UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE: GOLD KING MINE RELEASE IN SAN JUAN COUNTY, COLORADO, ON AUGUST 5, 2015 *This Document Relates to:* *No. 16-cv-465-WJ/LF* *No. 16-cv-931-WJ/LF* *No. 18-cv-319-WJ*	C.A. No. 1:18-md-02824-WJ

SOVEREIGN PLAINTIFFS' BRIEF IN OPPOSITION TO THE CONTRACTOR DEFENDANTS' MOTION TO DISMISS [DOC. 45]

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INTRODUCTION

On August 5, 2015, Defendants Environmental Restoration ("ER") and Weston Solutions, Inc. ("Weston," and together with ER, the "Contractor Defendants") triggered an environmental disaster by tearing open the Level 7 adit of the Gold King Mine with a backhoe, releasing millions of gallons of toxic mine water that polluted hundreds of miles of the Animas and San Juan Rivers, as well as Lake Powell. Plaintiffs the State of New Mexico, the Navajo Nation, and the State of Utah (together, the "Sovereign Plaintiffs") have brought suit to recover for the devastating harm they, and their citizens, suffered as a result of the Contractor Defendants' actions. There is no reasonable dispute that the Contractor Defendants, along with the Environmental Protection Agency ("EPA"), caused the blowout. Still, the Contractor Defendants move to dismiss the Sovereign Plaintiffs' claims, attempting to avoid *all* liability for the spill. (Doc. 46 ["Mot."].) The Court should deny the Contractor Defendants' motion.

First, Judge Armijo already resolved many of the issues presented by the Contractor Defendants' motion: namely, she held that New Mexico and the Navajo Nation have properly pleaded claims against ER under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), that CERCLA does not preempt New Mexico and the Navajo Nation's state tort claims against ER, and that ER is not entitled to dismissal of any of the claims against it based on the government contractor defense. (Case No. 16-cv-00465 Doc. 201 at 14-60.) ER never moved for reconsideration of Judge Armijo's Order and even now does not dispute Judge Armijo's reasoning or conclusions or provide any basis for the Court to revisit them. The Court should deny the Motion as to ER on this basis alone.

Second, CERCLA does not preempt or otherwise bar any of the Sovereign Plaintiffs' claims against the Contractor Defendants. The Contractor Defendants' argument that CERCLA

preempts all claims against them because they were engaged in an EPA response action is meritless; CERCLA contains *two* savings clauses that encompass claims like those at issue here: one providing that "[n]othing" in CERCLA preempts States' imposition of additional liability or requirements related to hazardous substance releases, and another emphasizing that CERCLA does not "modify in any way" parties' obligations or liabilities under State laws that bear on releases of hazardous substances. 42 U.S.C. §§ 9614(a), 9652(d) Moreover, CERCLA expressly provides for liability for response action contractors like the Contractor Defendants. 42 U.S.C. § 9619(a). Nor does section 113(h) of CERCLA, 42 U.S.C. § 9613, temporarily preempt the Sovereign Plaintiffs' tort claims while EPA conducts a remedial action because the Sovereign Plaintiffs have properly pleaded that no such remedial action has begun. And even if one had begun, which the Sovereign Plaintiffs deny, the Sovereign Plaintiffs claims would not be subject to dismissal for two additional reasons: first, their requested relief does not interfere with any ongoing or planned EPA work; and second, the Sovereign Plaintiffs do not seek potentially preempted damages. *See United States v. Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1242-43 (9th Cir. 1995). For similar reasons, New Mexico's claim under the Resource Conservation and Recovery Act ("RCRA") is also adequately pleaded.

Third, the Sovereign Plaintiffs have adequately pleaded CERCLA claims against the Contractor Defendants. As alleged by the Sovereign Plaintiffs, both ER and Weston controlled operations at the Gold King Mine, arranged for disposal of hazardous substances there, and selected the site for that disposal. *See Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 609-10 (2009). Accordingly, they are liable as operators, arrangers, *and* transporters under CERCLA—any one of which would be sufficient to state a claim. *See* 42 U.S.C. § 9607.

Fourth, the Contractor Defendants are not entitled to invoke the government contractor defense at this stage. On a motion to dismiss, ER must show that every element of the defense plainly appears on the face of the Sovereign Plaintiffs' Complaints. *Miller v. Shell Oil Co.*, 345 F.2d 891, 893 (10th Cir. 1965). But the Sovereign Plaintiffs have not pleaded a significant conflict between a uniquely federal interest and the operation of state law as required for the Contractor Defendants to rely on the defense. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 507, 511 (1988). To the contrary, the complaints allege that the Contractor Defendants had parallel duties under Federal and state law to conduct their work in a non-negligent fashion. *See* 42 U.S.C. § 9619(a)(2). And the Contractor Defendants' fail in their attempt to argue that a conflict exists because of the discretionary function exception to Federal Tort Claims Act ("FTCA") liability. The Sovereign Plaintiffs plead that EPA's and the Contractor Defendants' actions at Gold King neither complied with mandatory contractual duties and regulations, nor was driven by policy considerations. *See Bell v. United States*, 127 F.3d 1226, 1230 (10th Cir. 1997); *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The Contractor Defendants also have not shown that the Sovereign Plaintiffs have pleaded that the Contractor Defendants received—and complied with—reasonably precise specifications from EPA. *See Boyle*, 487 U.S. at 512.

Fifth, the Sovereign Plaintiffs have stated tort claims against the Contractor Defendants. Utah's statutory claims are not barred by the Clean Water Act because no Sovereign Plaintiff alleged that the Gold King Mine was the subject of a National Pollutant Discharge Elimination System ("NPDES") permit. *See* 33 U.S.C. § 1342. The Sovereign Plaintiffs have plainly stated claims for negligence. *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987). And contrary to the Contractor Defendants' argument, courts have recognized gross negligence as a tort in

Colorado. *See U.S. Welding, Inc. v. Tecsys, Inc.*, 2014 WL 10321666, at *15 (D. Colo. Dec. 1, 2014).

Finally, the statute of limitations does not bar any of the Sovereign Plaintiffs' claims. The Sovereign Plaintiffs are seeking damages that trace directly to the Contractor Defendants' actions that precipitated the spill. And the Contractor Defendants' complaint that the Sovereign Plaintiffs are seeking "indivisible" harm is nothing more than impermissible burden-shifting. It is well-settled in tort cases that *defendants*, not plaintiffs, bear the burden of showing that they are responsible for only a portion of a comingled harm. Restatement (Second) of Torts, § 433A.

Accordingly, the Sovereign Plaintiffs respectfully request that the Court deny the Contractor Defendants' motion.

FACTUAL BACKGROUND

The Gold King Mine, located in the Upper Animas Watershed, was discovered in 1887, but has been inactive since the 1920s. (Doc. 7 [Navajo Nation First Amended Complaint ("NN FAC") ¶ 37; Doc. 8 [New Mexico First Amended Complaint ("NM FAC")] ¶¶ 25, 29; Case No. 1:18-cv-00319-WJ Doc. 93 [Utah First Amended Complaint ("UT FAC")] ¶ 18.[1].) The topography of the Upper Animas Watershed is laden with faults, fissures, and fractures that are impacted by mining behavior. (NN FAC ¶ 41; NM FAC ¶ 21; UT FAC ¶ 19.) Tunneling associated with mining redirects and contaminates groundwater flowing through the mountains. (NN FAC ¶ 41; NM FAC ¶¶ 21, 22; UT FAC ¶ 19.) This contaminated water is referred to as "acid mine drainage." (NN FAC ¶ 41; NM FAC ¶ 22, n.1; UT FAC ¶ 21.)

[1] The Contractor Defendants' citations to the pleadings are notably incorrect, often making representations that do not appear in the cited portions.

In 1996, Defendant Sunnyside Gold Corporation ("Sunnyside") plugged the nearby Sunnyside Mine with the first of two "bulkheads"—massive plugs in the mine opening designed to hold back the acid mine drainage accumulating within the mine. (NN FAC ¶ 45; NM FAC ¶¶ 32, 35-40; UT FAC ¶¶ 20-21.) The bulkheads forced water that normally would have exited through Sunnyside Mine to accumulate within nearby mines, including Gold King. (NN FAC ¶ 48; NM FAC ¶¶ 39-41, 52; UT FAC ¶¶ 21-23.) This buildup risked a "blowout," which could release a significant amount of contaminated acid mine drainage into downstream waterways. (NN FAC ¶ 49; NM FAC ¶¶ 6-7; UT FAC ¶ 37.)

The buildup did not go unnoticed, since mines that had been dry for decades—including the Gold King Mine and the nearby Red and Bonita Mine—began to fill with acid mine drainage. (NN FAC ¶ 56; NM FAC ¶ 52; UT FAC ¶¶ 21-23.) Concerns about the buildup, and the potential for a blowout, were raised with EPA as early as 2007. (NN FAC ¶ 65; NM FAC ¶¶ 64-65.) In 2008, EPA determined (as it had once before) that the Upper Animas Watershed would qualify for inclusion on the National Priorities List. (NN FAC ¶¶ 58-60.) But EPA ceded to local resistance and did not propose listing the area. (*Id.* ¶ 60.)

In 2011, EPA initiated work at the Red and Bonita Mine due to the increased flow of water there. (NN FAC ¶ 61; NM FAC ¶ 72.) Before opening the portal, or entrance, to the mine, EPA asked the Bureau of Reclamation ("BOR") to conduct an independent review of its plans to open the mine. The BOR warned EPA that the water pressure in the mine could build up so high that the acid mine drainage would explode out the side of the mountain. (NN FAC ¶ 61; NM FAC ¶ 74.) EPA therefore decided to drill a well upslope from the Red and Bonita Mine that permitted it to measure the water level inside the mine. (NN FAC ¶ 62; NM FAC ¶ 74.) More water was present than EPA expected, so it enlarged its treatment ponds and pumped water out of the top of

the mine. (NN FAC ¶¶ 62-63.) After it pumped out the water, EPA safely excavated the portal at that mine. (*Id.* ¶ 63.)

In 2014, the Colorado Department of Reclamation, Mining, and Safety ("DRMS") asked EPA to open an adit, or horizontal tunnel, at the Gold King Mine to investigate the acid mine drainage that had accumulated there. (NN FAC ¶¶ 65-67; NM FAC ¶ 77; UT FAC ¶ 34.) In connection with the planned reclamation work, EPA issued a Task Order Statement of Work (the "Task Order") on June 25, 2014 and sought a work plan from a contractor, Defendant ER. (NN FAC ¶ 67; NM FAC ¶ 78; UT FAC ¶¶ 35-37.) The Task Order stated that "[a]ll work" was to "be performed under the conditions as described in an approved Work Plan to be submitted to the OSC [EPA On-Scene Coordinator] for approval," and those conducting the work were to use best management practices and engineering specifications. (NN FAC ¶ 72; NM FAC ¶ 78.)

On or around September 11, 2014, EPA, ER, and another contractor, Weston, began excavating at the Gold King Mine. (NN FAC ¶ 79; NM FAC ¶ 82; UT FAC ¶¶ 35-36.) But water quickly began seeping out of the side of the mine, and EPA and Contractor Defendants abruptly halted their efforts. (NN FAC ¶ 80; NM FAC ¶ 82; UT FAC ¶ 39.) They (incorrectly) estimated that there was approximately six feet of impounded water in the mine, and because the settling pond installed at the time was not large enough to treat that much water, EPA and the Contractor Defendants suspended excavation work until the next summer. (NN FAC ¶ 82; NM FAC ¶ 85; UT FAC ¶¶ 40-41.)

