¶ 17.

After its OSC had "reviewed and approved" an "Action/Work Plan" and "Final Site Health and Safety Plan" for the work at Gold King, EPA returned to Gold King in the summer

of 2015 with ER and Weston. NN ¶¶ 86, 88, 93, 101. In late July, EPA OSC Steven Way left for vacation and another EPA OSC, Hays Griswold, was put "in charge in the interim." NN ¶ 96; UT ¶ 43; McD ¶ 38. As the substitute OSC, it was Griswold's responsibility "to supervise the site from August 3 until Way returned from vacation." SNM ¶ 93. As OSCs, both Way and Griswold had equal authority "to coordinate and direct responses" at Gold King. *See* 40 C.F.R. § 300.5.

Plaintiffs allege that on August 4, 2015, EPA and its On Site Team "created a plan to conduct excavation activities" at Gold King, UT ¶ 44, and continued to perform work the next day, on August 5, 2015. UT ¶ 55. Plaintiffs admit that EPA remained on site at Gold King while the work was performed. SNM ¶¶ 95, 99; UT ¶¶ 43, 55. At some point on August 5, a release from Gold King occurred, allegedly discharging three million gallons of AMD into the Animas River (the "Release"). SNM ¶ 1; UT ¶ 60. Plaintiffs allege that AMD released from Gold King traveled through the State of New Mexico, Navajo Nation and the State of Utah along the Animas and San Juan River system until the AMD reached Lake Powell. SNM, ¶ 1; NN ¶ 1; UT ¶ 61.

After August 5, 2015, EPA began an emergency removal action pursuant to CERCLA. SNM ¶ 149. Additionally, EPA included the Bonita Peak Mining District Superfund Site (the "BPMD Site") on the NPL on September 9, 2016. National Priorities List, 81 Fed. Reg. 62,397, 62,400 (Sept. 9, 2016) (to be codified at 40 C.F.R. pt. 300). The BPMD Site includes Gold King among forty-eight (48) inactive and abandoned mines or mine-related sources that are draining AMD into the Animas River, and EPA's remedial actions extend wherever "contamination [from these sources] come to be located." *Id.* at 62,399. EPA's remedial investigation is ongoing and

EPA has proposed an interim remedial action at 26 sources at the site. www.epa.gov/superfund/bonita-peak.

STANDARD OF REVIEW

EPA Contractor Defendants bring this motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1).

A. Standard under Rule 12(b)(6).

A motion under Rule 12(b)(6) should be granted when a complaint's well-pleaded factual allegations fail to show that the plaintiff is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009). "In determining whether a complaint states a plausible claim," the Court is not bound to accept the plaintiff's "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Id*. Rather, the Court may "begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth." *Id.* at 679. "While legal conclusions can provide the framework of a complaint," they are not sufficient to survive a motion to dismiss unless they are supported by factual allegations showing that the plaintiff is entitled to relief. *Id.*

B. Standard under Rule 12(b)(1).

Rule 12(b)(1) permits a party to file a motion to dismiss for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Plaintiffs, as the parties invoking the Court's jurisdiction, have a "duty to establish that federal jurisdiction does exist, but, since the courts of the United States are courts of limited jurisdiction, there is a presumption against its existence." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (internal citations omitted). The Court "must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1)

motion than would be required for Rule 12(b)(6) motion for failure to state a claim." *Jones v. Univ. of D.C.*, 505 F. Supp. 2d 78, 83 (D.D.C. 2007). In deciding a motion, the Court may consider materials outside the pleadings. *Holt v. United States* 46 F.3d 1000, 1003 (10th Cir. 1995) (recognizing a court's "wide discretion" to consider materials outside the pleadings as it deems appropriate to resolve jurisdictional inquiries); *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992). If the Court concludes that it lacks jurisdiction over the subject matter of the complaint, then the Court must dismiss the action. FED. R. CIV. P. 12(h)(3).

C. Applicability of Prior Order on ER's Motion to Dismiss.[1]

Judge Armijo's February 12, 2018 order denying ER's motions to dismiss the State of New Mexico and Navajo Nation's CERCLA and state tort law claims, *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 (the "Ruling") at is an interlocutory order and, therefore, is not dispositive of any argument raised by ER in this Motion to Dismiss and Motion to Strike. *Wallace v. United States*, 372 Fed. App'x 826, 828 (10th Cir. 2010); *Langevine v. District of Columbia*, 106 F.3d 1018, 1022–23 (D.C. Cir. 1997) (internal citations omitted) ("Interlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment. This is true even when a case is reassigned to a new judge."); *In re Sony Grand Wega KDF-EA10/A20 Series Rear Projection HDTV T.V. Litig.*, 758 F. Supp. 2d 1077, 1098 (S.D. Cal. 2010) (granting motion to dismiss, even though the claim was "substantively unchanged" from a claim that had

[1] The Ruling does not apply to arguments raised by Weston in this Motion because Weston was not a party to this litigation at the time ER filed its Motion, and was therefore, not involved in any way in ER's Motion.

survived an earlier motion to dismiss, because t]he law of the case doctrine "'is in no way a limit on a court's power to revisit, revise, or rescind an interlocutory order'") (internal citation omitted). This Court should therefore consider all arguments presented in this Motion to Dismiss and Motion to Strike.[2]

ARGUMENT

I. CERCLA § 113(h) PROHIBITS THIS COURT FROM EXERCISING JURISDICTION OVER PLAINTIFFS' STATE LAW CLAIMS

EPA Contractor Defendants move to dismiss Plaintiffs' state law claims for lack of subject matter jurisdiction pursuant to Section 113(h) of CERCLA, which revokes federal court jurisdiction over challenges to ongoing EPA response actions, like the ongoing remediation at the BPMD Site. *See Cannon v. Gates*, 538 F.3d 1328, 1333 (10th Cir. 2008) (internal quotation marks and citation omitted) ("This clear and unequivocal provision is a blunt withdrawal of federal jurisdiction over challenges to ongoing CERCLA removal actions"); *Giovanni v. United States Department of the Navy*, 263 F. Supp. 3d 532, 537 (E.D. Pa. 2017) (citing *Cannon*, 538 F.3d at 1335) ("[L]awsuits that call into question a removal plan, interfere with the implementation of a CERCLA remedy, seek to dictate specific remedial actions or seek to improve on the CERCLA cleanup are challenges barred by [§ 113(h)]."") (internal quotation marks omitted).

Congress enacted Section 113(h) to "prevent time-consuming litigation which might

[2] EPA Contractor Defendants note that in May 2018, after Judge Armijo's Ruling, striking joint and several liability, State of New Mexico and Navajo Nation have reasserted such allegations in their amended complaints. SNM ¶¶ 8, 182, 184, 197, 199, 207, 217; NN ¶¶ 177, 183, 193, 203, 209, and Prayer for Relief No. 6.

interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites." *Cannon*, 538 F.3d at 1332. This jurisdictional bar is triggered when two criteria are met: (i) "the United States has 'selected' a 'removal or remedial action' under Section 104; and, if so," (ii) "the [plaintiffs'] claims present a 'challenge' to that removal or remedial action." *Id.* at 1332–33. As shown below, these criteria are satisfied and this Court is without jurisdiction to review Plaintiffs' state law claims.[3]

A. EPA Has "Selected" a Remedial Action for Purposes of Section 113(h)[4]

CERCLA defines "remedial action" as "those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24). A "removal" action is "the cleanup or removal of released hazardous substances from the environment…such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . . ." 42 U.S.C. § 9601(23).

In *Cannon*, the Tenth Circuit explained that the "[Section 113(h)] jurisdiction strip

[3] This includes State of Utah's claims under UWQA and USHWA. *See Anacostia Riverkeeper v. Washington Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012) (Section 9613(h) applied despite savings clauses because CERCLA "makes the primacy of CERCLA § 113(h) explicit").

[4] Judge Armijo's previously ordered limited discovery regarding the Court's subject matter jurisdiction under CERCLA § 113(h) (42 U.S.C. § 9613(h)). (Case No. 16-cv-465, Doc. 164.) The following section cites to facts taken from EPA's Declaration of Rebecca Thomas, attached hereto as Exhibit 3, and EPA's Analysis of the Transport and Fate of Metals Released from the Gold King Mine, attached hereto as Exhibit 4, both of which were produced in response to Judge Armijo's prior order and, therefore, included as part of the record for this case. (*See* Case No. 16-cv-465, Doc. 181-1 & 181-3.) Citations to specific page numbers in Exhibit 4 omits the bates number prefix "EPAH0000."

applies even if the Government has only begun to monitor, assess, and evaluate the release or threat of release of hazardous substances." 538 F.3d at 1334 (internal quotation marks and citation omitted). The Court therefore held that the initial steps taken by the Government toward determining how it will address the contamination was sufficient to trigger Section 113(h), even where the Government had not yet selected an official removal or remedial action. *Id.* 1334-35.

Pursuant to the Tenth Circuit's holding in *Cannon*, EPA's response actions at the BPMD Site are sufficient to trigger Section 113(h). Just like in *Cannon*, here the EPA has "undertaken several steps toward determining how it will address" areas that were potentially affected by the decades-long contamination from BPMD Site and the Release. *Cannon*, 538 F.3d at 1334. Immediately following the Release, EPA began evaluating, monitoring, and assessing all areas that were potentially impacted by AMD discharge from the BPMD Site and the potential effects of the Release on downstream communities in New Mexico, Navajo Nation, and Utah. Declaration of Rebecca J. Thomas attached hereto as Exhibit 3 at ¶ 11; Analysis of the Transport and Fate of Metals Released from the Gold King Mine in the Animas and San Juan Rivers, EPA, (Jan. 2017) attached hereto as Exhibit 4, at 2194. EPA's expansive study area spanned the entire length of the portions of the Animas and San Juan Rivers that were potentially affected by the Release, from the point where Cement Creek joins the Animas River, to the Animas River's confluence with the San Juan River in Farmington, New Mexico, to the San Juan River's terminus in Lake Powell in Utah. *See* Ex. 4, at 2230, 2232, 2489; Ex. 3 (Thomas Decl.) ¶ 11. And EPA and its "response partners" collected more than 2,000 water and soil samples from 294 sites within that area, including irrigation ditches, shallow private wells and public drinking

water intakes. Ex. 4 at 2194, 2409, 2490, 2496.

EPA also added the BPMD Site to the General Superfund section of the NPL. 81 Fed. Reg. 62,397, 62,401 (Sept. 9, 2016); Ex. 3 (Thomas Decl.) ¶ 6. Consistent with federal regulations pertaining to NPL and EPA's practice, the listing documentation for the BPMD Site "will be determined based on investigations regarding the extent of the release and the risks posed by the release," but will ultimately extend to "wherever contamination from these sources comes to be located." Ex. 3 (Thomas Decl.) ¶¶ 6, 8. Accordingly, Plaintiffs assertions that there are contaminated sites not contained within that listing are premature and cannot restore jurisdiction. *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) ("*New Mexico*") (finding arguments related to geographical scope of EPA's ongoing remedial actions "constitute a dispute over environmental cleanup methods and standards and thus constitutes a challenge to the cleanup under [Section 113(h)].") (internal quotation marks omitted).