After the aborted 2014 excavation, EPA and the Contractor Defendants began planning and preparing for future excavation work at Gold King. (NN FAC ¶ 84; NM FAC ¶¶ 88-91; UT FAC ¶ 41.) Based on what had happened in September 2014, a subcontractor, Harrison Western, prepared a revised excavation plan. (NN FAC ¶ 86.) The new plan provided that Harrison Western

would "ramp up" to an elevation much higher than where the crew had excavated in September. (*Id.*) From this elevation, Harrison Western would safely pump water out of the mine without triggering the blowout. (*Id.*) Harrison Western shared the plan with ER, who in turn shared it with EPA, neither of whom made any modifications. (*Id.*) In May 2015, EPA approved a final plan under which Harrison Western would be "mobilized to provide expertise in mine site related activities." (*Id.* ¶ 88; UT FAC ¶¶ 36, 85.) As Harrison Western had proposed, the final plan provided that EPA and its contractors would ramp above the Gold King Mine's portal, drill in mesh anchors and hang wire mesh to stabilize the portal, excavate into the top of the portal, and then pump out the impounded water to a flume and settling pond for treatment. (NN FAC ¶ 89.)

In June and July 2015, EPA visited the mine with ER and Weston to assess site conditions. (NN FAC ¶ 92; NM FAC ¶ 90.) EPA visited again on July 23, 2015 with Weston to measure drainage flow. (NN FAC ¶ 94; NM FAC ¶¶ 90-91.) That day, a plan was discussed regarding the installation of a sump basin to treat water that would be pumped out of the Gold King Mine during excavation work scheduled for August 2015. (NN FAC ¶ 94; NM FAC ¶¶ 90-91.)

On or around July 23, 2015, EPA's On-Scene Coordinator, Steven Way, spoke with a civil engineer at the BOR because he was unsure about the Gold King Mine excavation plans and wanted an outside, independent review. (NN FAC ¶ 95; NM FAC ¶ 92; UT FAC ¶ 42.) The two agreed that the engineer would conduct an all-day, on-site assessment of the Gold King Mine plans on August 14, 2015. (NN FAC ¶ 95; NM FAC ¶ 92; UT FAC ¶ 42.) A few days later, on July 29, 2015, Way emailed instructions for the week of August 3 to the crew working on the Gold King Mine site. (NN FAC ¶ 97; NM FAC ¶ 94.) The instructions, like the work plan, made clear that the work crew was to implement a water management system *before* excavating. (NN FAC ¶ 97; NM FAC ¶ 94.) Way also made clear at the time that no work on opening the adit was to proceed

until he returned from a planned vacation and the BOR consultation had taken place on August 14. (NN FAC ¶ 97; NM FAC ¶ 94.) Way then left for vacation, leaving Hays Griswold on duty in the interim. (NN FAC ¶ 97; NM FAC ¶ 93; UT FAC ¶ 43.)

On August 4, 2015, despite not having an adequate emergency response plan in place, and lacking any equipment to prevent, mitigate, or treat an uncontrolled release of water from the mine, and without Harrison Western on site, EPA and its crew began burrowing into the adit with a backhoe. (NN FAC ¶ 98; NM FAC ¶ 95; UT FAC ¶¶ 55-57.) The crew did not ramp up above the portal, as the work plan provided. (NN FAC ¶ 98.) Nor did they stabilize the portal with wire mesh. (*Id.*) Instead, they began digging at the same elevation as they had the year prior, removing a substantial amount of soil. (NN FAC ¶ 98; NM FAC ¶ 95-96.) Because they were excavating at the same place as they had in 2014, EPA and its team soon observed water seeping out of the blocked mine portal. Nevertheless, EPA and the Contractor Defendants did not drill into the mine from above to directly observe the water level inside—an approach taken previously with the Red and Bonita Mine, which would have prevented the blowout. (NN FAC ¶ 99; NM FAC ¶ 86; UT FAC ¶¶ 48, 56.) Instead, EPA and its team negligently assumed that the seepage level *outside* the mine reflected the water level *inside* the mine. (NN FAC ¶¶ 99-100; NM FAC ¶¶ 95-97; UT FAC ¶¶ 45-47.)

Shortly after they started excavating, pressurized water began spurting out of the mine and then rapidly increased in flow. (NN FAC ¶ 103; NM FAC ¶ 98; UT FAC ¶ 59.) A video of the incident revealed an on-scene worker asking, "What do we do now?" (NN FAC ¶ 104; NM FAC ¶ 98; UT FAC ¶ 59.) Personnel evacuated as the leak escalated into a massive blowout, dumping millions of gallons of contaminated water, and at least 880,000 pounds of metals, into waters upstream of New Mexico, the Navajo Nation, and Utah. (NN FAC ¶¶ 104, 108; UT FAC ¶¶ 59-

61.) EPA was unprepared to and failed to mitigate the release or to timely notify downstream communities. (NN FAC ¶ 174; NM FAC ¶¶ 98-99; UT FAC ¶¶ 51-52.)

The yellow sludge from the blowout rushed into downstream waterways, including approximately two hundred miles of the San Juan River, poisoning the river with dangerous toxins. (NN FAC ¶ 1; NM FAC ¶¶ 1-2; UT FAC ¶¶ 1, 60-61.) The spill also caused widespread economic harm. (NN FAC ¶ 122; NM FAC ¶¶ 3, 115, 117-118; UT FAC ¶ 62.)

In the aftermath of the spill, EPA admitted responsibility on numerous occasions. (NN FAC ¶¶ 124-25, 132; NM FAC ¶¶ 101, 106.) EPA's internal investigation found that underestimating the water pressure inside the mine was likely the most significant factor leading to the blowout. (NN FAC ¶ 125; NM FAC ¶ 101.)

ARGUMENT

To survive a motion to dismiss brought under Rule 12(b)(6), a plaintiff need allege "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts adjudicating Rule 12(b)(6) motions "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007).

I. The Court should deny the Motion as to Environmental Restoration based on Judge Armijo's February 12, 2018 Order.

As an initial matter, many of the issues raised in the Contractor Defendants' motion were already resolved as to ER in a 69-page order issued by Judge Armijo on February 12, 2018 that denied in nearly every respect prior motions to dismiss filed by ER. The Court has not expressed a willingness to revisit that Order, nor has ER identified any grounds for it to do so. Yet in the Contractor Defendants' motion, ER repeats each of the unsuccessful arguments it made to Judge Armijo, without even attempting to engage with Judge Armijo's careful analysis rejecting these

arguments. The Court should continue to apply Judge Armijo's well-reasoned opinion and deny ER's motion to dismiss.

A. Relevant procedural history.

ER initially moved to dismiss New Mexico's original complaint on July 18, 2016. [Case No. 16-cv-00465 Doc. 32.] The briefing on that motion was completed on August 15, 2016. [Case No. 16-cv-00465 Doc. 64.] At a status conference on September 20, 2016, New Mexico noted that it planned to amend its complaint to assert tort claims against the United States under the FTCA, and requested that the Court permit it to do so on November 15, 2016—the first day it was allowed to assert those claims under the FTCA's mandatory six-month waiting period. No party objected, and the Court agreed to set the deadline for November 15. The next day, ER filed what it styled as a "Motion to Expedite Decision" on its motion to dismiss, imploring the Court to rule on its motion before New Mexico amended—in the name of "judicial economy" and "equity." (*See* Case No. 16-cv-00465 Doc. 80 at ¶ 3.) The Court did not immediately rule on ER's motion to expedite, and New Mexico moved for leave to amend on November 15, 2016, as planned. On November 21, 2016, without leave of the Court, ER filed a "Supplemental Brief in Further Support" of its motion to expedite that accused New Mexico of "gamesmanship" for moving for leave. (Case No. 16-cv-00465 Doc. 88 at 1, 3.)

On January 23, 2017, Judge Armijo denied ER's motion to expedite, explaining that "[c]ontrary to ER's solely self-interested assertions," judicial economy would be served by resolving motions to dismiss and motions for leave to amend simultaneously. (Case No. 16-cv-00465 Doc. 118 at 6-7.) The Court also determined that ER's "supplemental brief" was a new motion and summarily denied it for failure to comply with the Local Rules. (*Id.* at 8.) The Court then "pause[d]" to emphasize that notwithstanding ER's repeated insistence that its seriatim briefing somehow served judicial economy, ER's filings had in fact "obviously detracted from the

efficient use of the Court's time." (*Id.*) The Court indicated that its expectation going forward was that the parties would "*further* judicial economy." (*Id.* (emphasis in original).)

On February 12, 2018, Judge Armijo issued a 69-page order granting-in-part, denying-in-part, and holding-in-abeyance-in-part ER's pending motions to dismiss the complaints of both New Mexico and the Navajo Nation. (Case No. 16-cv-00465 Doc. 201 (hereinafter "February 2018 Order").) In doing so, Judge Armijo explicitly considered ER's motions to dismiss as if they had been directed to New Mexico and the Navajo Nation's proposed amended complaints, which by that time had been filed as exhibits to motions for leave to amend. (*Id.* at 4.)

Judge Armijo's Order examined each of ER's arguments at length, ultimately concluding that New Mexico and the Navajo Nation had both stated claims against ER for cost recovery under CERCLA, that CERCLA did not preempt New Mexico and the Navajo Nation's tort claims, that dismissal of those tort claims pursuant to the government contractor defense was not warranted, and that the Navajo Nation was entitled to assert a claim for punitive damages. (*See* February 2018 Order at 69.) Judge Armijo granted ER's motions "solely with respect to striking [New Mexico and the Navajo Nation's] claims for joint and several liability as to their state law tort claims," and held the motions in abeyance as to ER's argument that New Mexico and the Navajo Nation's requests for injunctive relief were barred. (*Id.*) ER did not move for reconsideration.

At the time Judge Armijo ruled on ER's motions to dismiss, EPA and the Mining Defendants had pending motions to dismiss, on which Judge Armijo did not rule. This case was subsequently assigned to Judge Johnson, who on March 9, 2018 issued an Order "deny[ing] without prejudice the pending motions to dismiss in the New Mexico/Navajo Nation consolidated cases," and then providing that "parties ***with currently pending motions to dismiss***" were permitted to "refile their motions to dismiss or file amended motions to dismiss" once New Mexico

and the Navajo Nation filed amended complaints. (Case No. 16-cv-00465 Doc. 209 at 4 (emphasis added).) In a subsequent Case Management Order setting briefing schedules, the Court indicated that ER and Weston should file a joint motion to dismiss. (Doc. 34 at 4.)

B. The Court should exercise its discretion to deny the Motion as to ER.

Courts have discretion to "decline the invitation to reconsider issues already resolved earlier in the life of a litigation." *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1240 (10th Cir. 2016). Indeed, without such discretion, a decision adverse to any party would be "little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again." *Id.* Parties would accordingly "waste judicial resources" and "introduce even more delay into the resolution of lawsuits that today often already take long enough to resolve" by demanding that courts visit single issues multiple times. *Id.*

That is what has happened here: unhappy that Judge Armijo was not persuaded by the arguments in its first two motions to dismiss, ER has simply reasserted them. And, remarkably, ER has done so without engaging with the detailed analysis in Judge Armijo's 69-page Order. After contending only that the February 12, 2018 Order is "not dispositive," (Mot. at 11-12), ER largely pretends as though that Order does not exist.[2] ER does not (a) dispute Judge Armijo's recitation of the relevant legal rules that apply to its arguments, (b) engage with her explanations of why the cases ER cited the first time around (and re-cites here) do not merit dismissal, (c) attempt to distinguish the cases Judge Armijo cited as undermining ER's arguments, or (d) respond to Judge Armijo's holdings regarding the adequacy of particular allegations in New Mexico and the Navajo Nation's complaints. Instead, ER simply asks that the Court begin the analysis anew.

[2] The one exception to this comes with respect to that part of Judge Armijo's Order that went ER's way, whereupon ER emphasizes that "[t]he Court should reaffirm Judge Armijo's prior ruling" regarding joint and several liability as to the state law tort claims, lest the Court act "[i]n direct contravention" of Judge Armijo's ruling. (Mot. at 61.)

The Court should reject ER's invitation. ER fails to either engage with Judge Armijo's analysis or attempt to explain why this Court should revisit issues she already resolved. Accordingly, the Court should deny the Contractor Defendants' motion as to ER, except as to the limited issue on which Judge Armijo held-in-abeyance ER's earlier motion. The Court need proceed no further to deny this motion, with Judge Armijo's prior rulings equally applicable to ER and Weston.

II. The Sovereign Plaintiffs' claims are not barred by CERCLA.

A. CERCLA does not preempt the Sovereign Plaintiffs' claims.

Congress enacted CERCLA to supplement State laws protecting the environment rather than to replace them. To that end, CERCLA expressly preserves such state-law remedies with at least two separate savings clauses. *First*, Section 114(a) provides: "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). *Second*, Section 152(d) provides: "Nothing in this Act shall affect or modify in any way the obligations or liability of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." *Id.* at § 9652(d). The Sovereign Plaintiffs' claims implicate "additional liability or requirements with respect to the release of hazardous substances" under state law and are therefore not preempted.

The Contractor Defendants argue without support that "the most natural meaning" of the two CERCLA savings clauses is that they only preserve "claims relating to the *prior* environmental contamination caused by other parties, *not* claims related to the *cleanup* of those pollutants by EPA contractors . . . ." (Mot. at 21.) Neither the text of the statute nor any case supports this argument. The Contractor Defendants mis-cite *Minyard Enters. v. Se. Chem. & Solvent Co.*, 184 F.3d 373, 382 (4th Cir. 1999), which held only that CERCLA does not permit double-recovery for response

costs under both CERCLA and state law. In fact, *Minyard* shows that state law tort claims *are* viable in a CERCLA action—there the court upheld a damages award under a negligence claim for diminished property value, in addition to cost recovery under CERCLA. *Id.* at 382-83 ("CERCLA does not prevent a plaintiff from recovering damages under state law that are not duplicative of the damages it recovers under CERCLA.").

Thus, CERCLA's savings clauses expressly contradict the Contractor Defendants' argument that its "all-encompassing remedial scheme preempts any state law remedy." (Mot. at 19.) The opposite is true. The Tenth Circuit has repeatedly recognized that "Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination." *E.g., New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1244 (10th Cir. 2006). Judge Armijo accordingly rejected this argument the first time ER raised it, noting that "[t]he Court in *General Electric Co.* refused to conclude that the State of New Mexico's 'public nuisance and negligence theories of recovery are completely preempted.'" (February 2018 Order at 37; *id.* ("dismissal of Plaintiffs' state law tort claims is not appropriate, as there is no authority for concluding that the *claims* are preempted.").)

The Contractor Defendants say they shouldn't be subject to state law "because CERCLA would require strict compliance with the removal action plan while Plaintiffs' claims could penalize parties for that strict compliance." (Mot. at 22.) They ignore the most obviously applicable part of CERCLA: 42 U.S.C. § 9619(a), "Liability of Response Action Contractors." While paragraph (a)(1) provides some immunity from suit for a response action contractor, paragraph (a)(2) is titled "Negligence, etc." and provides: "Paragraph (1) shall not apply in the case of a release that is caused by conduct of the response action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct." This section explicitly recognizes

that a CERCLA response action contractor may be liable for state law torts, including negligence. When response action contractors commit state law torts, the courts have held them liable under those laws. *See*, *e.g.*, *New Castle County v. Halliburton NUS Corp.*, 903 F. Supp. 771, 775 (D. Del. 1995) ("[A] response action contractor *is* liable to 'any other person' who is harmed by that response action contractor's negligence."); *Amtreco, Inc. v. O.H. Materials, Inc.*, 802 F. Supp. 443, 446 (M.D. Ga. 1992) ("CERCLA . . . contemplates that a response action contractor will be independently liable for negligence or other tortious behavior . . . ."). Nor does it make any sense to immunize response action contractors from state tort laws when the federal government itself may be liable for such torts under the Federal Tort Claims Act. 28 U.S.C. § 2674. Thus, the Contractor Defendants are subject to CERCLA and state tort law liability.[3]

B. Sovereign Plaintiffs' Claims are not barred by CERCLA section 113(h) because EPA is not undertaking a removal or remedial action in the Sovereign Plaintiffs' territories, and the claims do not challenge an EPA-ordered remediation.

The Contractor Defendants next attempt to avoid the Sovereign Plaintiffs' state law claims by invoking CERCLA Section 113(h), entitled "Timing of review," which provides:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action . . . .

[3] The Contractor Defendants suggest that subjecting them to state tort law will somehow discourage them from agreeing to undertake cleanup efforts. (Mot. at 22.) But even setting aside that CERCLA expressly subjects response action contractors to liability for negligence, each of the Contractor Defendants freely accepted this work and the appropriate compensation. Like other contractors, CERCLA response action contractors generally have insurance and indemnity agreements with those that hire them, and the risks of the contractors' work is priced into those agreements. Or, the contractors are free to request that the federal government indemnify them for their negligence, although such indemnification would exclude conduct "which was grossly negligent or which constituted intentional misconduct." 42 U.S.C. § 9619(c)(1).

42 U.S.C. § 9613(h). Whether this section applies involves a two-step analysis: (1) is there a "removal or remedial action selected under section 9604" in the Sovereign Plaintiffs' territories; and (2) are Sovereign Plaintiffs' lawsuits a "challenge" to that action. *See id.* The answer to both is "no."

1. **The Contractor Defendants ignore Sovereign Plaintiffs' allegations that EPA has not selected a removal or remedial action in the Sovereign Plaintiffs' territories.**

The starting point for a Rule 12 motion to dismiss is the factual allegations in Sovereign Plaintiffs' Complaints. *See Constitution Party of Penn. v. Aichele*, 757 F.3d 347, 357-58 (3rd Cir. 2014). The Contractor Defendants argue that EPA has a plan to conduct remedial action at the Bonita Peak Mining District ("BPMD") in the State of Colorado where the Gold King Mine is located. (Mot. at 12); *see* 42 U.S.C. § 9613(h). Yet they (and EPA) carefully avoid any mention of the pleading allegations that are directly on-point: that EPA has not commenced, and has not decided whether it will ever commence any remedial action in the Sovereign Plaintiffs' territories. For example, Utah's First Amended Complaint alleges:

> To date, EPA is not and has not engaged in a removal action in the State of Utah for the contamination caused by the Blowout. EPA has not incurred costs to initiate a Remedial Investigation and Feasibility Study in the State of Utah. EPA is not diligently proceeding with a remedial action in the State of Utah for the Blowout. EPA has not determined whether it will commence such actions in the State of Utah, or when it will commence and diligently proceed with such actions in the State of Utah.

(UT FAC ¶ 63; *see also* NM FAC ¶ 119.).

The Contractor Defendants submit no extrinsic evidence of their own to controvert these allegations. Instead, they point to the Declaration of Rebecca Thomas to argue (1) EPA and others have collected sampling data from the Sovereign Plaintiffs' territories, and (2) EPA has designated the BPMD as a federal Superfund Site. (Mot. at 14-15.) But the Thomas Declaration otherwise confirms the Sovereign Plaintiffs' allegation that no removal or remedial action has

been *selected*, much less *commenced*, in the Sovereign Plaintiffs' respective territories. (*E.g.*, Doc. 46-3 at ¶ 9 ["Presently, the EPA Region 8 Superfund Remedial Program's investigation is centered around the source areas noted in the BPMD Site listing documents and extends downstream . . . approximately 50 stream miles south of Silverton."].)

The sampling data from the Sovereign Plaintiffs' territories, cited by the Contractor Defendants, was collected by the Sovereign Plaintiffs themselves "as the plume passed through each state"—it is not evidence that "the Government" (*i.e.*, EPA) has begun a remedial action there. (Doc. 46-4 at 8.)[4] Nor is mere "monitoring" a "remedial action" under CERCLA where the monitoring is unrelated to other ongoing actions to actually remediate the contamination. CERCLA defines "remedial action" as "includ[ing], but [] not limited to, such actions at the location of the release as storage, confinement, perimeter protection . . . ," and goes on to list a series of concrete physical actions that remove, confine, or clean up contaminants. 42 U.S.C. § 9601(24). The one and only mention of "monitoring" in this provision appears at the end of the list: ". . . and any monitoring *reasonably required to assure that* ***such actions*** *protect the public health and welfare and the environment*." *Id.* (emphasis added). Thus, monitoring alone does not qualify as a remedial action pursuant to CERCLA. Pursuant to the statute, it must be linked to the other enumerated remedial actions. Any sampling done in the Sovereign Plaintiffs'

[4] Ms. Thomas also refers to a fate and transport study performed by a different and separate research and development branch at EPA, not the EPA Region 8 Superfund Remedial Program at the BPMD. She then attempts to offers her legal opinion that this research is a response action under CERCLA, with no citation to any legal support. (Doc. 46-3 at ¶ 8.) Sovereign Plaintiffs object to Ms. Thomas' lack of foundation to make an unsupported legal conclusion and moves to strike this portion of her declaration. As her declaration makes clear, the EPA Region 8 Superfund Remedial Program at the BPMD has not performed a Preliminary Assessment and Site Investigation in the Sovereign Plaintiffs' territories, the first phase in commencing a remedial action (*id*. at ¶ 5), nor has EPA commenced a Remedial Investigation and Feasibility Study in the Sovereign Plaintiffs' territories. EPA has removed *zero* contamination there, and has not made any decision when EPA will take such action, or even whether EPA will ever take such action.

territories is not "reasonably required" to ensure the safety of work done at the BPMD site, the only site where other actions listed in 42 U.S.C. § 9601(24) have been or are taking place. Sampling at or just below the BPMD site is more than adequate for that purpose. Because the Sovereign Plaintiffs have pleaded that EPA has not selected or commenced any removal or remedial action in the Sovereign Plaintiffs' territories, and because the Contractor Defendants have pointed to no evidence to the contrary, the Court should deny the Contractor Defendants' Motion.

2. **Sovereign Plaintiffs' requested relief does not challenge EPA's selected response actions.**

The Contractor Defendants also fail to submit evidence to prove the second part of the test under Section 113(h): that the Sovereign Plaintiffs' claims challenge a remedial action selected under Section 104. They do not. Whether a lawsuit represents such a challenge depends on the extent to which the requested remedy would interfere with that plan. *See El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 880 (D.C. Cir. 2014) (summarizing the relevant case law). "[T]he obvious meaning of § 9613(h) is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." *Gen. Elec. Co.*, 467 F.3d at 1249 (internal brackets and quotes omitted). A lawsuit "challenges a removal action if it interferes with the implementation of a CERCLA remedy because the relief requested will *impact the removal action selected*." *Cannon v. Gates*, 538 F.3d 1328, 1335 (10th Cir. 2008) (internal quotes and brackets omitted) (emphasis added).