B. Plaintiffs' State Law Claims Challenge EPA's Ongoing Remedial Actions

The Tenth Circuit has repeatedly held that a lawsuit challenges a response action if it "calls into question that removal plan" or "interferes with the implementation of a CERCLA remedy." *Cannon*, 538 F.2d 1335; *New Mexico*, 467 F.3d at 1249. Under Tenth Circuit precedent, any challenge to the remediation of areas affected by the Release "must wait because CERCLA protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort." *New Mexico*, 467 F.3d at 1249 (internal quotation marks omitted). In other words, the obvious meaning of Section 113(h) is that when a remedial action has been "initiated" as is the case here, no challenge to the cleanup may occur prior to completion EPA's action. *See id.*

There can be no doubt that Plaintiffs' state law claims are a "challenge to EPA's remedial action" and trigger Section 113(h). Plaintiffs' requests for injunctive relief ordering the remediation of their property is the same relief that the court in *Cannon* held "would undoubtedly interfere with the Government's ongoing removal efforts." *Cannon*, 538 F.3d at 1335. This is precisely what Congress intended to avoid by enacting Section 113(h). *Id.* at 1332.

C. Section 113(h) also Bars Plaintiffs' Claims for Money Damages

In *New Mexico*, the Tenth Circuit dismissed the State of New Mexico's claims for money damages under state law for lack of jurisdiction pursuant to Section 113(h). In reaching that holding, the Tenth Circuit rejected the State of New Mexico's argument that it was "not seeking to alter or expand the EPA's response plan but rather only to acquire money damages," explaining that this argument "falls on deaf ears" because "*[a]ny relief* provided the State would substitute a federal court's judgment for the authorized judgment of both the EPA and [New Mexico Environment Department] . . . ." *Id.* at 1249–50 (emphasis added). *See also id.* at 1250 ("We will not permit the State to achieve indirectly through the threat of monetary damages, which would be available only to restore or replace the injured natural resource, what it cannot obtain directly through mandatory injunctive relief incompatible with the ongoing CERCLA-mandated remediation.").

Just like the State of New Mexico's claims for money damages in *New Mexico*, the Court cannot review Plaintiffs' state law claims for monetary damages until the EPA-ordered remediation is complete. *Id.*

D. New Mexico's Claim Against ER for Relief under RCRA is Barred[5]

The State of New Mexico also asserts a claim for injunctive relief against ER under RCRA, which authorizes citizen suits to compel responsible parties to take "action" with respect to "solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The State of New Mexico, however, is barred from seeking injunctive relief under RCRA because, as set forth above, EPA "is actually engaging in a removal action under section 104" of CERCLA, or "has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 [of CERCLA] and is diligently proceeding with a remedial action under that Act." 42 U.S.C. § 6972(b)(2)(B)(ii) and (iii). In *Reynolds v. Lujan*, 785 F. Supp. 152 (D.N.M. 1992), the District of New Mexico dismissed a lawsuit in which the plaintiff, like the State of New Mexico here, requested "injunctive relief to prevent future contamination and to cleanup current contamination." *Id.* at 152-53. *See also United States v. Colorado*, 990 F.2d 1565, 1578 (10th Cir. 1993) (recognizing that RCRA citizen suits under § 6972(a)(1)(B) "are prohibited, not only when the EPA is prosecuting a similar RCRA imminent hazard action pursuant to 42 U.S.C. § 6973, but also when . . . the EPA is engaged in a CERCLA removal action . . . .").

For the same reasons that the District of New Mexico dismissed plaintiff's RCRA claim in *Reynolds*, the Court should dismiss New Mexico's RCRA claim here under § 6972(b)(2)(B)(ii). EPA is not only engaging in ongoing response actions, which include monitoring, assessing and evaluating areas potentially impacted by the Release along the Animas

[5] This claim was not asserted against Weston.

and San Juan Rivers, but EPA has also listed Gold King on the NPL as part of the BPMD Site. 81 Fed. Reg. 62,397, 62,400 (Sept. 9, 2016). Although EPA is still determining the geographical boundaries of the BPMD Site, the listing documentation for the Superfund site allows the site boundaries to extend wherever contamination from these sources comes to be located. *Id.* at 62,399.

II. CERCLA PREEMPTS PLAINTIFFS' STATE LAW CLAIMS

This Court should dismiss each of Plaintiffs' state law tort claims on the grounds that their state law claims for damages are preempted by CERCLA's comprehensive remedial scheme.

A. Conflict Preemption Acts as a Bar to Claims Seeking the Same Recovery as Allowed by CERCLA's Comprehensive Framework

The Supremacy Clause in the U.S. Constitution provides that United States laws and treaties "shall be the supreme law of the land." U.S. Const., art. VI, cl. 2. Congress may preempt state law as long as it is within its constitutionally mandated powers. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-80 (1990). Conflict preemption exists when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Choate v. Champion Home Builders*, 222 F.3d 788, 792 (10th Cir. 2000).

This is a clear case of conflict preemption under *New Mexico*, 467 F.3d at 1244 (recognizing a saving clause does not bar application of conflict preemption principles). CERCLA established a comprehensive framework for the removal of, and remedial action relating to hazardous substances, pollutants, or contaminants, caused by others. 42 U.S.C. § 9604(a)(1); *United States v. City and Cnty. of Denver*, 100 F.3d 1509, 1511 (10th Cir. 1996). By Executive Order, EPA was delegated the "response" authority to implement both "removal" and

"remedial actions." *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987); 42 U.S.C. §§ 9601(25), 9604. CERCLA preempts Plaintiffs' requests for money damages and injunctive relief because those claims conflict with the clear congressional objectives in CERCLA's statutory settlement scheme that promotes the "efficient resolution of environmental disputes," and thus, preempts other types of claims that seek to obtain environmental damages. *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997), *abrogated on other grounds by E.I. DuPont De Nemours & Co. v. U.S.* 460 F.3d 515 (3d Cir. 2006).

B. CERLA Preempts Plaintiffs' Claims Requesting an Unrestricted Award of Money Damages

Plaintiffs' requests for unrestricted money damages deriving from contamination of natural resources, NN ¶¶ 177, 183, 193, 204, 210; SNM ¶¶ 183, 198, 208; UT ¶¶83, 99; McD ¶¶ 61, 65, 73, 79, are expressly preempted by CERCLA.

CERCLA has created a comprehensive scheme to address natural resource damages ("NRD"). 42 U.S.C. § 9607(f)(1); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 498-99, n. 19 (1987) (recognizing preemption of state law remedies may occur where such remedies conflict with congressional objectives). This all-encompassing remedial scheme preempts any state law remedy. *See, e.g.*, *Cannon*, 538 F.3d 1328; *APWU v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995).

The damages claimed by Plaintiffs result from the alleged contamination to the Animas River, San Juan River, and Lake Powell, which are all natural resources damages as defined by Section 101 of CERCLA. 42 U.S.C. § 9601(16). SNM ¶¶ 111–114; NN ¶ 108; UT ¶ 61. In *New Mexico*, the State, like Plaintiffs here, sought Natural Resource Damages based on claims of trespass, public nuisance, and negligence. *New Mexico*, 467 F.3d at 1247. The Tenth Circuit

analyzed CERCLA's "comprehensive mechanism for cleanup of hazardous waste sites under a restoration-based approach," and recognized that under CERCLA, "[t]he measure and use of damages arising from the release of hazardous waste is restricted to accomplishing [the] essential goals of restoration or replacement, while also allowing for damages due to interim loss of use." *New Mexico*, 467 F.3d at 1245 (emphasis in original). Accepting the long-standing principle that NRDs are only to be awarded to restore or replace injured natural resources, the Tenth Circuit held that CERCLA's mechanism for natural resource damages "preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource," notwithstanding CERCLA's saving clauses. *New Mexico*, 467 F.3d at 1247. *See also United States v. City and Cnty. of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996). Like the claims brought in *New Mexico*, Plaintiffs' requested remedy, seeking to obtain through common law causes of action an unrestricted award of money damages for contamination and damages to natural resources, conflicts with CERCLA's comprehensive damage scheme and is therefore preempted.[6] *Id.*

[6] This is true for both the Sovereign Plaintiffs and the McDaniel Plaintiffs. *See Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 772 (9th Cir. 1994) (dismissing private plaintiffs' damage claims arising from contamination of natural resources by the Exxon Valdez oil spill because "it simply makes no sense to reserve a portion of damages for recovery by private parties"); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1228 (D.C. Cir. 1996) (accepting *Exxon*'s reasoning that it is inconsistent with CERCLA's damage provisions to allow a party to recover sums in tort for natural resource damages because the restorative purpose of the statute necessitated damage recovery via public trustees rather than private litigants).

C. CERCLA'S "Savings Clause" Does Not Permit Liability for Lawful Removal Actions at the Gold King Mine, Thus Plaintiffs' Common Law Claims Must Be Dismissed

CERCLA's savings clause acts as a buffer to complete preemption in recognition of the fact that state law may supplement the incomplete regulation of cleanups of hazardous substances. 42 U.S.C. § 9614(a); *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997). CERCLA's savings clause, however, was not intended by Congress to be an absolute pass to bring any and all state law claims, regardless of whether those claims are otherwise barred. *New Mexico*, 467 F.3d at 1246; *Wyoming v. United States*, 279 F.3d 1214, 1234 (10th Cir. 2002) (recognizing "[t]he Supreme Court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law") (internal citations omitted)).

CERCLA's savings clauses were not intended to apply to claims seeking to impose liability for actions contemplated as part of a removal or remediation. *See* 42 U.S.C. § 9652; § 42 U.S.C. 9614(a). In the context of CERCLA, the most natural meaning of this savings provision is that it preserves claims relating to the *prior* environmental contamination caused by other parties, ***not*** claims related to the *cleanup* of those pollutants by EPA contractors, in compliance with an approved removal plan. *Minyard Enters. v. Se. Chem. & Solvent*, 184 F.3d 373, 382 (4th Cir. 1999) ("Certainly, CERCLA … precludes a plaintiff from recovering cost [to repair the contaminated property] under both CERCLA and state law."). Additionally, CERCLA expressly prohibits double recovery. *See* § 9614(b). While this provision preserves certain state common-law liability claims against those who pollute, a party that performs a cleanup as contemplated in an approved removal or remediation plan does not fall within the ambit of this section. *Id.* To

find otherwise would be to undermine one of the key goals of CERCLA, namely, to encourage such parties to take responsibility for cleaning up contaminated sites.

Allowing state law claims that would require actions beyond those authorized by the responsible agency would undermine the intent of CERCLA. Indeed, Plaintiffs' state common-law claims would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," by discouraging potentially responsible parties from agreeing to undertake cleanup efforts for risk of common law liability for the same. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In this case, allowing Plaintiffs' claim to proceed would create inconsistency in the statute, because CERCLA would require strict compliance with the removal action plan while Plaintiffs' claims could penalize parties for that strict compliance. Such internal inconsistency must not be read into the statute. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (requiring statute be read as a whole, using common sense to determine if there is a meaning that would make the statute inconsistent).

III. EPA CONTRACTOR DEFENDANTS ARE NOT LIABLE FOR COST RECOVERY DAMAGES UNDER CERCLA[7]

Congress designed CERCLA to create a system for the timely cleanup of hazardous waste sites and place the cost of that cleanup on those responsible for creating or maintaining the polluted areas. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, however, does not "automatically assign liability to every party with any connection to a" release of hazardous substances. *United States v. Qwest Corp.*, 353 F. Supp. 2d 1048, 1051 (D. Minn. 2005). To establish a prima facie case under Section 107(a), a plaintiff must show that (1) the site was a

[7] The McDaniel Plaintiffs did not assert any claims under CERCLA.