Here, the Contractor Defendants fail to demonstrate that the Sovereign Plaintiffs' requested relief, cleaning up the toxic pollution in their territories, will "impact" or "interfere with" sampling efforts or with remedial work taking place hundreds of miles away in Colorado. *See United States v. Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993) (Colorado's efforts to enforce hazardous waste

laws at a site undergoing a CERCLA response action was not a challenge to that action). Lawsuits based on state law that do not interfere with EPA's remedial plan are not precluded by Section 113(h). In *Beck v. Atl. Richfield Co.*, for example, the court held that plaintiffs who sought damages resulting from a CERCLA cleanup plan did not press a "'challenge to the cleanup effort;" rather, they merely sought "to recover damages under Montana law." 62 F.3d 1240, 1242-43 (9th Cir. 1995). Likewise, in *Weiss v. Kuck Trucking, Inc.*, the court held Section 113(h) inapplicable where "plaintiff's alleged causes of action are based entirely on state law and do not challenge any CERCLA cleanup plan," even though the claims might "draw money" away from that cleanup. 166 Fed. Appx. 931, 932 (9th Cir. 2006).

The Contractor Defendants cite *Cannon* for the proposition that Section 113(h) can be triggered "even where the Government had not yet selected an official removal or remedial action." *Cannon* did not so hold. Rather, that Court recognized the Federal Government may "select" an action within the meaning of the statute before the Federal Government "has complied with the full panoply of the applicable regulations . . . ." 538 F.3d at 1335. No such issue is presented here. And the "challenge" to that action was clear—the relief requested focused on the same parcel of land that was the subject of the Federal Government's ongoing removal action, and would certainly have interfered with the Federal Government's decision-making and remedial efforts there. *Id.* at 1334.[5]

[5] The cases *Cannon* relied on for its decision are likewise inapplicable here because those lawsuits sought to directly interfere with ongoing remedial efforts at particular contaminated sites. In *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1013-14 (3rd Cir. 1991), the plaintiff polluter was attempting to use the National Historic Preservation Act to *restrain* EPA from commencing a remedial action on its contaminated property because Native American artifacts might be disturbed by EPA's work. In *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 238-39 (9th Cir. 1995), plaintiffs were potentially responsible parties under CERCLA who had already agreed to conduct a remedial investigation/feasibility study for a contaminated landfill under an EPA work plan. The

Moreover, the facts of *Cannon* differ markedly from this case. In *Cannon* the court observed that the "[Federal] Government ha[d] already undertaken several steps toward determining how it w[ould] address the contamination present on [plaintiffs'] property." *Id.* "The [Federal] Government ha[d] completed a preliminary assessment of [plaintiffs'] property," which included "compil[ing] historical records, interviews, and site surveys to determine the exact nature of the military testing conducted on [the plaintiffs'] property" and preparing a draft report that "indicated that [the plaintiffs'] property was in fact highly contaminated." *Cannon*, 538 F.3d at 1334; *see* 40 C.F.R. § 300.415(b)(4)(i) (providing that such a report must be prepared "[w]henever a planning period of at least six months exists before on-site activities must be initiated" and that the report consists of "an analysis of removal alternatives for a site"). The court further noted that "the record also indicates that the [Federal] Government was planning its site inspection while this suit was pending before the district court." *Cannon*, 538 F.3d at 1334. As discussed above, none of those circumstances exist here, where it is undisputed that EPA has taken no steps at all to begin remediating the contamination within the Sovereign Plaintiffs' territories.

The possibility that EPA could possibly select another removal action in the future does not trigger Section 113(h)—the statute only bars challenges to removal or remedial actions that have been "selected." 42 U.S.C. § 9613(h). Thus, the only actions relevant to this Court's section 113(h) analysis are those removal actions EPA has presently "selected," and the Sovereign Plaintiffs' requested relief does not impact either of the actions identified by the Contractor

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plaintiffs brought suit while this study was ongoing, alleging that another party's management of the site was violating the CWA and RCRA. *Id.* Unlike *Boarhead* and *Razore*, the Sovereign Plaintiffs here do not challenge EPA's activities at the BPMD site—they seek remediation of contamination within their territories that is not the subject of any ongoing or planned remedial action.

Defendants. The Contractor Defendants have failed to prove the second prong of the analysis under Section 113(h), and the Court should deny their motion.

C. The Sovereign Plaintiffs' damages claims are not barred by section 113(h).

The Contractor Defendants next argue that *all* of the Sovereign Plaintiffs' claims for damages are "natural resource damages" ("NRD") that the Court cannot review until EPA has completed its remedial work. (Mot. at 16.) To begin with, the Sovereign Plaintiffs seek monetary damages for a number of harms that are not NRD, and which could not be barred by Section 113(h). (*See*, *e.g.*, Utah FAC at ¶¶ 62, 86, 96, 133; NN FAC ¶¶ 192, 199, 201, Prayer for Relief ¶¶ 3, 4; NM FAC ¶¶ 178, 214.) Harms such as economic loss, lost tax revenue, and stigma damages are not NRD. *See* 42 U.S.C. § 9601(16); *see also id.* at § 9652(d) ("Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."); *Gen. Elec. Co.*, 467 F.3d at 1247-48 (refusing to conclude that New Mexico's "public nuisance and negligence theories of recovery are completely preempted"); *Bd. of Cnty. Comm'rs v. Brown Grp. Retail*, 598 F. Supp. 2d 1185, 1192–95 (D. Colo. 2009) (finding that claims including negligence, negligence per se, and strict liability for abnormally dangerous activities were not preempted because they provided for recovery not otherwise provided under CERCLA). The Sovereign Plaintiffs' state law tort claims neither make it "impossible for a private party to comply with both state and federal requirements," nor do they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing CERCLA; there is no conflict preemption under these facts. *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000). Moreover, the Contractor Defendants' argument regarding NRD fails for the same reasons demonstrated above, that there is

no ongoing remedial action in Utah, the Navajo Nation, or New Mexico, and therefore, any such NRD action cannot be barred by Section 113(h).[6] (*E.g.*, UT FAC ¶ 63; NM FAC ¶¶ 119.)

D. New Mexico's RCRA claim is not barred by section 113(h).

RCRA authorizes citizen suits to enforce its provisions. *See* 42 U.S.C. § 6972. But to ensure that EPA remains the primary enforcement authority under RCRA (when it is not a defendant) and that polluters do not face duplicative litigation, RCRA prohibits citizen suits in certain situations. *See* 42 U.S.C. § 6972(b). For example, a RCRA citizen suit is barred if EPA is "actually engaging in a removal action under section 104 of [CERCLA]" or if it "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 [CERCLA]." 42 U.S.C. § 6972(b)(2)(B)(ii) and (iii).

ER[7] argues that EPA's decision to designate the BPMD as an NPL Site bars New Mexico's RCRA claim. (Mot. at 17-18.) ER's argument fails for the same reason as its argument based on CERCLA's timing of review provision, 42 U.S.C. § 9613(h): EPA is neither "actually engaging in a removal action under section 104" nor "diligently proceeding with a remedial action" to address contamination present in New Mexico. 42 U.S.C. § 6972(b)(2)(B)(ii) & (iii). ER all but concedes the absence of EPA action in New Mexico by observing that, "EPA is still determining the geographical boundaries of the BPMD Site" and "the listing documentation for the [BPMD] site allows the site boundaries to be extended wherever contamination from these sources comes to be located." (Mot. at 18.) But the mere possibility that EPA might engage in a future removal

[6] New Mexico and the Navajo Nation have sought only NRD Assessment costs, which are distinct and separate from NRD, as permitted by *Confederated Tribes & Bands of the Yakama Nation v. United States*, 616 F. Supp. 2d 1094 (E.D. Wash. 2007). However, neither NRD nor NRD Assessment costs encompass any other category of damage available under federal, state or common law. The Sovereign Plaintiffs have since agreed with EPA to temporarily stay Utah's NRD claims, and toll the statute of limitations for New Mexico and the Navajo Nation's NRD claims while the natural resource trustees complete their assessment.

[7] New Mexico did not assert a RCRA claim against Weston.

action in New Mexico does not implicate RCRA's prohibition on citizen suits, which contemplates concrete – not conjectural – agency actions. Here, it is uncontested that the entirety of EPA's remedial action is within the confines of Colorado.

New Mexico has alleged specific RCRA claims related to solid and hazardous waste disposed of in *New Mexico*, where no EPA remedial actions are underway. (NM FAC ¶¶ 116, 150, 151, 154.) And even in cases where EPA actions are underway—which is not the case in the Sovereign Plaintiffs' territories—courts have found that such actions do not preclude citizen suits under RCRA, where the consent orders did not remediate all of the harm. *See, e.g.*, *Organic Chemicals Site PRP v. Total Petroleum*, 6 F. Supp. 2d 660, 665 (W.D. Mich. 1998) (denying motion to dismiss RCRA citizen suit for cleanup of soil contamination where plaintiff alleged EPA had taken action only with respect to groundwater contamination); *A-C Reorg. Trust v. E.I. DuPont de Nemours & Co.*, 968 F. Supp. 423, 430-31 (E.D.Wis. 1997) (holding RCRA claim regarding groundwater contamination not futile where EPA consent order only expressly covered surface contamination and might not extend to groundwater); *Coburn v. Sun Chem. Corp.*, 1988 WL 120739, *12, 28 E.R.C. 1665 (E.D. Pa. Nov. 9, 1988) (concluding citizen suit could proceed where order dealt with underground contamination and plaintiffs sought surface cleanup); *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1539 (M.D. Pa. 1985) (allowing citizen suit addressing subsurface contamination and drinking water where EPA ordered removal of surface wastes).

Finally, *Reynolds v. Lujan*, 785 F. Supp. 152 (D.N.M. 1992), the sole case ER cites to support its argument, is plainly inapposite from the case at hand. In *Reynolds*, the Court barred a citizen suit against the Bureau of Land Management seeking to impose additional hazardous waste disposal requirements upon cleanup activities already being undertaken by the Bureau.

Importantly, the plaintiffs' property was situated next to a landfill Superfund site where the Bureau's cleanup activities were being performed. *Id.* at 153-155. Here, EPA's response action does not address contamination in New Mexico, and no plan for cleaning up these waterbodies is in progress. Further, New Mexico seeks relief for contamination found within its territory; it does not seek to impose additional cleanup requirements on EPA's activities dozens and even hundreds of miles upstream at the BPMD Site. (NM FAC ¶¶ 116, 150, 151, 154.) Because the Contractor Defendants have wholly failed to demonstrate that New Mexico's RCRA claim, if upheld, will interfere with, delay, or "alter the [EPA's] ongoing response activities," 785 F. Supp. at 154, the Court should deny their motion.

III. The Sovereign Plaintiffs have stated CERCLA claims against the Contractor Defendants.

CERCLA provides liability for, among others, persons who "operated any facility at which [] hazardous substances were disposed of," "arranged for disposal or treatment" of hazardous substances, or "accepted any hazardous substances for transport." 42 U.S.C. § 9607(a)(2)-(4). Here, the Sovereign Plaintiffs sufficiently allege that each of the Contractor Defendants was an operator, an arranger, and a transporter within the meaning of § 9607(a) at the time of disposal of the toxic wastewater (any one of which is sufficient to create liability). (*E.g.*, NN FAC ¶¶ 153-55; NM FAC ¶¶ 127-129; UT FAC ¶¶ 68-71.) The Contractor Defendants are not, as they say, immune from § 9607 because they are contractors; CERCLA specifically provides that response action contractors like the Contractor Defendants are liable for negligent acts. 42 U.S.C. § 9619. In addition, the costs sought by the Sovereign Plaintiffs are recoverable under CERCLA, which creates a presumption of recoverability on the part of States and Tribes.

A. The Sovereign Plaintiffs have properly alleged that the Contractor Defendants were operators at the Gold King Mine.

"[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility," or who "manage[s], direct[s], or conduct[s] operations specifically related to pollution" or the "leakage or disposal of hazardous waste." *United States v. Bestfoods*, 524 U.S. 51, 66 (1998); *see also Clean Harbors, Inc. v. CBS Corp.*, 875 F. Supp. 2d 1311, 1329 (D. Kan. 2012) (holding that CERCLA "contemplates operator liability if [a plaintiff] can merely show [that a defendant] managed, directed, or conducted [relevant] operations"). Whether an entity is an operator under CERCLA involves "a fact-intensive inquiry requiring consideration of the totality of the circumstances." *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000).

1. Judge Armijo determined that New Mexico and the Navajo Nation stated CERCLA cost recovery claims against ER.

Judge Armijo explained at length why New Mexico and the Navajo Nation had stated operator liability claims against ER. After summarizing operator liability under the CERCLA statute and analyzing the leading Supreme Court case on operator liability, *Bestfoods*, Judge Armijo turned to the specific allegations New Mexico and the Navajo Nation had advanced against ER:

> Here, Plaintiffs allege that ER was responsible for providing drainage control, implementing a water management system, and constructing and maintaining the retention pond. [Doc. 86-1, ¶¶ 79, 95; Doc. 141-1, ¶ 89] EPA selected ER to "procur[e] and manag[e] the reopening and ground support construction" of the Gold King Mine portal. [Doc. 86-1, ¶ 80; Doc. 141, ¶ 73] New Mexico alleges that ER was involved in the decision making concerning operation of the facility, including deciding in 2014 that larger settling ponds and additional treatment were necessary. [Doc. 86-1, ¶ 83] Navajo Nation quotes a May 2015 Action/Work Plan submitted by ER which lists the following tasks for ER and its subcontractor:
>
> - Utilize ramp created in site set up to access slope above portal[.]
> - Excavate loose material from the top of the high wall.

> - Drill in wire mesh anchors.
> - Hang wire mesh on the high wall as excavation to the sill of the portal proceeds.
> - Excavate to the sill and into the competent rock face at the portal.
> - Gradually lower the debris blockage with the appropriate pumping of the impounded water to water management/treatment system.
>
> [Doc. 141-1, ¶ 89] Further and not least, ER was one of the parties present on August 4 and 5, 2015 and excavating at the time of the spill, contrary to the directions of Mr. Way. [Doc. 86-1, ¶¶ 96-100; Doc. 141-1, ¶¶ 101-104] These facts state a claim that ER "*conduct[ed] operations* specifically related to [the] pollution." *Bestfoods*, 524 U.S. at 66 (emphasis added). Contrary to ER's argument, these are not conclusory allegations. [Doc. 33, p. 8] Plaintiffs' allegations are sufficient to state a claim for operator liability.

(February 2018 Order at 16-17.)

Judge Armijo analyzed in detail the only two cases the Contractor Defendants cite here in support of their argument that the Sovereign Plaintiffs have not stated operator liability claims against them: *Interstate Power Co. v. Kansas City Power and Light Co.*, 909 F. Supp. 1284 (N.D. Iowa 1994), and *Ryland Grp., Inc. v. Payne Firm, Inc.*, 492 F. Supp. 2d 790 (S.D. Ohio 2005). Judge Armijo explained that *Interstate Power* was distinguishable from this case because there it was "undisputed" that "all of [the contractor's] actions were taken at the direction of the other parties," and that *Ryland Group* both misapplied the *Bestfoods* standard and was distinguishable on its facts: there, Judge Armijo explained, a contractor—not the defendant subcontractor—had been "direct[ing] and control[ling] all activities that took place in the contaminated areas of the site." (February 2018 Order at 18 (citing *Interstate Power*, 909 F. Supp. at 1289 and *Ryland Group*, 492 F. Supp. 2d at 793-94).)

But even if *Interstate Power* and *Ryland Group* controlled, Judge Armijo reasoned, dismissal would still be inappropriate, since New Mexico and the Navajo Nation had advanced "specific allegations as to the contractual duties of ER and ER's actual operation of the facility."

(February 2018 Order at 19.) She also surveyed case law that undermined ER's arguments, explaining that "[o]ther courts have held Contractor Defendants liable as CERCLA operators" and discussing in detail four separate cases doing just that. (*Id.* at 19-20 (citing *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992), *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988), *KFD Enters., Inc. v. City of Eureka*, 2010 WL 4703887, at *2-3 (N.D. Cal. Nov. 12, 2010), and *City of N. Miami, Fla. v. Berger*, 828 F. Supp. 401, 413-14 (E.D. Va. 1993)).) Judge Armijo found these cases "persuasive" and accordingly held that "ER, as a contractor, may be liable as an operator." (February 2018 Order at 21.)

The Contractor Defendants wholly ignore Judge Armijo's careful operator liability analysis. They do not explain why they believe Judge Armijo erred and do not suggest that her holdings do not apply to Weston just as they applied to ER. The Court should affirm Judge Armijo's analysis, find that the Sovereign Plaintiffs have stated operator liability claims against the Contractor Defendants, and deny the Contractor Defendants' motion.

2. **The Sovereign Plaintiffs state claims for operator liability.**

Even if the Court were to undertake the analysis anew, however, it should still reach the same conclusion as Judge Armijo. The Navajo Nation alleges, for example, that ER and Weston "had authority to control and did control, manage, direct, and implement the conduct of those working on-site" at Gold King. (NN FAC ¶ 153; *see also* NM FAC ¶ 127; UT FAC ¶¶ 36, 59, 68.) ER *itself* described its task at Gold King as "procur[ing] and manag[ing] the reopening and ground support construction," as well as "conduct[ing] operations in oversight management of surface and underground work activities. (NN FAC ¶ 73; *see also* NM FAC ¶ 78.) Weston, for its part, was "responsible for overseeing [and managing] the water treatment operations" and was to "provide real-time monitoring of discharge water during all mine activities." (NN FAC ¶ 78.)

Weston also discussed the planned Gold King Mine operations with EPA in March 2015 and was sent a list of "anticipated tasks," including "prepar[ing] water treatment plans for managing water impounded behind the adit portal" and "document[ing] activities during the portal opening and construction." (NN FAC ¶ 87; *see also* NM FAC ¶ 88.) And both ER and Weston were on-site with EPA at the time of release, where they misjudged the level of the water within the mine, disregarded explicit instructions *not* to excavate, and then charged into the mine. (NN FAC ¶¶ 101-03; *see also* NM FAC ¶¶ 96-99; UT FAC ¶¶ 55-56.)

These allegations establish that both ER and Weston managed and conducted "operations specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste," *Bestfoods*, 524 U.S. at 66, and therefore state a claim for operator liability under CERCLA. *See Kaiser Aluminum*, 976 F.2d at 1341-42 & n.6 (reversing district court's dismissal of operator liability claims where the defendant was hired to grade contaminated soil at a work site and exercised alleged control over that "phase of [] development"); *Clean Harbors,* 875 F. Supp. 2d at 1329 (denying defendant's summary judgment motion on operator liability where parties disputed what role defendant played in "manag[ing], direct[ing], or conduct[ing] operations"); *Diamond X Ranch LLC v. Atl. Richfield Co.*, 2016 WL 4498211, at *7-8 (D. Nev. Aug. 26, 2016) (denying motion to dismiss operator liability claims where the "gist" of the plaintiff's allegations was that the defendant "carried out maintenance activities including the removal of sediment containing hazardous substances . . . that resulted in the moving, spread, and release" of those substances); *BancorpSouth Bank v. Envtl. Ops., Inc.*, 2011 WL 4815389, at *3 (E.D. Mo. Oct. 11, 2011) (denying motion to dismiss operator liability claim where complaint "sufficiently allege[d] control" of landfill work site).

The Contractor Defendants do not dispute that the Sovereign Plaintiffs have alleged the Contractor Defendants played significant roles in the botched excavation at Gold King. Instead, they insist that they cannot possibly be operators under CERCLA because they are mere contractors, and EPA was the party that "initiated [the] removal action at Gold King in 2014" and had "the legal authority to direct and control the activities at Gold King." (Mot. at 24.) This argument is directly contrary to the language of CERCLA, which specifically provides for liability on the part of any "response action contractor" who is "negligent" or "grossly negligent." 42 U.S.C. § 9619(a)(2). In addition, as Judge Armijo explained, courts have "held Contractor Defendants liable as CERCLA operators." (February 12, 2018 Order at 19 (collecting cases)); *see also Kaiser Aluminum*, 976 F.2d at 1341-42 (rejecting the argument that "a contractor can *never* be liable as an operator" and reversing dismissal of operator liability claims where the defendant contractor had "excavated [] tainted soil, moved it away from the excavation site, and spread it over uncontaminated property"); *KFD Enters.*, 2010 WL 4703887, at *3 (explaining that operator liability attached when a "contractor had authority to control the cause of the contamination at the time the hazardous substances were released into the environment").

The Contractor Defendants present no authority for their sweeping assertion that contractors cannot incur operator liability whenever EPA initiates a remedial action. Instead, they once again rely on the cases ER cited to Judge Armijo: *Ryland Group* and *Interstate Power*. But as set forth above, neither of those cases is on-point; *Interstate Power* was a summary judgment order where it was "undisputed that all of [the defendant contractor's] actions were taken at the direction of other parties." *Interstate Power*, 909 F. Supp. at 1289. And *Ryland Group* is even further off-point; that case involved a subcontractor who was hired to perform a single, discrete task—rototilling soil in an area marked with flags—but exercised no other control over the site.

Ryland, 492 F. Supp. 2d at 794. Here, by contrast, the Sovereign Plaintiffs have alleged that ER and Weston had considerable authority to manage and control excavation and waste treatment operations at Gold King. (NN FAC ¶¶ 73-78; NM FAC ¶¶ 78-83, 88-91, 94-97; UT FAC ¶¶ 36, 59.) And the Contractor Defendants' insistence that the Sovereign Plaintiffs have not "allege[d] that ER or Weston actually directed work at Gold King," (Mot. at 25), wholly ignores, for example, the Sovereign Plaintiffs' allegations that ER (1) determined with EPA to halt excavation in 2014 and wait until 2015 (NN FAC ¶ 81; NM FAC ¶ 82; UT FAC ¶ 41); (2) drafted the work plan that dictated the requirements and activities for the excavation (NN FAC ¶¶ 88-89; NM FAC ¶ 89); (3) dictated who was responsible for bringing pipes and pumps to the site (NN FAC ¶ 90; NM FAC ¶ 94); and (4) conducted excavation operations on August 4 and 5, 2017, leading to the blowout (NN FAC ¶¶ 98-99, 103; NM FAC ¶¶ 95-98); and that Weston (1) frequented the excavation site with EPA in 2014 and 2015, (NN FAC ¶ 78; NM FAC ¶¶ 82, 90; UT FAC ¶¶ 35-36, 39-41, 44, 55-59); (2) measured the flow rate of water outside the mine in 2014 and negligently estimated that there was approximately six feet of impounded water in the mine, (NN FAC ¶¶ 79, 82; NM FAC ¶¶ 83-85; UT FAC ¶¶ 39-40); (3) discussed the planned excavation with EPA in March 2015 and received instructions on "anticipated tasks," (NN FAC ¶ 87; NM FAC ¶ 88); (4) visited the mine "several times" in 2015 "to assess site conditions and drainage flows" (NM FAC ¶ 90); and (5) was on-site at the mine, wholly unprepared for the release, on August 5, (NN FAC ¶ 104; NM FAC ¶ 99; UT FAC ¶ 55). These allegations are sufficient to state a claim for operator liability, and the Contractor Defendants do not argue otherwise. *See Kaiser Aluminum*, 976 F.2d at 1341-42; *KFD Enters.*, 2010 WL 4703887, at *3.