CERCLA facility, (2) a hazardous substance was released, (3) the defendant is a "covered person" under CERCLA, and (4) the plaintiff incurred response costs following the release that were necessary and consistent with the national contingency plan ("NCP"). 42 U.S.C. § 9607(a); *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005).

Each of the Sovereign Plaintiffs assert a claim for Cost Recovery under CERCLA Section 107(a) against the EPA Contractor Defendants. As explained below, these claims fail for at least two reasons: (1) Plaintiffs have failed to allege a prima facie claim under Section 107(a); and (2) under Section 119, response action contractors are not generally liable for cost recovery.

A. Plaintiffs Have Failed to State a Claim for Cost Recovery under Section 107

CERCLA liability attaches to four categories of "covered persons": (1) owners; (2) operators; (3) arrangers; and (4) transporters.[8] *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002); *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1270 (10th Cir. 2017). None of these categories apply to ER or Weston.

1. Weston and ER were not "operators" of Gold King

Contrary to the Sovereign Plaintiffs' conclusory allegations, SNM ¶ 127; NN ¶ 153; UT ¶ 68, the EPA Contractor Defendants cannot be liable as operators in this case because the EPA Contractor Defendants lacked the requisite authority to control EPA's CERCLA removal actions at Gold King.

"[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods*, 524 U.S. at 67; *see also Mathews v.*

[8] Plaintiffs do not allege that the EPA Contractor Defendants are "owners."

Dow Chem. Co., 947 F. Supp. 1517, 1526 (D. Colo. 1996) (recognizing "most courts have required the corporation to have exercised 'substantial control' for operator liability). In *Bestfoods*, the Supreme Court explained that "the verb 'to operate' . . . obviously meant something more than mere mechanical activation of pumps and valves." *Bestfoods*, 524 U.S. at 71.[9]

Plaintiffs' assertions that EPA initiated a removal action at Gold King in 2014, *see, e.g.*, UT ¶¶ 31, 32, combined with federal law giving EPA and its OSCs the legal authority to direct and control the activities at Gold King, demonstrates that Weston and ER were not conducting operations of the mine. 40 C.F.R. § 300.5 (OSCs "coordinate and direct" response actions); 40 C.F.R. § 300.120(a) (an OSC "directs response efforts"); 40 C.F.R. § 300.135 (an OSC "shall direct response efforts").

This is further supported by the fact that the EPA Contractor Defendants would not have been at Gold King, if not for the government's direction through the ERRS and START contracts that described the EPA Contractor Defendants role. Plaintiffs' allegations are clear that EPA was directing the work at Gold King through its "Task Order Statement of Work" that specified the plan for the removal investigation. SNM ¶ 78; NN ¶ 67; UT ¶ 37, 38. Likewise, Plaintiffs admit that EPA was undertaking a removal action under CERCLA, which gave EPA broad authority over Gold King. UT ¶ 30-35.

[9] While *Bestfoods* and its Tenth Circuit progeny, *Raytheon Constructors v. Asarco Inc.*, 368 F.3d 1214 (10th Cir. 2003), each conducted informative, in-depth analyses of operator liability, those cases are distinguishable. *Bestfoods* was analyzing CERCLA liability in the context of a parent-subsidiary relationship, and *Raytheon* in the context of a minority shareholder of a corporation. *See Raytheon*, 368 F.3d at 1217. Neither one of those circumstances are present here.

Plaintiffs fail to allege any instance where ER or Weston actually directed work at Gold King necessary to support a claim for operator liability. Nor do Plaintiffs allege that ER or Weston performed any action that was not directed, approved and/or overseen by EPA. To the contrary, Plaintiffs admit that the EPA Contractor Defendants were working under the "direction" and constant supervision of an EPA OSC, who was on-site and "in charge" at all relevant times. SNM ¶¶ 93, 95, 99; NN ¶ 96; UT ¶¶ 43–44, 55. One cannot reasonably infer from these allegations that ER and Weston, as EPA's contractors, controlled the CERCLA clean-up activities at Gold King. *See Ryland Group, Inc. v. Payne Firm, Inc.*, 492 F. Supp.2d 790, 794 (S.D. Ohio 2005) (dismissing a CERCLA claim against a sub-contractor because the general contractor "effectively directed and controlled all activities that took place" at the site and there were no allegations that the sub-contractor "exercised any discretion over the activities at the site"); *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1284, 1289 (N.D. Iowa 1994) (contractor that acted "at the direction of other parties" was not an operator).

EPA's authority to control the activities at Gold King, including the alleged actions of ER and Weston, is further established by documents relied on in the Complaints: (i) an October 27, 2015 email from EPA OSC Hays Griswold, *see* SNM ¶ 100; (ii) the ERRS contract, Ex. 1 (Sheridan Decl.), at Decl. Ex. A, (iii) the START contract, Ex. 2 (Wechsler Decl.) at Decl. Ex. A), and (iv) "ERRS contract task order," Ex. 1 (Sheridan Decl.) at Decl. Ex. B; UT ¶¶ 32–35. *See Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (on a motion to dismiss, a court may consider "documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity").

Plaintiff State of New Mexico references and relies on an October 27, 2015 email from EPA OSC Hays Griswold, *see* SNM ¶ 100, in which Griswold admitted: (i) "***I was in charge of all activities*** related to the investigation and ***had the last say*** whether to stop or proceed at any point," and (ii) "***At my direction*** and with careful observation of the group . . . we began removing the material a bit at a time all the while inspecting for the actual blockage we all knew to be behind this material." E-mail from Hays Griswold, Region 8 OSC, EPA, (Oct. 27, 2015, 6:24 MDT) attached hereto as Exhibit 5. These affirmative allegations acknowledge that EPA was directing the work at Gold King.

The ERRS contract expressly provides that (i) the EPA OSCs were authorized to "direct and coordinate" the response action at Gold King, Ex. (Sheridan Decl.) at Decl. Ex. A, § B.5; (ii) ER "shall take any response action, under the direction of the" EPA OSC, *id.* at Decl. Ex. A, Statement of Work, Pt. I.E; and (iii) the EPA OSCs were authorized to provide "technical direction" to ER, to "make all final policy and regulatory decisions," and to "determine the appropriate planning activity," *id.* at Decl. Ex. A, § H.3, Statement of Work, Pt. I.E, Pt. III.D. The ERRS contract task order likewise provides that (i) activities would be "directed by EPA's On-Scene Coordinator"; (ii) work would be performed under work plans that were "to be submitted to the OSC for approval"; and (iii) work would be performed "[a]s determined appropriate by the OSC." *Id.* at Decl. Ex. B at 1–3. Based on the express language of the ERRS contract and task order, EPA's authority to direct ER and the alleged activities at Gold King cannot reasonably be questioned.

Similarly, the START contract requires Weston to provide "support on removal assessment activities, pursuant to EPA's obligations under" CERCLA. Ex. 2 (Wechsler Decl.) at

Decl. Ex. A, Attach 1, Pt. II. EPA directed all the work under the START contract by and through "[t]he Project Officer [who] is the primary representative . . . authorized to provide technical direction on contract performance," *id.* at Decl. Ex. A, § H.4(a), and only EPA, or its Project Officer, is authorized to provide "technical direction" under the START contract, which is limited to only those terms provided in the contract, the delivery order, work assignment, or technical direction document statement of work. EPA further prohibited any other party from issuing technical direction "institut[ing] additional work outside the scope of the contract, delivery order, work assignment or technical direction document." *Id.* at Decl. Ex. A, § H.4(d). Based on the express language of the START contract, EPA's authority to direct the alleged activities at Gold King including the actions of Weston cannot reasonably be questioned. Accordingly, ER and Weston cannot be liable as operators.

2. Weston and ER were not "arrangers" at Gold King

Arranger liability under CERCLA attaches to "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity." 42 U.S.C. § 9607(a)(3). The Tenth Circuit has recognized that arranger liability requires a person to arrange, by contract, agreement, or otherwise, for the transport or disposal of such hazardous substances by another party. *Chevron*, 863 F.3d at 1282 (the scope of arranger liability under 42 U.S.C. § 9607(a)(3) "most naturally reads as the arrangement 'for disposal or treatment . . . by any other party or entity'"). In other words, a party cannot "arrange" with itself to transport, dispose of or treat hazardous substances, and instead such actions "must be performed by another party or entity." *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 23–24 (1st

Cir. 2004). *See also Chevron*, 863 F.3d at 1281 (adopting the First Circuit's "correct interpretation" of arranger liability). As the Tenth Circuit recognized in *Chevron*, "not all involvement in the disposal process triggers arranger liability." *Chevron*, 863 F.3d at 1282. The key part of the Section 107(a)(3) analysis is whether one of the EPA Contractor Defendants entered into a contract or other arrangement with another party who agreed to dispose of the hazardous substances that were released from Gold King.

All three Sovereign Plaintiffs state conclusively that Weston and ER were "arrangers" at Gold King without alleging any facts that either Weston or ER entered into any contract, agreement or other arrangement with any other party to transport, dispose of or treat the hazardous substances that were released from Gold King. SNM ¶ 129; NN ¶ 154; UT ¶ 69. The Complaints do allege that ER subcontracted with Harrison Western, as a part of the ERRS contract, UT ¶ 33, for "mining services," UT ¶ 36, but not for any transport, disposal, or treatment of hazardous waste from Gold King, UT ¶ 76. Further, it is undisputed that Harrison Western was not on-site at the time of the Release. UT ¶¶ 41, 80. Thus, Plaintiffs do not—and cannot—allege that any hazardous substances were released by Harrison Western.

Without specific allegations as to the existence of a contract for disposal of the hazardous substances, Plaintiffs' arranger theory of liability necessarily fails because neither Weston nor ER contracted with a third party for the *removal of* hazardous waste *from the Gold King Mine*.

3. Weston and ER were not "transporters" of hazardous materials at Gold King

"Transporter" liability under section 107(a)(4) of CERCLA is imposed on "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a

threatened release which causes the incurrence of response costs, of a hazardous substance." 42 U.S.C. § 9607(a)(4). The Tenth Circuit has held that "transporter liability is predicated on site selection by the transporter." *United States v. Hardage*, 985 F.2d 1427, 1435 (10th Cir. 1993) (citing 42 U.S.C. 9607(a)(4)). This same reasoning has been adopted in courts across the country. *See, e.g., United States v. W. Processing Co.*, 756 F. Supp. 1416 (W.D. Wash. 1991); *Tippins Inc. v. USX Corp.*, 37 F.3d 87 (3d Cir. 1994).

Similar to the allegations regarding operator and arranger liability, Plaintiffs conclusively state that Weston and ER were "transporters" without alleging any facts that either participated in the decision-making process to select a disposal or treatment facility for the substances that were released from Gold King. UT ¶ 70; NN ¶¶ 70, 76, 155; SNM ¶ 128. Equally significant, there are no allegations in the Complaints that Weston or ER was charged with the "site selection" that is required to impose transporter liability. Instead, the only reasonable inference that can be drawn from Plaintiff's allegations regarding EPA's authority under CERCLA, the ERRS contract, and the START contract is that EPA controlled any "site selection" decision. SNM ¶ 94; NN ¶ 67.

Moreover, neither Weston nor ER made a "site selection" decision where the Release was uncontrolled. *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002). *See Coppola v. Smith*, 19 F. Supp. 3d 960, 972 (E.D. Cal. 2014) (dismissing transporter claim where contaminants accidently seeped through a well). It thus follows that as a matter of law, EPA Contractor Defendants cannot be liable as transporters.