Instead, the Contractor Defendants resort to collecting materials outside the Sovereign Plaintiffs' pleadings in an attempt to demonstrate that ER and Weston had no control at Gold King.

As an initial matter, this effort is inappropriate: consideration of documents outside the pleadings is only permissible when the documents are "referred to in the complaint" *and* "central to the plaintiff's claim." *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016). Not just any document mentioned in a pleading qualifies; when a complaint makes "passing references" to a document that is not "dispositive" or "essential" to a plaintiff's claim, the document should not be considered on a motion to dismiss. *Rogers v. Garcia*, 2010 WL 3547432, at *2 (D. Colo. Sept. 3, 2010). And for obvious reasons, documents that are "not even referenced" in a complaint "cannot meet the requirement that they are central" to a plaintiff's claims. *Id.*

The first document the Contractor Defendants proffer is an October 27, 2015 email from Griswold regarding the spill. The Navajo Nation and Utah do not mention this email at all in their amended complaints. New Mexico does mention the email, but only to quote a single line from it as support for the proposition that federal investigations of the spill were "rife with conflict and shortcomings." (*See* NM FAC ¶ 100.) Unsurprisingly, given that only one Sovereign Plaintiff mentions the email (and only in passing), the Contractor Defendants make no argument whatsoever that the email, which *postdates* the spill, is somehow "central to the [Sovereign Plaintiffs'] claims." *Sutton v. Leeuwen*, 2015 WL 10606988, at *3 (D. Colo. May 29, 2015) ("Here, although Plaintiff mentions the video, the video itself is not 'central to the plaintiff's claims' in the way that a contract or a copyrighted work would be."). In addition, the email is not authenticated. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (requiring an "indisputably authentic copy" of any document considered on the pleadings). Accordingly, the Court should disregard the email at this stage. Even if the Court were to consider the email, however, it does not contradict what the Sovereign Plaintiffs allege repeatedly in their complaints: that ER and Weston had significant responsibilities during the

excavation, that they were on-site at the time of the release, and that they participated in the negligent determinations that led to the release. *See Kaiser Aluminum*, 976 F.2d at 1341-42; *KFD Enters.*, 2010 WL 4703887, at *3.

The second document the Contractor Defendants rely on is an Emergency and Rapid Response Services (ERRS) contract entered into between ER and EPA. Although ER's counsel avers (without citations) that the ERRS contract is "referenced throughout the complaints filed by the [Sovereign Plaintiffs]," (Doc. 46-1 at 1), in fact the ERRS contract is not mentioned ***at all*** in the Navajo Nation's FAC, is not mentioned ***at all*** in New Mexico's FAC, and is mentioned only ***once*** in Utah's amended complaint—and then only in passing: "EPA began a removal site evaluation to investigate the possibility of opening the collapsed mine portal in 2014, using the services of contractors under . . . EPA Emergency and Rapid Response Service ("ERRS") contracts." (UT FAC ¶ 35.) No Sovereign Plaintiff quotes from the ERRS contract or relies on the contents of that contract. And the Contractor Defendants again do not bother even attempting to argue that the contract is somehow "central" to all three Sovereign Plaintiffs' claims. Finally, the Contractor Documents do not even attach the entire document, instead providing the Court with what they believe are its "relevant portions." This is not how taking notice of documents outside the pleadings works, and the Court should disregard the Contractor Defendants' attempt to avoid liability on the pleadings by cherry-picking from an extrinsic document no Sovereign Plaintiff relies on.

The third document the Contractor Defendants rely on is the "START" contract between EPA and Weston. Like the ERRS contract, the START contract is mentioned in passing in Utah's amended complaint, and not at all in New Mexico and the Navajo Nation's amended complaints. (*See* UT FAC ¶ 35.) It, too, is not appropriate for consideration on this motion.

Finally, the Contractor Defendants quote language from the Task Order Statement of Work that EPA issued to ER. This document *is* quoted in the Sovereign Plaintiffs' respective pleadings, but the Task Order actually supports the Sovereign Plaintiffs' argument that although EPA did maintain at least some control at Gold King, control over the disposal of hazardous substances at the mine was specifically assigned to ER.[8] (*See*, *e.g.*, Doc. 46-1 at 15 (requiring ER to "provide a detailed work plan to accomplish the project" that "define[d] the types and quantities of cleanup personnel, equipment and materials that will be needed" and the "proposed project schedule by sub-task," as well as to "provide for appropriate removal of contamination"), 16 (requiring ER to "provide for appropriate disposal and transportation of all contaminated debris").)

Because the Sovereign Plaintiffs each allege that ER and Weston had control over excavation and waste treatment operations at Gold King, they have properly stated claims for operator liability. The Contractor Defendants' motion to dismiss the Sovereign Plaintiffs' cost recovery claims should be denied.

B. The Sovereign Plaintiffs have properly alleged that the Contractor Defendants were arrangers at the Gold King Mine.

The Sovereign Plaintiffs have also adequately alleged that ER and Weston are liable under CERCLA as arrangers. To be liable under CERCLA as an arranger, a party must satisfy three requirements. "First, the party must be a 'person' as defined in CERCLA. Second, the party must 'own' or 'possess' the hazardous substance at issue. Third, the party must, by contract, agreement, or otherwise, arrange for the transport or disposal of such hazardous substances." *Raytheon Constructors, Inc. v. Asarco Inc.*, 368 F.3d 1214, 1219 (10th Cir. 2003) (citing 42 U.S.C.

[8] The Sovereign Plaintiffs' assertion that both the Contractor Defendants and the EPA exercised control at Gold King is not inconsistent with CERCLA, since "a facility may have more than one operator." *Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 928 (5th Cir. 2000), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009).

§ 9607(a)(3)). Although the "many permutations of 'arrangements'" can complicate arranger liability at the margins, it is "plain" that arranger liability attaches whenever an entity "enter[s] into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 609-10 (2009).

The Contractor Defendants do not dispute that they are "persons" under CERCLA and that they "possessed" the hazardous waste at issue here. Instead, they argue that they did not enter into any contract or agreement *with anyone else* to dispose of the acid mine drainage at Gold King. ER made this same argument to Judge Armijo, who rejected it. As Judge Armijo explained, based on the Contractor Defendants' plans, the acid mine drainage within Gold King was to travel through certain "channels and conveyances" to be treated in a "settling" or "retention pond," and ER contracted with Harrison Western to pump water from the mine to the pond. (February 12, 2018 Order at 26 (*citing* NN FAC ¶ 89).) Accordingly, Judge Armijo reasoned, this case represents the precise circumstance "in which *Burlington Northern* concluded that CERCLA liability as an arranger was 'plain.'" (*Id.* at 24.)

ER now argues, citing only to Utah's amended complaint, that it contracted with Harrison Western only for unspecified "mining services," and not for disposal or treatment. (Mot. at 28.) Not so. Obviously the "mining services" in question were for the reclamation work EPA and its contractors intended to perform at the mine—*i.e.*, pumping out the wastewater so it could be treated and disposed of, and then opening the adit—not actual gold mining. (UT FAC ¶¶ 35-37.) Moreover, the Navajo Nation alleges that ER and Harrison Western agreed that Harrison Western would "safely pump water out of the mine," (NN FAC ¶ 86), by "[g]radually lower[ing] the debris blockage with the appropriate pumping of the impounded water to [a] water management/treatment system," (*id.* ¶ 89). New Mexico similarly alleges that ER, EPA, and

Harrison Western "discussed a plan to install a sump basin to treat water that would be pumped out of the mine during the adit excavation work," (NM FAC ¶ 90). All of these allegations support the Sovereign Plaintiffs' claim that ER contracted with Harrison Western for "transport or disposal of [a] hazardous substance" and is therefore liable as an arranger.

ER also argues that any agreement it had with Harrison Western does not trigger arranger liability because Harrison Western "was not on-site at the time of the Release" and therefore never actually released any hazardous substances. (Mot. at 28.) This is wrong for two reasons. *First*, the reason Harrison Western was not on site is that ER and Weston negligently opened the Gold King Mine early, before Harrison Western had arrived and could be prepared to draw down the impounded water. (NN FAC ¶¶ 98, 103; NM FAC ¶¶ 94-96; UT FAC ¶ 85.) The Contractor Defendants may not avoid arranger liability on the ground that they arranged for Harrison Western to dispose of the acid mine drainage safely and then prevented Harrison Western from doing its job properly, causing an environmental disaster in the process. *Second*, even though Harrison Western was not on-site at the time of the spill, Weston *was*. And ER agreed with Weston that while ER would "conduct operations in oversight management of surface and underground work activities," it was *Weston* who would take responsibility for treating the drainage. (*E.g.*, NN FAC ¶¶ 73, 78; NM FAC ¶ 88.) At bottom, ER and Weston agreed with EPA to divvy up the responsibilities for "disposal" and "treatment" of the waste, *see* 42 U.S.C. § 9607(a)(3), and are therefore both liable as arrangers under CERCLA.

C. The Sovereign Plaintiffs have properly alleged that the Contractor Defendants were transporters at the Gold King Mine.

The Contractor Defendants are also both liable under CERCLA as transporters. Transporter liability arises whenever a party "accepts . . . any hazardous substances for transport . . . from which there is a release[.]" 42 U.S.C. § 9607(a)(4). CERCLA defines "transport" as "the

movement of a hazardous substance by any mode . . . ." 42 U.S.C. § 9601(26). The Contractor Defendants argue that they cannot be liable as transporters because EPA, not they, selected the site for treatment of the waste, and site selection is required for liability pursuant to *United States v. Hardage*, 985 F.2d 1427, 1435 (10th Cir. 1993). But the Sovereign Plaintiffs allege that the Contractor Defendants participated in selection of the site for the transport and treatment of the waste, which is sufficient to state a claim for transporter liability at this stage. (NN FAC ¶¶ 82-83, 85, 91, 94; NM FAC ¶¶ 78, 82, 88, 90-91; UT FAC ¶ 70.)

Judge Armijo rejected this argument when ER made it in its first motions to dismiss, concluding that both the Navajo Nation and New Mexico [properly] alleged that ER "participated in the selection of the site of either the temporary water treatment site or the Red and Bonita treatment basin," including by participating in "meetings" concerning water treatment. (February 2018 Order at 33 (citing NM FAC ¶¶ 83, 90-92 and NN FAC ¶¶ 67, 71, 85, 88-89, 94).) Because Weston also participated in those same meetings, (*e.g.*, NN FAC ¶¶ 82, 87, 94), Judge Armijo's analysis applies equally to Weston, which does not argue otherwise.

The Contractor Defendants argue, in the alternative, that no "site selection" occurred at all at Gold King because the release was "uncontrolled," citing *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002) and *Coppola v. Smith*, 19 F. Supp. 3d 960, 972 (E.D. Cal. 2014). They are wrong. *Morrison Enterprises* did not hold that transporter liability cannot be triggered by an uncontrolled release; it simply held, like *Hardage*, that to incur transporter liability a party must have "selected the facility as the destination for the waste." 302 F.3d at 1132. And *Coppola* reasoned only that transporter liability requires a defendant to "accept" the waste for transport, and that it was "doubtful" that the operator of a well that received contaminated runoff had "accepted" that runoff for transport. 19 F. Supp. 3d at 972. Here, by contrast, it is undisputed

that all parties on-site at Gold King intended to dispose of the hazardous waste bottled up in the mine, and that they intended to do it at the settling pond. (*E.g.*, NN FAC ¶¶ 82, 84, 89, 91; NM FAC ¶ 82, 88, 90, 91, 94.) *Coppola* reaffirms that transporter liability *does* attach in such circumstances. 19 F. Supp. 3d at 972 (explaining that allegations that contaminated water has been "accepted to be transported to a selected site" state a claim for transporter liability). Here, the Contractor Defendants accepted the Gold King Mine acid mine drainage for transport to the settling pond. That their negligence caused the waste to overwhelm the pond and flow into Cement Creek, (*e.g.*, NN FAC ¶ 108), does not absolve the Contractor Defendants from transporter liability.