4. Plaintiffs' alleged response costs are not necessary and consistent with the national contingency plan ("NCP")

Courts have interpreted CERCLA § 107 to provide for recovery of expenses for investigating, testing, sampling, and the purchase of monitoring equipment. However, the Supreme Court in *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986), stated that "superfund money is not available to compensate private parties for economic harms that result from discharges of hazardous substances." *Compare Exxon Corp. v. Hunt*, 475 U.S. 355 (1986), *with Alaska Sport Fishing Ass'n*, 34 F.3d at 772 (allowing governments acting as trustees for the public to recover for lost-use damages). Additionally, courts have held that future response costs are not recoverable under CERCLA and have required plaintiffs to actually incur response costs before they can recover them. *Stanton Road Associates v. Lohrey Enters.*, 984 F.2d 1015, 1021 (9th Cir. 1993). Finally, the Supreme Court ruled that CERCLA section 107 does not provide for the award of attorney's fees associated with bringing a cost recovery action. *Key Tronic Corp. v. United States*, 511 U.S. 809, 818–819 (1994).

In line with the cases cited above, Plaintiffs' claims for attorneys' fees, economic loss, and future damages are not recoverable under Section 107 and should be dismissed. *See* SNM ¶ 218; UT ¶ 140; NN Prayer for Relief ¶ 7. Additionally, New Mexico's claims for natural resource damages and claims of lost-use damages are not recoverable because the complaint was brought on behalf of the Environment Department, and not New Mexico's designated natural resource trustee. *See* 42 U.S.C. § 9607(f) (providing that responsible parties may be liable to the United States Government and any State or Indian tribe for natural resources belonging to, managed by, controlled by or appertaining to such state or tribe but imposing limitations on who may act on behalf of the government in bringing such claims); NMSA 1978, § 75-7-2 (2007)

("The trustee is appointed by and serves at the pleasure of the governor pursuant to [CERCLA.]"). *See also* 40 CFR § 300.615(e)(1).

B. CERCLA Section 119 Shields EPA Contractor Defendants from Liability for Damages Resulting from Cleanup Activities

CERCLA was not intended to impose strict liability on contractors, such as Weston and ER, who were brought in to conduct removal actions under the direction and supervision of EPA at an abandoned mining site in order to ameliorate the build-up of hazardous substances caused by others. *See FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 841 (3d Cir. 1994) ("CERCLA does not intend to discourage the government from making cleanup efforts by making the government liable for such efforts");[10] *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 96 F.Supp.2d 1375, 1379-80 (S.D. Fla. 2000) ("engaging in clean-up activities at a facility does not qualify as the type of 'operation' CERCLA contemplated"), *aff'd in part and rev'd in part on other grounds*, 283 F.3d 1286 (11th Cir. 2002). In fact, Congress specifically enacted Section 119 in order to remedy the possibility of response action contractors being included in the definition of covered persons under CERCLA Section 107 by adding a negligence threshold.

[10] In *FMC Corp.*, the Third Circuit recognized that federal agencies were "immune from CERCLA liability for the consequences of cleanup activities in response to emergencies created by others." *FMC Corp.*, 29 F.3d at 841. It follows that if the Government is entitled to sovereign immunity under CERCLA in this case that the EPA Contractor Defendants should be entitled to derivative sovereign immunity. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (U.S. 2016) ("'Government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.'" (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943))).

Section 119 provides that "a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant" is not liable under CERCLA, "or under any other Federal law" for damages "which result[] from such release or threatened release," unless the release "is caused by conduct of the response action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct." 42 U.S.C. § 9619(a)(1), (2). *See New Castle County v. Halliburton NUS Corp.*, 903 F.Supp. 771 (D. Del. 1995), *aff'd in part* 111 F.3d 1116, *rehearing denied* 116 F.3d 82.

1. EPA Contractor Defendants are Response Action Contractors.

It cannot be reasonably disputed that the EPA Contractor Defendants were response action contractors under CERCLA. *See* 42 U.S.C. § 9619(e)(1) & (e)(2) (defining a "response action contractor" as any person who enters into a "written contract or agreement" with "any Federal agency" to provide services with respect to any "threatened release of a hazardous substance or pollutant or contaminant from a facility"). New Mexico and Utah admit that Weston and ER were response action contractors. SNM ¶ 132; UT ¶ 71. And, as set forth in Plaintiffs' Complaints, both ER (the ERRS Contract) and Weston (the START contract) entered into written agreements with EPA to provide services for EPA in connection with EPA's clean-up action at Gold King, which Plaintiffs allege posed a risk of a blowout. SNM ¶¶ 16, 17; NN ¶¶ 5, 16, 21; UT ¶¶ 10, 11, 35–38; McD ¶¶ 12, 14.

2. Plaintiffs have not alleged facts showing that the Release was caused by the negligent act of Weston or ER

As response action contractors at the site to help EPA clean-up the mess left behind by others, the EPA Contractor Defendants are shielded from liability for costs and damages resulting from the Release at the Gold King Mine, unless Plaintiffs can prove that the release of

hazardous substances was caused by "negligent, grossly negligent, or … intentional misconduct" of Weston or ER. 42 U.S.C. § 9619(a). *See also Blasland, Bouck & Lee, Inc. v. City of North Miami*, 96 F. Supp. 2d 1375, 1380 (S.D. Fla. 2000) *aff'd in part and rev'd in part on other grounds*, 283 F.3d 1286 (11th Cir. 2002).

Sovereign Plaintiffs fail to overcome the negligence threshold for three reasons. First, contrary to the requirements of CERCLA § 119, Sovereign Plaintiffs have each lumped together "contractor defendants" without specifying their allegations as to each response action contractor. *See* UT ¶ 17, 71; NM ¶ 4; NN ¶ 5, 98, 156. *Cf. Rocha v. Rudd*, 826 F.3d 905, 911 (7th Cir. 2016) ("[B]ecause fair notice is the most basic consideration underlying Rule 9(b), in a case involving multiple defendants, the complaint should inform each defendant of the nature of his alleged participation in the fraud.") (internal citation and quotation marks omitted); *Rich v. Maidstone Fin., Inc*., No. 98 Civ. 2569(DAB), 2002 WL 31867724 (S.D.N.Y. Dec. 20, 2002) (because the plaintiff used the word "Defendants" to refer to the entire class of defendants despite being instructed by the court not to do so, the court struck all allegations in which the word "Defendants" was used.).

Second, Sovereign Plaintiffs compound their improper grouping of ER and Weston by vaguely asserting that the alleged acts and omissions of the "EPA crew," "USEPA crew," "EPA On Site Team" and the "Contractor Defendants" caused the Release. *See* SNM ¶¶ 95–98; NN ¶¶ 98–105; UT ¶¶ 44–56. These allegations are insufficient under any pleading standard because they fail to support the elements of negligence as to each individual defendant. *Cf. U.S. ex rel. Ahumada v. NISH*, 756 F.3d 268, 281 n.9 (4th Cir. 2014) (plaintiff failed to plead fraud with sufficient particularity because plaintiff asserted undifferentiated allegations against a group of

defendants); *Lesavoy v. Lane*, 304 F.Supp.2d 520 (S.D. N.Y. 2004) (complaint failed to satisfy Rule 9(b)because "instead of specifying which act or omission was made by which party, the complaint names all of the many defendants and then mechanically adds 'and each of them' for each act or omission"), *aff'd in part, rev'd in part*, 170 Fed. App'x 721 (2d Cir. 2006).

Third, Sovereign Plaintiffs fail to plead sufficient facts to support a *prima facie* claim for negligence against the EPA Contractor Defendants. *Cf. McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 43 (6th Cir. 1988) (courts should not "conjure up unpleaded facts that might turn a frivolous claim into a substantial one"….[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist"). At all relevant times when the EPA Contractor Defendants were allegedly engaging in the acts and omissions that Plaintiffs allege triggered the Release, Plaintiffs admit that an EPA OSC was on-site, "in charge" and supervising the work. SNM ¶ 93; NN ¶ 96; UT ¶ 43; McD ¶ 38. The acting OSC was authorized under federal regulations and EPA's ERRS and START contracts to direct the on-site activities. *See* 40 C.F.R. § 300.5. Based on these admissions, all of the alleged acts and omissions giving rise to Plaintiffs' claims against ER and Weston were done with the acting EPA OSC's knowledge and consent. Thus, Plaintiffs' allegations of negligence do not implicate ER or Weston.

Because Plaintiffs' have failed to plead a cost recovery claim against Weston or ER and because the factual allegations of negligent conduct by the EPA Contractor Defendants are insufficient as a matter of law, the claims for cost recovery must be dismissed.

C. Sovereign Plaintiffs are not entitled to Declaratory Judgment under CERCLA for Liability for Future Damages

Each Sovereign Plaintiff pleads a separate claim for Declaratory Judgment under 42

U.S.C. § 9613(G)(2) which states: "In any such action described in this subsection (referring to Section 107 claims), the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." As described above, Plaintiffs' have failed to show that Weston and ER can be held liable for responses costs. Moreover, Plaintiffs have failed to state a claim for liability under Section 107. Without having established liability for recovery costs, Plaintiffs cannot be awarded declaratory judgment for future liability and these claim must be dismissed.

IV. THE EPA CONTRACTOR DEFENDANTS ARE SHIELDED FROM STATE TORT LIABILITY UNDER THE GOVERNMENT CONTRACTOR DEFENSE[11]

Plaintiffs admit that ER and Weston worked as EPA's contractors on a removal action to address the threat of a release of AMD from Gold King. *See* SNM ¶¶ 16, 17, 78, 88, 132; NN ¶¶ 5, 21, 67, 78, 189; UT ¶¶ 10, 11, 17, 35, 36, 71; McD ¶¶ 14, 69. Plaintiffs further admit that the EPA Contractor Defendants' work at Gold King began "under the direction" of EPA OSC Steve Way, SNM ¶ 81, and that another EPA OSC (Hays Griswold) was on-site "to supervise" and was "in charge" at all relevant times at Gold King during the days leading up to and through

[11] In the Ruling, to which Weston was not a party, Judge Armijo ruled that the Government Contractor Defense "is not limited to military contracts" and, therefore, could apply to EPA contracts at issue in this case. Ruling at 45–48. Judge Armijo further ruled that "EPA has a uniquely federal interest concerning the liability of its response action contractors that perform response actions pursuant to CERCLA, as occurred in this case." *Id.* at 50. Judge Armijo, however, was "not prepared, at this juncture, to hold that there is such a conflict" between "state tort law and the uniquely federal interest of the liability pursuant to the EPA's response action contracts." *Id.* at 50. Although Judge Armijo concluded that "CERCLA did not prescribe a specific course of action for government employees to follow in conducting the response action at the Gold King Mine," *id.* at 54, Judge Armijo was "not persuaded" that the Government Contractor Defense was established "based on the allegations in the proposed amended complaints" of State of New Mexico and Navajo Nation, *id.* at 59–60.

the Release, SNM ¶ 93; NN ¶ 96; McD ¶ 38; UT ¶¶ 44, 45, 55. Plaintiffs fail to allege any facts showing that the EPA Contractor Defendants performed any activity at Gold King that that was not approved, directed, and/or overseen by an EPA OSC.

Under the facts alleged here and in similar cases, federal government contractors cannot be held liable under state tort law for damages caused by their performance of a government contract. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (military contractor not liable under state tort law for a defectively designed emergency escape system for a helicopter); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940) (government contractor not liable for producing "artificial erosion" along a river because the work was "authorized and directed by the governmental officers"); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 423–24 (D.S.C. 1994) (granting summary judgment in favor of a contractor hired by EPA to assist with clean-up activities, including excavation, based on the Government Contractor Defense); *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) (finding the Government Contractor Defense is afforded to protect a contractor from liability when the government is actually at fault, but is otherwise immune from liability); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir. 1993) ("A private contractor who is compelled by contract to perform an obligation for the United States should, in some circumstances, share the sovereign immunity of the United States.").

To establish the Government Contractor Defense, the EPA Contractor Defendants "must demonstrate that (1) EPA had a unique federal interest; (2) a significant conflict exists between the state law and that interest; and (3) their actions were within *Boyle's* 'scope of displacement.'" *Gadsden Indus. Park, LLC v. United States*, 111 F. Supp. 3d 1218, 1228 (N.D. Ala. 2015)

(concluding that the Government Contractor Defense could apply "outside of the military context" to EPA contractors working on an EPA remediation project, but holding that contractors were not entitled to the defense because they acted unilaterally and with "little daily oversight" by EPA). As alleged in their Complaints, Plaintiffs' claims satisfy all three prongs of the Government Contractor Defense. Thus, Plaintiffs' state law claims should be dismissed.

A. The EPA Contractor Defendants' Alleged Conduct Involves "Uniquely Federal Interests"

This case involves uniquely federal interests because Plaintiffs allege that the EPA Contractor Defendants were federal contractors working for EPA at all relevant times and the EPA Contractor Defendants' alleged conduct arises from their performance of their ERRS and START contracts with EPA during an EPA "removal" action. SNM ¶¶ 16, 17, 132; NN ¶ 21, 78, 189; UT ¶¶ 10, 11, 35, 36; McD ¶¶ 14, 69. *Boyle*, 487 U.S. at 505, n.1 ("[T]he liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest."). Plaintiffs State of New Mexico and State of Utah admit that ER and Weston were "response action contractors" under CERCLA, who were engaged by EPA to perform work falling within the unique federal interest; namely, cleaning up the pollution created by others and then abandoned. SNM ¶ 132; UT ¶ 71. Just like in *Gadsden*, where the district court found that the "cleanup of a Superfund site on the national priority list" was "a unique federal interest that must be protected from interference by state tort law," the EPA had a "uniquely federal interest" in carrying out its CERCLA removal action at Gold King and directing the work of the EPA Contractor Defendants. *Gadsden*, 111 F. Supp. 3d at 1228.

B. There Is a "Significant Conflict" Between Federal Interests and State Law.

Federal law displaces state law when "a 'significant conflict' exists between an

identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation." *Boyle*, 487 U.S. at 507. In *Boyle*, the Supreme Court held that a "significant conflict" exists if the discretionary function exception of the Federal Tort Claims Act ("FTCA") is triggered. *Id.* at 509–511. *See* 28 U.S.C. § 2680(a) (excepting from liability "[a]ny claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function"); *Gadsden*, 111 F. Supp. 3d at 1228 ("The discretionary function to the [FTCA] suggests the outlines of, significant conflict between federal interests and state law.") (internal citations and quotation omitted); *Richland-Lexington Airport Dist.*, 854 F. Supp. at 419 (in *Boyle*, "the Court employed the discretionary function exception to the FTCA to define the parameters of the [Government Contractor Defense]").

A two-part test applies to determine whether a course of action is entitled to "discretionary function" immunity under the FTCA. First, a court must "consider whether the action is a matter of choice for the acting employee," in this case, the Original and Substitute OSCs. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The "discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* Second, "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield," *i.e.*, "'decisions grounded in social, economic, and political policy.'" *Id.* at 536–37. "[I]t is irrelevant whether the government employee actually balanced" these considerations. *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988). The relevant question is only "whether the decision is susceptible to policy analysis." *Id.* at 121.

The Tenth Circuit has held that the discretionary function exception barred a similar action based on the Army's allegedly "deficient planning and execution" of an environmental clean-up of the Rocky Mountain Arsenal. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1541 (10th Cir. 1992). In reaching that decision, the court explained that "there seems little doubt . . . that the Army's actions . . . involved policy choices of the most basic kind" noting that "nothing in CERCLA or the National Contingency Plan compelled them to prioritize the removal action." *Id.* Based on this reasoning, the court determined "[h]ow they were to go about containing the spread of contamination before further damage could occur while still protecting public health touched on policy choices, not the least of which involved the translation of CERCLA's general health and safety provisions into concrete plans," noting that "this type of translation involves the very essence of social, economic, and political decisionmaking—the precise policy choices protected by the discretionary function exception." *Id.*

As pled, the alleged actions at Gold King fall within the discretionary function exception of the FTCA for the reasons set forth below and, therefore, cannot give rise to state tort liability. Just like the claims in *Daigle*, all of Plaintiffs' state law claims in this case arise from decisions that were controlled by EPA pursuant to its broad authority under CERCLA. Plaintiffs allege that ER and Weston were "response action contractors" under CERCLA, SNM ¶ 132; UT, ¶ 71, who began working "under the direction" of an EPA OSC, SNM, ¶ 81, in order to assist with EPA's "removal site evaluation to investigate the possibility of opening the collapsed mine portal," which posed the risk of a blowout as a result of prior actions by Sunnyside and the State of Colorado, UT ¶¶ 35, 37. Plaintiffs also admit that ER and Weston subsequently worked under the supervision of another EPA OSC who was "in charge" at Gold King when the original OSC

went on vacation. SNM ¶ 93; NN ¶ 96; McD ¶ 38. *See also* Ex. 5. In cases like this, where a government agency is actively participating in a removal action under CERCLA to address the threat of a release of hazardous substances, the Tenth Circuit and other federal courts have routinely held that the discretionary function exception of the FTCA bars any liability under state tort law for actions taken during the removal action. *See, e.g.*, *Daigle*, 972 F.2d at 1541; *U.S. Fid. & Guar. Co.*, 837 F.2d at 122 (discretionary function exception barred an action based on an EPA OSC's decision to conduct a removal operation involving an airborne contaminant when the wind was blowing toward a city); *Richland-Lexington Airport Dist.*, 854 F. Supp. at 423–24 (EPA contractor could not be liable under state law for excavating, removing and stockpiling contaminated soil onto plaintiff's property because the contractor "was a vehicle for executing the EPA's clean-up activities" and "merely implemented the remedy that the EPA had previously determined was appropriate").

1. The alleged actions were "a matter of choice" for EPA and its OSCs

It is uncontested that EPA had broad authority to direct the activities at Gold King. *See* 42 U.S.C. § 9604(a)(1); *Key Tronic*, 511 U.S. at 814; *Spillway Marina, Inc. v. United States*, 445 F.2d 876, 878 (10th Cir. 1971) (dismissing FTCA action arising out of an Army Corps of Engineers project because "[d]ecisions of when to release and when to store required the use of discretion"); *Lockett v. United States*, 938 F.2d 630, 637 (6th Cir. 1991) (federal statutes and regulations "granted the regional EPA employees discretion to formulate a response to evidence of PCB contamination at a particular spill site within their jurisdiction," including when to inspect and "clean up the site"). Like other statutes that the Tenth Circuit has held grant the U.S. Government discretion, CERCLA incorporates a "broad statutory directive" and there is no

"statute, regulation or policy [that] specifically prescribes a course of action" for EPA to follow when conducting reclamation activities at an inactive mine. *See Johnson v. U.S. Dep't of Interior*, 949 F.2d 332, 337–38 (10th Cir. 1991) (National Park Service not liable for allegedly negligent rescue because no statute, regulation or policy "prescribe a specific course of conduct for search or rescue efforts"); *Daigle*, 972 F.2d at 1541 (Army's environmental clean-up actions "involved policy choices of the most basic kind").

The Third Circuit's decision in *U.S. Fidelity & Guaranty*, is illustrative. 837 F.2d at 122. Contrary to an expert report that recommended only performing hazardous operations when the wind was blowing away from a nearby city, the EPA's OSC directed operations when the wind was blowing toward the city. *Id.* During the course of the operations, an acid cloud was released and migrated toward the city. *Id.* The Third Circuit nonetheless reversed a judgment against EPA, because the discretionary function exception barred recovery. *Id.* Despite the EPA OSC's alleged negligence, acting contrary to the expert report, the Third Circuit found that the OSC, like the Original and Substitute OSCs at Gold King, "was dispatched with authority to determine how to schedule the cleanup operations at the Drake site in a manner that would most safely and effectively minimize the risk of serious injury to the public." *Id.* Just like the OSC in *U.S. Fidelity & Guaranty*, the authority delegated to the Original and Substitute OSCs at Gold King "left room for, and indeed required, the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions." *Id.* (emphasis added). EPA was not bound by any statute, regulation or policy prescribing "a specific course of conduct" at Gold King and, therefore, under prevailing law, had discretion to choose among several alternatives. *See Johnson*, 949 F.2d at 337–38.

In an attempt to defeat application of the discretionary function exception, Plaintiffs allege issues with the specific manner and method EPA employed. *See infra* n. 12. This is precisely the second-guessing of policy choices regarding the appropriate course of action dismissed by the Court in *Daigle*. *See Daigle*, 972 F.2d at 1540. These assertions regarding insufficient or inappropriate preparation, training, and procedures to mitigate damages cannot defeat the protection provided by the discretionary function analysis where CERCLA does not provide specific standards for the level of care to be taken or how to assess a collapsed mine portal. Where EPA is given broad discretion to determine the appropriate course of actions—even when the chosen course of action results in alleged injury—the protections still appertain. *See Daigle*, 972 F.2d at 1540 ("Harsh as it may be, whether the Army substantially endangered Plaintiffs' health and welfare is irrelevant to the discretionary function determination. The question is not whether the Army fell short in its efforts to attain the general health and safety goals of CERCLA, but whether the Army's shortcomings involved violations of specific, mandatory directives.").

Plaintiffs also attempt to defeat application of the discretionary function exception by drawing a meaningless distinction between the "lead" or "original" EPA OSC (Steve Way) and the "substitute" EPA OSC (Hays Griswold). As stated in the Navajo Nation and McDaniel Complaints, the "substitute" OSC was "in charge" at Gold King while the original OSC was on vacation. NN ¶ 96; McD ¶ 38; *see also* UT ¶ 43. This is supported by the plain language of the ERRS and START contracts that reveal no distinction in the authority of Hays Griswold and Steve Way, as Region 8 OSCs. Ex 2 (Wechsler Decl.) at Decl. Ex A, G.2; Ex. 1 (Sheridan Decl.) at Decl. Ex. A, Pt. I.E. *See* Ex. 5. Further, as an EPA OSC, Griswold had the authority to decide

what actions to take at Gold King and, under Supreme Court precedent, his alleged decisions fall within the discretionary function exception of the FTCA "whatever his . . . rank." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984).

Plaintiffs also allege that certain plans and instructions were ignored by EPA and its contractors, much like the expert report was ignored in *U.S. Fidelity & Guaranty*. That allegation by Plaintiffs should have the same effect on the outcome here as in *U.S. Fidelity & Guaranty*—none. Because the Original and Substitute OSCs had to perform their duties "without reliance upon a fixed or readily ascertainable standard," their decisions were discretionary and protected from later liability. *See Miller v. U.S. Dep't of Transp.*, 710 F.2d 656, 663 (10th Cir. 1983); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1177–78 (10th Cir. 2008) (Air Force guide and instructions did "not prescribe a mandatory course of conduct that the government was required to follow"); *Elder v. U.S.*, 312 F.3d 1172, 1177–78 (10th Cir. 2002) (National Park Service's mandatory safety guidelines did "not dictate what actions park employees must take in response to particular problems").