D. The Sovereign Plaintiffs' response costs are recoverable under CERCLA.

The Contractor Defendants next argue that the Sovereign Plaintiff are not entitled to recover economic harm, future response costs, or attorney's fees under CERCLA because those costs are "not necessary and consistent with the national contingency plan ('NCP')." (Mot. at 30.) Apparently without considering whether these remedies are available under any of the Sovereign Plaintiffs' other claims, the Contractor Defendants insist that they "should be dismissed" from the Sovereign Plaintiffs' respective prayers for relief. The Contractor Defendants also argue that New Mexico's claims for "natural resource damages and claims of lost-use damages are not recoverable," again without citing to New Mexico's FAC.[9]

The Contractor Defendants fundamentally misunderstand CERCLA section 107. It entitles States and Indian Tribes to all costs of removal or remedial action "*not inconsistent* with the national contingency plan," as opposed to only "necessary costs of response incurred by *any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A)-(B) (emphases

[9] Once again, New Mexico has not asserted a claim for NRD in this litigation. *See supra* at n.6.

added). This is not a subtle distinction. It means that Sovereign Plaintiffs are entitled to a presumption that costs incurred were necessary and consistent with the NCP, and the Contractor Defendants will have to show that Sovereign Plaintiffs "acted arbitrarily and capriciously in choosing a particular response action." *See United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992); *Fireman's Fund Ins. Co. v. City of Lodi, Cal.*, 302 F.3d 928, 949 (9th Cir. 2002). Moreover, the categories of damages that Sovereign Plaintiffs have prayed for, and a declaratory judgment for future response costs, are plainly permitted under CERCLA. *See* 42 U.S.C. § 9613(g)(2); *Hardage*, 982 F.2d at 1445 (holding that "the entry of declaratory judgment on the issue of liability for future response costs is appropriate" (emphasis omitted)); *United States v. Chapman*, 146 F.3d 1166, 1175-76 (9th Cir. 1998) (holding that attorney's fees are recoverable as response costs under section 107).

In any event, the Contractor Defendants' arguments are premature. "[A] Rule 12(b)(6) motion properly targets claims, not remedies," and when claims are adequately stated, the issue of available remedies should be "left for another day." *Goodman v. J.P. Morgan Inv. Mgmt., Inc.*, 2015 WL 965665, at *6 (S.D. Ohio March 4, 2015); *see also Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) ("It need not appear that [a] plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted.") (emphasis omitted); *Equal Emp't Opportunity Comm'n v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1175 (10th Cir. 2017) ("[A] district court cannot dismiss a claim solely because a plaintiff seeks excessive or otherwise inappropriate relief."). Here, the Sovereign Plaintiffs have stated CERCLA cost recovery claims under multiple theories of liability; that is enough for the Court to deny the Contractor Defendants' motions to dismiss those claims.

E. CERCLA specifically provides for liability for negligent response action contractors like the Contractor Defendants.

The Contractor Defendants next argue that they cannot be liable under § 9607 because response action contractors are only liable for CERCLA cost recovery pursuant to 42 U.S.C. § 9619 when they act negligently or recklessly. (Mot. at 31-32.) The answer to this argument is simple: the complaints allege that the Contractor Defendants acted negligently and recklessly. Specifically, the Sovereign Plaintiffs allege that the Contractor Defendants "negligently estimated that there was approximately six feet of impounded water built up behind" the blocked adit, (NN FAC ¶ 82; NM FAC ¶¶ 84-85; UT FAC ¶¶ 39-40); that the two "disregard[ed] . . . known facts" that "directly affected" future work at the mine, (NN FAC ¶ 84; NM FAC ¶¶ 84-85); that they "began burrowing into the adit" while lacking "any equipment to mitigate an uncontrolled release of water from the mine," (NN FAC ¶ 98; NM FAC ¶ 95; UT FAC ¶¶ 51-52); that they negligently failed to "ramp up" or stabilize the portal with wire mesh and anchors, (NN FAC ¶ 98); that they proceeded "without a pump, hose, stinger, or sump-pump in place," (NN FAC ¶ 98; NM FAC ¶ 96; UT FAC ¶¶ 48-52); that they did so after "observing concerning conditions similar to what was seen the previous year," namely, water seeping from the blocked adit, (NN FAC ¶ 99; UT FAC ¶ 45); that they did not use a trusted method of determining the pressure buildup in the mine—a method Bureau of Reclamation has concluded would have prevented the blowout, (NN FAC ¶ 99; NM FAC ¶ 86; UT FAC ¶ 50); that instead, they negligently estimated the level of water inside the adit based on where water was seeping out of the mine, (NN FAC ¶ 100; UT FAC ¶¶ 45-46); that they "blatantly disregarded explicit instructions" from EPA's OSC to wait to begin work until BOR had an opportunity to confirm the soundness of the proposed work plan, (NN FAC ¶ 102; NM FAC ¶ 96); that they excavated on August 5, "contrary to the work plan and despite the fact that the site was not prepared to deal with the potential ramifications of the excavation," (NN

FAC ¶ 103; NM FAC ¶ 95); that they failed to implement an "adequate emergency response plan" or procure equipment that could mitigate a release, (NN FAC ¶ 103; NM FAC ¶ 96; UT FAC ¶¶ 51-52); that they negligently dug at the "same elevation" as the prior year, (NN FAC ¶ 103; NM FAC ¶¶ 82, 95, 97); and that they excavated before the experienced subcontractor, Harrison Western, arrived, (NN FAC ¶ 103; NM FAC ¶ 96; UT FAC ¶ 85). (The Navajo Nation also collects these allegations in a twelve-item summary list in paragraph 174 of its FAC; New Mexico does the same in paragraph 205 of its FAC.) And the Sovereign Plaintiffs allege unambiguously that the Contractor Defendants' negligence caused the blowout. (NN FAC ¶ 100; NM FAC ¶ 4; UT FAC ¶ 59.)

The Contractor Defendants do not address these allegations or attempt to explain why they do not properly state a claim for negligence. Instead, they complain that the Sovereign Plaintiffs have "lumped [them] together," "without specifying their allegations as to each response action contractor." (Mot. at 33.) This is not an accurate reading of the Sovereign Plaintiffs' pleadings, which, as set forth above, allege negligence against both ER and Weston by name and in detail. But at any rate, "[n]othing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical claims are asserted against each defendant." *Hudak v. Berkley Grp., Inc.*, 2014 WL 354676, at *4 (D. Conn. Jan. 23, 2014); *see also 1-800-411-I.P. Holdings, LLC v. Ga. Injury Ctrs., LLC*, 71 F. Supp. 3d 1325, 1330 (S.D. Fla. 2014) (noting that pleading claims against defendants together "only runs afoul of the applicable pleading standard where it denies a defendant notice of the specific claims against it"); *Acciard v. Whitney*, 2008 WL 5120898, at *10 (M.D. Fla. Dec. 4, 2008) (group pleading complies with Rule 8 when the defendants "had the same role" in the targeted conduct). Here, insofar as the Sovereign Plaintiffs refer to the Contractor Defendants together or advance allegations regarding the "USEPA crew,"

they do so because the Contractor Defendants made negligent decisions *together* with other defendants and were at the Gold King Mine *together* when they—once again, *together*—triggered the spill. Now after more than two years of litigation and multiple rounds of motions to dismiss, neither Contractor Defendant can realistically argue that it is not on fair notice of the claims against it.

The Contractor Defendants' case law is not to the contrary. All three of the group pleading cases they cite arose in the context of fraud claims, which are subject to a heightened pleading standard under Rule 9(b). *Rocha v. Rudd*, 826 F.3d 905, 911 (7th Cir. 2016) (requiring a complaint to "inform each defendant of the nature of his alleged participation in the fraud"); *Rich v. Maidstone Fin., Inc.*, 2002 WL 31867724, at *10 (S.D.N.Y. Dec. 20, 2002) ("A complaint may not simply clump defendants together in value allegations to meet the pleading requirements of Rule 9(b)."); *U.S. ex rel. Ahumada v. NISH*, 756 F.3d 268, 281 n.9 (4th Cir. 2016) (undifferentiated allegations of fraud violated Rule 9(b)).

Finally, the Contractor Defendants suggest in a footnote that the Court should conclude that as federal contractors, they are *per se* immune from any CERCLA liability. This argument is directly contrary to the plain text of CERCLA: 42 U.S.C. § 9607 identifies the categories of defendants that are liable, and 42 U.S.C. § 9619 provides that response action contractors are not liable ***except for*** their negligence, gross negligence, or intentional misconduct that causes a release of hazardous substances. The Contractor Defendants do not attempt to reconcile their argument for complete immunity with § 9619. They also misrepresent the court's holding in *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994). *FMC* did *not* hold, as the Contractor Defendants claim, that federal agencies are "immune from CERCLA liability for the consequences of cleanup activities." (Mot. at 31 n.10.) Instead, the Third Circuit reasoned in *dicta* that

"inasmuch as state and local governments are immune from CERCLA liability for the consequences of cleanup activities," the federal government's liability for response actions should be similarly limited—*i.e.*, to "reckless, willful, or wanton misconduct" or "gross negligence." *See id.* at 841 (emphasis added); 42 U.S.C. § 9607(d)(2). *FMC* did not hold that the federal government is "immune" from all liability for response actions, let alone that such (non-existent) federal government immunity might extend to federal response action contractors in the face of the express language of § 9619. *See FMC Corp.*, 29 F.3d at 840-41 (rejecting regulatory exception to government liability).

The Sovereign Plaintiffs have stated CERCLA cost recovery claims against the Contractor Defendants on multiple theories of liability. Accordingly, the Court should deny the Contractor Defendants' motion to dismiss those claims, as well as their request to dismiss the Sovereign Plaintiffs' corresponding claims for a declaratory judgment as to future response costs.

IV. The government contractor defense does not apply.

The Contractor Defendants next argue that the Court should dismiss the Sovereign Plaintiffs' tort claims against them on account of the "government contractor defense" ("GCD"). The GCD is available only in limited circumstances. Three threshold requirements apply: first, the case must arise in an area concerning "uniquely federal interests"; second, a "significant conflict" must exist between an identifiable federal policy and the operation of state law; and third, the claim must be based on "a discretionary function" by the contractor or government agent. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 507, 511 (1988). If these requirements are met, three more apply: the United States must have approved "reasonably precise specifications" for a contractor's work, the contractor must have "conformed to those specifications," and the contractor must have warned the United States of any dangers known to the contractor but not to the government. *Id.* at 512. The defendant "bears the burden of proving each element of the

government contractor defense." *Andrew v. Unisys Corp.*, 936 F. Supp. 821, 830 (W.D. Okla. 1996). "[W]hether the facts establish the conditions for the defense is a question for the jury." *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259, 1265 (9th Cir. 2010) (quoting *Boyle*, 487 U.S. at 514)). Because this is so, and because the GCD is an affirmative defense, a defendant may only prevail on the defense on the pleadings if the GCD "appears plainly on the face of the complaint itself." *See Miller v. Shell Oil Co.*, 345 F.2d 891, 893 (10th Cir. 1965). The GCD does not appear on the face of the Sovereign Plaintiffs' pleadings, so the Court should deny the Contractor Defendants' motion to dismiss.