2. The alleged actions were grounded in policy

In *Daigle*, the Tenth Circuit ruled that "[w]hen government agents are authorized to exercise discretion in carrying out established government policy, such as the policies underlying CERCLA response actions, the exercise of that discretion is presumed to be grounded in policy." *Daigle*, 972 F.2d at 1541–42 (10th Cir. 1992) (Army immune under FTCA for work at arsenal that "gass[ed]" an entire neighborhood; the Army had to choose how to go about "containing the spread of contamination before further damage could occur while still protecting public health").

The alleged decisions that Plaintiffs challenge in this case involved the same

considerations that the Tenth Circuit has found to be discretionary "policy" judgments: safety, human resources, economic resources, and governmental interference. *See Johnson*, 949 F.2d at 339.[12] Given the decisions alleged by Plaintiffs, EPA had to weigh numerous policy considerations when deciding what to do at Gold King, including: the environmental impacts of any reclamation activity; the safety of on-site personnel and surrounding areas; the impacts of any activity on the conditions of other inactive mines in the area; the potential for delaying a project that was already postponed a year earlier and had to be completed in a mountainous region with a short work season; the scheduling of other EPA clean-up projects (particularly in terms of allocating personnel, equipment and other resources); the utility and practicality of different courses of action, including further or other testing; the availability of equipment and other resources; and costs. *See U.S. Fid. & Guar. Co.*, 837 F.2d at 122 (noting that the EPA OSC had to balance "the risks of proceeding with the neutralization on the day chosen against the risks of further delay"). Thus, all of the alleged decisions at Gold King were "susceptible to policy analysis," *even if* they did not consider "each of the identified policy factors." *Johnson*, 949 F.2d at 339; *U.S. Fid. & Guar. Co.*, 837 F.2d at 121. *See also Varig Airlines*, 467 U.S. at 820 (FAA employees "spot-checking" aircraft during compliance reviews was a discretionary function because employees made policy judgments involving "confidence" in a manufacturer,

[12] This principle applies to Plaintiffs' allegations that EPA and the Contractor Defendants decided (i) not to test the water pressure or water level inside the Gold King adit, SNM ¶¶ 4, 91, 205; NN ¶ 7; UT ¶¶ 48, 49, 50; (ii) not to drill a bore hole on the mountainside above the Gold King adit, SNM ¶¶ 86, 176; NN ¶ 99; and (iii) to excavate toward the adit floor without a water management system in place, without having the necessary equipment on-site, without pumping out the impounded water, without ramping up, and without Steve Way or Harrison Western present SNM ¶¶ 4, 93-97, 172, 173, 193, 194, 205; NN ¶¶ 7, 68-71, 74, 86, 88, 90, 92, 97, 98, 103, 107, 146, 174; UT ¶¶ 51, 82.

"the need to maximize compliance" with regulations, and allocation of resources); *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1222–23 (10th Cir. 2016) (despite mandatory checklist, Forest Service's wildlife response was "susceptible to a policy analysis" because it involved balancing "the needs to protect private property, ensure firefighter safety, reduce fuel levels, and encourage natural ecological development").

As in *Daigle*, Plaintiffs' challenges to the reclamation activities at Gold King are "but an assertion that the [EPA] could have done a better job in planning for and attaining the overall goals of public health and safety as expressed throughout CERCLA." *Daigle*, 972 F.2d at 1541. Any alleged missteps by EPA, however, do not defeat discretionary function immunity. *Cisco v. United States*, 768 F.2d 788, 789 (7th Cir. 1985) ("Whether the EPA acted negligently or even abused its discretion has no effect on the applicability of the discretionary function exception."). Just as the government was not liable for refusing to implement a potentially safer method of removing a cap and backfilling a mine shaft in *White v. U.S. Department of Interior*, 656 F. Supp. 25 (M.D. Pa. 1986), and even when it ignores an expert report, as in *U.S. Fidelity & Guaranty*, EPA's alleged decisions regarding whether and how to determine the water level inside Gold King, whether and how to re-open the adit, what preparations to undertake and how to respond to the Release fall "squarely within the coverage of the discretionary function exception." *White*, 656 F. Supp. at 35.

3. Section 119 of CERCLA does not eliminate the "Significant Conflict" Between Federal Interests and State Law

The existence of CERCLA Section 119, which allows the Government to "agree to hold harmless and indemnify any response action contractor," does not eliminate the "significant conflict" between state tort law and the Government's uniquely federal interests under

CERCLA.[13] In the two cases where a district court applied the Government Contractor Defense as articulated in *Boyle* to EPA contractors, both courts found that there was a significant conflict between uniquely federal interests and state tort law. *Gadsden*, 111 F. Supp. 3d at 1229 ("EPA's unique federal interest in remediation of the eastern excluded property and state tort liability are in significant conflict and state tort law must be displaced as to actions directed by EPA."); *Richland-Lexington*, 854 F. Supp. at 423 (holding "that the decisions concerning the stockpiling satisfied the discretionary function exception" and, therefore, satisfied the "significant conflict" prong of the Government Contractor Defense). The existence of Section 119 did not impact the courts' conclusions in those cases, and does not foreclose the applicability of the Government Contractor Defense in this case because EPA was on-site at Gold King, and directing the activities that allegedly triggered the Release. *See* Ex. 5. As the court explained in *Gadsden*, "state tort law must be displaced as to actions directed by EPA." *Gadsden*, 111 F. Supp. 3d at 1229.

C. The EPA Contractor Defendants' Alleged Actions Fall Within the "Scope of Displacement" of the Government Contractor Defense.

After demonstrating that there is a unique federal interest that is in significant conflict with state law, federal government contractors, like ER and Weston, are entitled to protection from state law liability under the Government Contractor Defense if they can show, as one court put it, "'that the government made me do it.'" *Gadsden*, 111 F. Supp. 3d at 1230 (quoting

[13] In the Ruling, Judge Armijo raised the issue of whether Section 119 "demonstrates that there is or is not a significant conflict between state tort law and the uniquely federal interest of the liability pursuant to the EPA's response action contracts but reserved ruling on the issue because it had not been analyzed by either party. *See* Ruling at 50.

Brinson v. Raytheon Co., 571 F.3d 1348, 1351 (11th Cir. 2009)). A three-part test applies to determine whether the EPA Contractor Defendants' alleged actions fall within the "scope of displacement" of the Government Contractor Defense: "(1) EPA approved reasonably precise clean-up procedures; (2) [the EPA Contractor Defendants] followed those procedures; and (3) [the EPA Contractor Defendants] revealed to EPA any dangers regarding the cleanup activity unknown to EPA." *Gadsden*, 111 F. Supp. 3d at 1230 (citing *Boyle*, 487 U.S. at 512). All three of these prongs are satisfied based on the allegations pled by the Plaintiffs.

As to the first two elements, the allegations against Weston and ER establish EPA oversight by providing discrete examples of EPA's OSCs directing the nature, manner, and method of the response work of the Contractor Defendants. *See Boyle*, 487 U.S. at 501. Plaintiffs admit that (i) the EPA Contractor Defendants began working "under the direction" of the EPA OSC, SNM ¶ 81; (ii) work plans were submitted, reviewed and approved by both EPA OSCs, NN ¶¶ 88, 93, 97; and (iii) at all relevant times, there was an EPA OSC on-site who was "in charge" and constantly supervising the alleged activities at Gold King, NN ¶ 96.

Plaintiffs' allegations belie any claim that the EPA Contractor Defendants deviated from the on-site directions of the EPA OSC, and align this case with the facts of *Richland-Lexington*, where the district court held that an EPA contractor was entitled to the Government Contractor Defense. In *Richland-Lexington*, as here, "the EPA made the decisions with respect to cleaning up the site," and the EPA's contractor "was a vehicle for executing the EPA's clean-up activities" and "merely implemented the remedy that the EPA had previously determined was appropriate." *Richland-Lexington*, 854 F. Supp. at 423–24. Just like in *Richland-Lexington*, Plaintiffs do not allege any facts that the EPA Contractor Defendants acted unilaterally and

without the approval of the on-site EPA OSC. Rather, these allegations conclusively demonstrate that the EPA Contractor Defendants' actions were taken under the direct supervision and oversight of the EPA such that there is no question that the EPA Contractor Defendants' performance conformed to the EPA's directives. *See Yearsley*, 309 U.S. at 19–21 (contractor was not liable for work that "washed away" plaintiffs' land because the "work was done pursuant to contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States"); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir. 1993) ("A private contractor who is compelled by contract to perform an obligation for the United States should, in some circumstances, share the sovereign immunity of the United States."). *Cf. Gadsden*, 111 F. Supp. 3d at 1230–31 (EPA contractors were not entitled to Government Contractor Defense because the contractors "unilaterally determined how to conduct day-to-day activities" and "EPA had little input into the plan to remediate the slag piles and provided little daily oversight of the mining operation").

Finally, as to the third *Boyle* element, Plaintiffs' allegations establish that the EPA Contractor Defendants were not aware of any dangers or risks of which EPA was unaware. *See Boyle*, 487 U.S. at 512. To the contrary, Plaintiffs admit that EPA identified numerous "risks" in its task order, including that "[c]onditions may exist that could result in a blow-out." NN ¶ 68; *See also* SNM ¶¶ 4, 5, 32, 78, 172; NN ¶¶ 7, 67; UT ¶¶ 37, 39–41; McD ¶ 32, 33. *See Richland-Lexington*, 854 F. Supp. at 423–24 (contractor entitled to the Government Contractor Defense "because the EPA determined that the site required clean-up and further determined the manner to effectuate clean-up, the logical conclusion is that the EPA was fully apprised of any danger."). Thus, the EPA Contractor Defendants have affirmatively established all three *Boyle* factors.

None of the acts and omissions on the part of EPA and the EPA Contractor Defendants that Plaintiffs allege contributed to the Release are sufficient to avoid application of the Government Contractor Defense.

For example, Plaintiffs allege that EPA and the EPA Contractor Defendants failed to develop a plan to address the known risk of water impounded inside the Gold King adit and prevent a blowout, SNM ¶¶ 4, 99, 205; NN ¶¶ 7, 104, 146, 174, and also allegedly failed to develop adequate emergency procedures, SNM, ¶¶ 101, 173, 175, 194; NN, ¶¶ 7, 69, 70, 71, 103, 117, 174; UT, ¶¶ 52, 53, 82. Plaintiffs, admit, however, that (i) an "Action/Work Plan" was prepared, submitted, reviewed and approved by both EPA OSCs, NN ¶¶ 88, 97; and (ii) a "Final Site Health and Safety Plan was reviewed and approved by the EPA OSC and made part of the final work plan," NN ¶ 93. Accordingly, based on Plaintiffs' own admissions, EPA and the EPA Contractor Defendants did develop a plan to address the water that was impounded inside the Gold King adit. Just as in *Daigle*, where the Army's allegedly "deficient planning and execution" of an environmental clean-up of the Rocky Mountain Arsenal did not support plaintiffs' state tort claims, the Plaintiffs' cannot state claims against the EPA Contractor Defendants based on allegations that EPA and the EPA Contractor Defendants "could have done a better job in planning" the work at Gold King. *Daigle*, 972 F.2d at 1541.

Similarly, Plaintiffs generally allege that the substitute OSC (Hays Griswold) and the "EPA crew" failed to follow the original OSC's emailed instructions and the Action/Work Plan by allegedly excavating toward the adit floor without the necessary equipment on-site, without installing a water management system, without pumping out the impounded water, without "ramping up," and without other necessary parties present. *See, e.g.,* SNM ¶¶ 4, 94–97, 105,

110, 172, 173, 193, 194, 205; NN ¶¶ 7, 68–71, 74, 86, 88–90, 92, 97, 98, 102, 103, 107, 146, 174; UT ¶¶ 51, 82. As set forth above, however, Plaintiffs admit that an EPA OSC (Hays Griswold) was on-site directing the alleged activities at Gold King. *See* Ex. 5. Based on Plaintiffs' own admissions, any work at Gold King was (at a minimum) being performed with the acting EPA OSC's knowledge and consent.

Plaintiffs have not alleged—and cannot allege—any facts showing that the EPA Contractor Defendants disobeyed the on-site directions of the acting EPA OSC at Gold King or that the acting EPA OSC did not approve of the alleged work at Gold King. Without any allegations that the EPA Contractor Defendants disobeyed the on-site directions of the acting EPA OSC, Plaintiffs cannot overcome the discretionary function exception of the FTCA because no case holds that a government contractor can be held liable under state tort law when the contractor is acting under the direct supervision of the contracting government agent.

D. The Contractor Defendants' Derivative Immunity Deprives This Court of Jurisdiction to Review Plaintiffs' Tort Claims

The Contractor Defendants, having established all elements of the Government Contract Defense on the facts as asserted in the Complaint, are entitled to the same immunity afforded to the United States government from claims brought under section 1346(b). *See Boyle*, 487 U.S. 500. *See also Weiss v. U.S.*, 787 F.2d 518, 521 (10th Cir. 1986) ("under section 2680(a) the Government is immune from claims brought under 1346(b) based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.") (internal quotations and citations omitted); *Dalehite v. United States*, 346 U.S. 15, 26-27 (1953) (Section 2680 of the FTCA is meant to assure protection for the government against

tort liability for errors in administration or in the exercise of discretionary functions) *abrogated in part by Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

It is well established that such derivative immunity "deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction." *Ackerson v. Bean Dredging LLC*., 589 F.3d 196, 207 (5th Cir. 2009). *See also San Juan Cnty, Utah v. United States*, 754 F.3d 787, 792 (10th Cir. 2014) ("Unless the United States waives its sovereign immunity, thereby consenting to be sued, the federal courts lack jurisdiction to hear claims against it. The terms of the waiver define the court's jurisdiction to entertain the suit."); *Daigle v. Shell Oil Co*., 972 F.2d 1527, 1531 (10th Cir. 1992) ("grant[ing] the Government's Rule 12(b)(1) motion to dismiss the FTCA claims, holding that [the Court] lacked subject matter jurisdiction because the Government's cleanup activities fell under the discretionary function exception to the FTCA waiver of sovereign immunity."). Thus, Plaintiffs' Complaint for tort claims must be dismissed under Rule 12(b)(1).

E. McDaniel's Assertion that *Ayala's* "Technical Consideration" Analysis Waives the Contractor Defendants' Derivative Immunity is Incorrect.

"A waiver of sovereign immunity cannot be implied but must be unequivocally expressed" and the burden is on the Plaintiff to establish waiver. *Goodwill Indus. Serv. Corp. v. Comm. for Purchase from People who are Blind or Severely Disabled*, 378 F. Supp. 2d 1290, 1292 (D. Colo. 2005). *See also Fostvedt v. U.S.*, 978 F.2d 1201, 1203 (10th Cir. 1992). For the reasons stated, the McDaniel Plaintiffs have not asserted facts sufficient to overcome that burden.

The McDaniel Plaintiffs assert as paragraph 27 and 28 of their Complaint that the

"discretionary function exception does not apply when technical considerations govern the decision," taking issue with "the specific technical objective standards Defendants violated when they maintained the mine." This assertion is factually and legally incorrect. McDaniel Plaintiffs' reliance on the Tenth Circuit's case of *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992), is misplaced and provides no grounds for a waiver of sovereign immunity that would allow for subject matter jurisdiction. McD ¶¶ 21, 25, 26. *Ayala* is distinguishable because it only involved technical advice provided by an employee of the Mine Safety and Health Administration ("MSHA")—not a government contractor. 980 F.2d at 1349–50. Further, the technical advice did not involve any discretionary policy decisionmaking.

Contrary to the single decision of the inspector with regards to the proper connection of the lights in *Ayala*, the EPA was in the process of an ongoing CERCLA response evaluation at an abandoned mine, which involved a myriad of social, economic, and political policy decisions that were not present in the *Ayala* case.

V. PLAINTIFFS' HAVE FAILED TO STATE ANY STATE LAW OR COMMON LAW CAUSES OF ACTION AS A MATTER OF LAW AND EACH CLAIM MUST BE DISMISSED

Each of the four suits fail to state any state statutory or common law claims, and those claims must be dismissed as follows.

A. Utah Statutory Claims

The Fifth and Sixth Causes of Action in the Utah Complaint bring claims for violations of Utah-specific statutes. UT ¶¶ 102-114. These claims must be dismissed because neither Utah state statute is applicable to the alleged actions at Gold King.

A state does not have authority to regulate the conduct of persons in other states. *See Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (a state "can impose its own legislation on no one of the others, and is bound to yield its own views to none"); *Lindsey v. McClure*, 136 F.2d 65, 70 (10th Cir. 1943) (states water laws "have no extraterritorial effect"); *Abraham v. WPX Energy Prod., LLC*, 20 F. Supp. 3d 1244, 1262 (D.N.M. 2014) (reasoning that "neither the Due Process clause, nor the Full Faith and Credit Clause, requires [a state] to substitute for its own laws, applicable to persons and events within it, the conflicting statement of another state") (internal citations and quotations omitted). Established Supreme Court precedent forecloses the Utah state statutory claims. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487, 497–98 (1987) (realizing "independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states" thus, releases from a New York mill that moved toward Vermont on Lake Champlain were actionable only under New York law); *Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992) ("[T]he only state law applicable to an interstate discharge is the law of the State in which the point source is located."). Thus, only Colorado law applies to conduct at the Mine.

Utah's Water Quality Board is authorized only to take action in the interest of "the prevention, control, and abatement of new or existing pollution of the waters **of the state,**" and not to govern any conduct or actions occurring outside of the state, which is what Utah seeks to do by this action. *See* Utah Code Ann. § 19-5-104. Both of the code sections cited by Utah are clear that they apply only to pollution in "waters of the state," and not elsewhere. *See* Utah Code Ann. §§ 19-5-107, -117; § 19-6-101. Colorado is not required to substitute Utah's statutes for its own, and these improperly pleaded claims must fail.

B. Negligence Per Se

Similarly, the McDaniel Plaintiffs' cite several New Mexico statutes as a basis for their negligence per se claims. McD ¶¶ 57-58. For the reasons stated above, New Mexico law may not make the basis of a negligence per se claim, and these claims must be dismissed. There is not a valid claim for negligence per se unless (1) one of the purposes of the statute or ordinance was to protect against the type of injuries or losses the plaintiff sustained, and (2) the plaintiff was a member of the group of persons the statute or ordinance was intended to protect. *See Scott v. Matlack, Inc.*, 39 P.3d 1160 (Colo. 2002); *Bd. of County Com'rs of County of La Plata, Colorado v. Brown Group Retail, Inc.*, 598 F. Supp. 2d 1185, 1195 (D. Colo. 2009).

The McDaniel Plaintiffs have pointed to no specific Colorado statute that meets the elements of a negligence per se claim: that the violation of any particular statute proximately caused injury, that the injury was the type the statute was enacted to protect against, or that the plaintiff is a member of the group of persons the statute was intended to protect. McD ¶ 57; Colo. Jury Instr., Civil 9:14. Although the McDaniel Complaint ¶ 57.a. (sic), ¶ 57.b. (sic) alleged Weston and ER violated Colorado statutes or regulations (5 Colo. Code Regs. § 1002-62:62.3(1); 5 Colo. Code Regs. § 1002-85:85.1), those allegations fail to plead the alleged violations with any degree of specificity such that the Court would have sufficient grounds to believe that any of them have a reasonable likelihood of factual support for their negligence per se claims.

McDaniel Plaintiffs also fail to establish a claim for negligence per se where Weston or ER owed no duty under the federal and state law and regulations cited in the Complaint. McD ¶¶ 57–59 (sic). For example, the McDaniel Plaintiffs' allege Defendants owed them various duties under the ordinary person standard, "reasonable engineering, mining, safety, and other applicable

standards in the industry, as well as EPA, National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and OSHA regulations, and the laws and regulations of the states of Colorado and New Mexico." McD ¶ 56. For evidence of violations of statutory standards to have any bearing on Weston or ER's liability, Plaintiffs would have to first establish the existence of a tort duty independent of these provisions, which they have failed to do by citing these wholly inapplicable provisions.

Next, McDaniel Plaintiffs attempt to equate a negligence standard with an OSHA violation to create civil liability. This is not a legally sound argument. OSHA and subsequent case law are clear that OSHA does not create a private cause of action between a non-employee and a company. *See* McD ¶ 57; *see e.g.*, OSHA, 29 U.S.C. § 666 (1985) (imposing safety standards only on employers: since [the defendant] was not [plaintiff's] employer, OSHA's safety standards do not apply directly to [the defendant]), *accord Sprankle v. Bower Ammonia & Chemical Co.*, 824 F.2d 409, 416, n. 10 (5th Cir. 1987); *Valdez v. Cillessen & Son, Inc.*, 1987-NMSC-015, ¶ 10, 105 N.M. 575 ("OSHA violations do not constitute a basis for assigning negligence as a matter of law . . . [because to do so] would affect the common law duties or liabilities . . . and would be contrary to the clear intent of Congress.") (internal citations and quotations omitted).

Because Gold King, as the point source, is located in Colorado, New Mexico statutes do not create any standards of care for the actions of Defendants in Colorado. For that reason, the New Mexico Hazardous Waste Act, NMSA 1978, § 74-4-1 to -14 (1977, as amended through 2018), does not provide standards of care or duties owed by Defendants in this case. *See* McD ¶ 58 (sic). Even if this Court were to apply New Mexico law in a choice of law analysis, New Mexico law has held that the Hazardous Waste Act is not meant to establish any duty in a negligence per

se claim. *See Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co*., 857 F. Supp. 838, 848 (D.N.M. 1994) ("not every statutory violation gives support to a claim of negligence per se. Instead, a court must examine legislative intent.").

Finally, allegations by the McDaniel Plaintiffs that Defendants violated the effluent limitations under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1311, are unfounded as these kinds of claims are preempted by federal common-law nuisance actions for interstate water pollution. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). Moreover, the CWA precludes a court from applying the law of an affected state (New Mexico) against an out-of-state (Colorado) source. *Ouellette*, 479 U.S. 481.

C. Negligence

In all four cases, Plaintiffs' negligence claims must fail because each has failed to state a prima facie claim as a matter of law where Colorado law does not recognize a duty owed to persons in other states for a CERCLA cleanup. Under Colorado law, "a claimant alleging negligence of another party must establish the existence of a duty, a breach of that duty, causation, and damages." *Redden v. SCI Colo. Funeral Servs*., Inc., 38 P.3d 75, 80 (Colo. 2001). *See also* Colo. Jury Instr., Civil 9:6 (Negligence is "a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect others from property damage."). Plaintiffs' argument that Colorado law imposes a duty on Weston and ER when they provided technical and other assistance under CERCLA is completely unsupported by law.

Colorado common law has not imposed tort duties on the design and implementation of an approved CERCLA removal plan. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987) (a negligence claim must fail if based on circumstances for which the law imposes no duty of care on the defendant for the benefit of the plaintiff). Duty is a question of law determined by looking to several factors, including "the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, the consequences of placing the burden upon the actor, and any additional elements disclosed by the particular facts of the case." *Ayala v. U.S.*, 846 F. Supp. 1431, 1437, (D. Colo. 1993), *aff'd, Ayala v. U.S.*, 49 F.3d 607 (10th Cir. 1995); *Bd. of County Com'rs of County of La Plata v. Moreland*, 764 P.2d 812, 816, 1988 WL 125422 (Colo. 1988) (recognizing a duty may be derived by either statute or common law). It logically follows that Colorado would not recognize a duty here where the state has carefully limited the scope of duty to "fairness under contemporary standards-whether reasonable persons would recognize a duty and agree that it exists." *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987). As a matter of law, no such far-reaching duty to persons in other states exists under these circumstances where neither the risk involved nor the likelihood of injury were foreseeable.

Moreover, the Complaints lack any allegations of a duty recognized under Colorado law. Utah and New Mexico similarly allege that all of the Defendants, including Weston and ER, had a duty "to design and plan their tasks, . . . to oversee, manage, maintain, and regulate the Gold King Mine . . . with reasonable care" and "to take reasonable precautions in case of an accidental release." UT ¶ 82; SNM ¶ 201 (alleging also a "duty to conduct investigations and work activities at the mines with reasonable care). Navajo likewise claims that Weston and ER "owed

a duty . . . to conduct, regulate, maintain, and oversee the operations, investigations, and conditions . . . in a reasonable manner and with reasonable care." NN ¶¶ 111, 173 (alleging general duty to act "with the level of care that someone of ordinary prudence would have exercised under the same circumstances"). These formulaic recitations of a negligence cause of action are insufficient to state a plausible claim for relief.

As alleged by Plaintiffs and established by the terms of the START and ERRS contracts, Weston and ER had no duty to determine and direct the work at Gold King. Neither Weston nor ER oversee, manage, maintain, and regulate Gold King, but rather, only federal and state regulators had statutory authority to approve the clean-up plan that went forward, and indeed they did at Gold King. NN ¶¶ 88, 93, 97. Before the CERCLA plan was approved, the agency experts analyzed the plan's environmental impact, safety, technical feasibility, and cost. *See id.* As a result, Colorado tort law would not recognize that Weston and ER had a duty to other states, such as Utah, New Mexico, or the Navajo Nation, or persons in other states, like the McDaniel Plaintiffs, not to execute the remedial plan implemented by the state and federal agencies. Contrary to notions of negligence, these suits seek to implicate Weston and ER for negligence merely by participation in the implementation of a cleanup plan directed, approved, and overseen by state and federal regulators. That theory of duty would result in potentially unlimited or insurer-like liability to everyone in Colorado and nearby states, which is not cognizable under Colorado law that has carefully tailored the scope of duty to prevent such limitless liability. Plaintiffs' negligence claims must be dismissed for a failure to state a duty as a matter of law.

Additionally, there are no facts in the McDaniel Complaint as to what damages they allege to have suffered, but rather state numerous times that they are seeking an unspecified

amount of damages "to be determined at trial." *See* McD ¶ 45 (alleging generally that they "are reminded of this devastating pollution every time there is a rainfall, as toxic elements are dredged up from the River's floor where they have come to rest," and that metals "remain[] embedded in the river upstream of the Plaintiffs and threatens to re-mobilize during natural runoff, storms, or other events," McD ¶ 47. *See also Brown v. Whirlpool Corp.*, 996 F. Supp. 2d 623, 639 (N.D. Ohio 2014) (dismissing claims for property damage when the complaint did not "specify the type of damage to plaintiffs' varied properties or the extent of such damages"); *Robertson v. Chevron USA, Inc*., No. CV 15-874, 2017 WL 679406, at *16 (E.D. La. Feb. 21, 2017) (allegations of property damage from hazardous substance failed to state a claim when they did not specify "where the property is located, the nature of the damage, and when the damage occurred."). A general allegation of personal injury or property damage like this is exactly the type of insufficient pleading that must be dismissed because it omits the alleged nature of the damages sustained. McD ¶¶ 1-9. Because Plaintiffs do not specify in the Complaint how the release has impacted their properties, where the properties are located in relation to the Animas River, when the injuries occurred, what substances have caused personal injuries or property damages, if any at all, the McDaniel Plaintiffs' negligence claim must be dismissed.

D. Gross Negligence

All four Complaints' gross negligence claims must be dismissed because Colorado (and New Mexico) does not recognize "varying degrees of negligence." *Denver & Rio Grande Ry. v. Peterson*, 69 P. 578 (Colo. 1902), *accord Dukeminier v. K-Mart Corp.*, 651 F. Supp. 1322, 1323 (D. Colo. 1987) (recognizing "the Colorado Supreme Court has refused to recognize

stratification by degrees of negligence"). Because Plaintiffs' attempts to plead gross negligence claims are not properly before this Court as a matter of law, these requests must be dismissed.

E. Trespass, Private Nuisance, and Public Nuisance

Each of the Complaints seek an order to abate the alleged trespass and nuisance through an injunction as well as damages, but these requests must be denied for several reasons. NN Counts 5-7; SNM Counts 5-6; UT Count 4; McD Counts 3-4. As described above, CERCLA's timing of review provision in section 113(h) prevents a court from interfering with an ongoing removal action. It necessarily follows that these requests for injunctive relief for the nuisance claims must also fail.

Implicit in the Complaints are the allegations that the Sovereign Plaintiffs are seeking under CERCLA the same cost of dredging, transporting, treating and disposing of contaminated sediment from the Animas and San Juan Rivers and Lake Powell as sought by these state law claims. UT ¶¶89-101; NN ¶¶ 163-184; SNM ¶¶ 194-204. As a matter of law, where a plaintiff's CERCLA and state law claims seek recovery of the same response costs, CERCLA preempts the plaintiff's right to recover under the state law, as described above. Thus, Plaintiffs are unable to proceed with such claims where they are seeking the same damages under CERCLA as the state law claims.

VI. PLAINTIFFS' DAMAGE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiffs admit that it is "well-known" that waste water has discharged into the Animas and San Juan Rivers from inactive and abandoned mines in the Bonita Peak Mining District for decades. NN ¶ 36; *see also* SNM ¶ 5, NN ¶¶ 5, 36; UT ¶ 18. To the extent that any portion of the Plaintiffs' claims are for damages or costs caused by the decades-long contamination of the

Animas and San Juan Rivers and Lake Powell, such claims are barred by the applicable statute of limitations. *See* Colo. Rev. Stat. § 13-80-102(1)(a) (two-year statute of limitations for tort actions).

Plaintiff State of New Mexico also admits that the alleged hazardous substances from the Release have "combined and mingled' with the decades-long contamination into the Animas and San Juan Rivers. SNM ¶ 8. Plaintiffs, however, fail to provide any basis for distinguishing its claim for damages from the Release with its time-barred claim for damages resulting from the decades-long contamination of the Animas and San Juan Rivers. Accordingly, Plaintiffs' claims for damages should be dismissed.

VII. PLAINTIFFS' JOINT AND SEVERAL LIABILITY REQUESTS SHOULD BE STRICKEN.

Judge Armijo previously granted ER's motions to strike the allegations of State of New Mexico and Navajo Nation that ER is "jointly and severally" liable with other defendants under state law. Ruling at 69. In direct contravention of this ruling, both the State of New Mexico and Navajo Nation inexplicably reassert their "joint and several" allegations against ER. SNM ¶¶ 8, 182, 184, 197, 199, 207, 217; NN ¶¶ 177, 183, 193, 203, 209, and Prayer for Relief No. 6. The Court should reaffirm Judge Armijo's prior ruling, hold that Colorado law governs Plaintiffs' state law claims and strike the Plaintiffs' allegations that the Defendants are "jointly and severally" liable for Plaintiffs' state law claims.

In cases such as this one that involve interstate discharges, the Supreme Court has made clear that the only state laws that apply are those of the state where the "point source" is located. *Ouellette*, 479 U.S. at 487, 497–98 (releases from a New York mill that moved toward Vermont on Lake Champlain were actionable only under New York law); *Arkansas v. Oklahoma*, 503

U.S. 91, 100 (1992) ("[T]he only state law applicable to an interstate discharge is the law of the State in which the point source is located."). The "point source" in this case is Gold King, which is located in Colorado. Accordingly, the laws of the State of Colorado govern all of Plaintiffs' state law claims.

Colorado has abolished joint and several liability by statute in favor of pro-rata liability. Colo. Rev. Stat. § 13-21-111.5(1).[14] Accordingly, Plaintiffs' claims that the Contractor Defendants are "jointly and severally" liable for damages under state tort law should be stricken as immaterial under Fed. R. Civ. P. 12(f) because such claims have no bearing on this case. *See Nitzsche v. Stein, Inc.*, 797 F. Supp. 595, 601–02 (N.D. Ohio 1992) (striking improper prayer for joint and several liability); *Carlson v. Armstrong World Indus., Inc.*, 693 F. Supp. 1073, 1079 (S.D. Fla. 1987) (striking "punitive damages based on joint and several liability").

CONCLUSION

The Court should grant the EPA Contractor Defendants' Motion to Dismiss and Motion to Strike. Since any potential amendments would be based on facts that Plaintiffs either knew or, in light of the scores of reports and investigations about the Release, should have known about "but fail[ed] to include them in the original complaint," the Plaintiffs' complaints should be dismissed without leave to amend. *See Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990).

[14] Even if New Mexico state law applies to Plaintiffs' claims (which it does not), New Mexico has also abolished the doctrine of joint and several liability by statute. NMSA 1978, § 41-3A-1(A).

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GLASER WEIL FINK HOWARD
AVCHEN & SHAPIRO LLP

By: */s/ Peter C. Sheridan*

Terry D. Avchen (*pro hac vice*)
Peter C. Sheridan (*pro hac vice*)
Andriy R. Pazuniak (*pro hac vice*)
10250 Constellation Blvd., 19th Fl.
Los Angeles, California 90067
Telephone: (310) 553-3000
Email: tavchen@glaserweil.com
Email: psheridan@glaserweil.com
Email: apazuniak@glaserweil.com

Attorneys for Defendant
Environmental Restoration, LLC

MONTGOMERY & ANDREWS, P.A.

By: */s/ Jeffrey J. Wechsler*

Jeffrey J. Wechsler
Louis W. Rose
Kari E. Olson
Kaitlyn A. Luck
325 Paseo de Peralta (87501)
P.O. Box 2307
Santa Fe, NM 87504-2307
Telephone: (505) 986-2637
Email: jwechsler@montand.com
Email: lrose@montand.com
Email: kolson@montand.com
Email: kluck@montand.com

Attorneys for Defendant
Weston Solutions, Inc.

MOSES, DUNN, FARMER & TUTHILL, P.C.

Terry D. Farmer
612 First Street NW
P.O. Box 27047
Albuquerque, New Mexico 87125-7047
Telephone: (505) 843-9440
Email: terry@moseslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2018, the foregoing document 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 electronic transmission upon all counsel of record, and reflected by the Court's CM/ECF system.

/s/ Jeffrey J. Wechsler
Jeffrey J. Wechsler