A. Judge Armijo's Order denied application of the GCD at this stage.

ER's original motions to dismiss the Navajo Nation and New Mexico's complaints also argued that ER was entitled to dismissal based on the GCD. Judge Armijo wrote 22 pages of analysis on this argument, exhaustively reviewing each element of the defense and analyzing the allegations in the Navajo Nation and New Mexico's amended complaints. Ultimately, Judge Armijo concluded that although "EPA has a uniquely federal interest concerning the liability of its response action contractors," and although she "assume[d] without deciding" that there was a "significant conflict . . . between state tort law and the uniquely federal interest in liability of the response action contractors," she could *not* "conclude that EPA approved reasonably precise clean-up procedures," that ER "followed EPA's instructions" (assuming such instructions had actually been given), or that ER "revealed to EPA any dangers regarding the cleanup activity unknown to EPA." (February 2018 Order at 50, 55-56, 58-59.) Accordingly, Judge Armijo explained, ER was not "plainly entitled to application of the government contractor defense based on the allegations in the proposed amended complaints." (*Id.* at 59-60.) Judge Armijo's analysis was thorough, and the Court need do no more than affirm it.

B. The Sovereign Plaintiffs' amended complaints do not plead the elements of the government contractor defense.

The Contractor Defendants are not entitled to avail themselves of the GCD for at least three reasons. *First*, the Sovereign Plaintiffs' amended complaints do not identify a significant conflict between uniquely federal interests and the operation of state law; on the contrary, the fact that federal law provides for liability on the part of negligent response action contractors like ER and Weston means that federal and state law are exactly in accord. *Second*, even if a significant conflict existed, the GCD still would not apply because the Sovereign Plaintiffs have not pleaded that EPA's actions at Gold King were discretionary—in fact, they have pleaded the opposite. And *third*, even if a significant conflict existed *and* EPA's actions at Gold King had been discretionary, the Sovereign Plaintiffs have not pleaded that the Contractor Defendants received precise instructions from EPA, complied with those instructions, and warned EPA of dangers.

1. No significant conflict exists between federal interests and state law.

The GCD is unavailable at this juncture because the Sovereign Plaintiffs do not allege that any federal interest significantly conflicts with the application of state tort law to the Contractor Defendants. The Contractor Defendants argue that such a conflict exists because the discretionary function exception to the FTCA applies. (Mot. at 38.) They are wrong.

Boyle did hold that the discretionary function exception "suggests the outlines of" a significant conflict between federal interests and state law—but added that the exception only creates a conflict when the suit at hand is "within the area where the policy of the 'discretionary function' would be frustrated." *Boyle*, 487 U.S. at 511-12. Here, holding the Contractor Defendants responsible for their negligence will not "frustrate" the discretionary function exception because federal law—42 U.S.C. § 9619—specifically provides for response action contractor liability in circumstances like these. Accordingly, no "significant conflict" exists

between federal law (which provides for liability on response action contractors for negligence) and state law (which *also* provides for liability on response action contractors for negligence). *See Saleh v. Titan Corp.*, 580 F.3d 1, 23 (D.C. Cir. 2009) ("*Boyle* has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy."); *see also Amtreco, Inc. v. O.H. Materials, Inc.*, 802 F. Supp. 443, 446 (M.D. Ga. 1992) (construing § 9619 as precluding the application of the "government agency defense" because CERCLA "contemplates that a response action contractor will be independently liable for negligence or other tortious behavior").

The absence of a conflict between federal interests and tort liability for response action contractors is confirmed by the fact that § 9619(c) provides that the federal government can elect to "hold harmless and indemnify any response action contractor . . . against any liability . . . for negligence arising out of the contractor's performance in carrying out response action activities[.]" This provision would make no sense if, as the Contractor Defendants argue here, state tort law liability for negligent response action contractors necessarily clashes with federal interests. Congress would not have empowered the federal government to indemnify contractors from nonexistent liability.

The Contractor Defendants dispute that § 9619 precludes a conflict between federal interests and the operation of state law, but they do so without analysis. All they say is that two out-of-circuit district courts have applied the government contractor defense to EPA response action contractors. (Mot. at 46 (citing *Gadsden Indus. Park, LLC v. United States*, 111 F. Supp. 3d 1218, 1229 (N.D. Ala. 2015), and *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 423 (D.S.C. 1994).) But neither *Gadsden* nor *Richland-Lexington* even cites § 9619, much less analyzes the effect of that provision on the question whether there is a significant conflict

between state and federal law for the purposes of the GCD. Those cases should not be taken as authority on a question they did not consider.

Because no Sovereign Plaintiff pleaded the existence of a significant conflict between federal interests and the operation of state law, the Contractor Defendants may not invoke the GCD at this stage, and the Court need proceed no further to deny their motion to dismiss on that ground.

2. **EPA's conduct at Gold King is not protected by the discretionary function exception to FTCA liability.**

Even if the Court were to disregard the plain language of § 9619, however, the discretionary function exception still would not create the required significant conflict, because it does not apply here. The discretionary function exception is a carve-out from the FTCA's waiver of the United States' sovereign immunity. It bars "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the [Federal] Government[.]" 28 U.S.C. § 2680(a). Like all exceptions to the FTCA waiver, it is to be "narrowly construed." *Smith v. United States*, 546 F.2d 872, 877 (10th Cir. 1976). The exception applies if a two-part test, crystallized in *Berkovitz by Berkovitz v. United States*, 486 U.S. 531 (1988), is met. That test asks first whether the action complained of was "a matter of choice for the acting [federal] employee"—in this case, the EPA *See id.* at 536. Then, if so, the test asks whether the employee's judgment "is of the kind that the discretionary function exception was designed to shield," *i.e.*, those judgments "based on considerations of public policy." *Id.* at 536-37. Only if both elements of this test are met is the government shielded from tort liability.

Here, neither element is met. *First*, regulatory mandates and contractual duties deprived EPA of discretion at the Gold King Mine, so the exception's threshold requirement is not met. *See*, *e.g.*, *Bell v. United States*, 127 F.3d 1226, 1230 (10th Cir. 1997) (holding that the discretionary

function did not apply when a contract between the government and a contractor "prohibited" a government engineer from acting in a manner complained of); *Dickerson, Inc. v. United States*, 875 F.2d 1577, 1581 (11th Cir. 1989) (holding that "federal statutes, regulations, and policies made the discretionary-function exception unavailable to the Government"). *Second*, even if EPA did exercise discretion at Gold King, it was not the sort of discretion the exception is intended to protect because EPA's reckless conduct at Gold King was disconnected from any policy considerations. *E.g.*, *Boyd v. U.S. ex rel U.S. Army, Corps of Eng'rs*, 881 F.2d 895, 898 (10th Cir. 1989) (refusing to apply the discretionary function exception where the challenged decision did not "implicate any social, economic, or political policy judgments with which the discretionary function exception properly is concerned").

3. EPA was not exercising discretion when EPA and its contractors recklessly burrowed into the mine.

(a) EPA assumed voluntary contractual obligations that imposed nondiscretionary duties.

Courts have long recognized that "the government's voluntarily assumed contractual obligations can impose nondiscretionary duties on government employees," so as to preclude the application of the discretionary function exception. *Bell*, 127 F.3d at 1229; *Routh v. United States*, 941 F.2d 853, 856 (9th Cir. 1991) ("[D]iscretion may be removed if the government incorporates specific safety standards in a contract which imposes duties on the government's agent.") (citation omitted).

As the Sovereign Plaintiffs allege, EPA's Task Order required that "[a]ll work will be performed under the conditions as described in an approved work plan to be submitted to the OSC for approval that will be prepared by the Contractor and submitted to the Agency before mine rehabilitation work begins." (NN FAC ¶ 72; NM FAC ¶ 78.) The work plan was submitted, and EPA's OSC approved that plan. (NN FAC ¶ 88; NM FAC ¶ 89.) Thus, EPA voluntarily assumed

a contractual obligation to conduct all of its work at Gold King as described in that plan. *See Bell*, 127 F.3d at 1229. That plan provided, among other things, that an experienced underground subcontractor, Harrison Western, would be "mobilized to provide expertise in mine site related activities." (NN FAC ¶ 88; NM FAC ¶ 89; UT FAC ¶ 85.) Only "after mobilization" would the crew ramp up to the top of the GKM portal, drill in anchors to stabilize the excavation, and then gradually pump the impounded water out. (NN FAC ¶ 89.)

But as Plaintiffs allege, none of those steps occurred. In violation of their contractual duty to perform "[a]ll work" at GKM "as described in an approved Work Plan," EPA and its contractors charged into the mine before Harrison Western even arrived. (NN FAC ¶¶ 72, 98-104; UT FAC ¶ 85.) They dug at the wrong elevation, the portal was not yet stable, and no one was ready to pump water out of the mine. (NN FAC ¶¶ 86, 89-91, 97-98, 103, 107, 174; NM FAC ¶ 95-99, 101, 104-105, 110, 172, 205; UT FAC ¶¶ 46, 51-52, 56, 59.) EPA had no discretion to ignore its contractual duties in this fashion, and therefore the discretionary function exception does not apply to its conduct at the Gold King Mine. *E.g., Bell*, 127 F.3d at 1229; *Phillips v. United States*, 956 F.2d 1071, 1076 (11th Cir. 1992) (rejecting application of discretionary function exception where "the Army Corps assumed substantial, mandatory responsibilities for insuring a safe working environment" at a construction site).

Bell v. United States is directly on point. There, a contract between the government and a contractor provided that at the conclusion of certain contracted work, a reservoir pipeline needed to be buried and the ground leveled. 127 F.3d at 1230. But at the end of the work, the government permitted the contractor to leave the pipeline in an elevated "bench," which subsequently injured a diver. *Id.* at 1227-28. The Tenth Circuit held that the discretionary function exception did not apply because the contract "prohibited [the government] from leaving the raised bench." *Id.* at

1230. Here, likewise, the Task Order and Action/Work Plan did not grant the government discretion to deviate from the agreed-upon plan, which required Harrison Western—not EPA or ER—to excavate the portal, only *after* ramping up, stabilizing the portal, and pumping down the impounded water. (*E.g.*, NN FAC ¶ 89.)

These allegations differentiate this case from the Contractor Defendants' principal authority: *U.S. Fidelity & Guaranty Co. v. United States*, 837 F.2d 116 (3d Cir. 1988). There, the Third Circuit determined that the government's decision to ignore the recommendation of an expert to release certain airborne chemicals only when the wind was blowing *away* from the City of Lock Haven, Pennsylvania, was protected by the discretionary function exception. *Id.* at 123. The Contractor Defendants concede that Plaintiffs have properly alleged EPA "ignored certain plans and instructions" but insist that those plans and instructions are like the expert report in *U.S. Fidelity*. (Mot. at 43.) They are wrong. The Third Circuit explained that the EPA OSC there "had the authority to accept" or "reject" the expert's opinion. *U.S. Fidelity*, 837 F.2d at 123. Here, by contrast, EPA and its contractors were contractually bound by the terms they entered into regarding the excavation—making this case like *Bell*, not *U.S. Fidelity*. (NN FAC ¶ 72; NM FAC ¶ 78.) And in any case, Griswold (the temporary supervisor) had no authority to overrule either the work plan or the instructions that had been left by Way (the OSC). The discretionary function exception therefore cannot apply.

(b) EPA violated applicable mandatory regulations.

The discretionary function exception also does not apply "when a federal statute, regulation, or policy specifically prescribes a course of action" for a federal employee to follow, because in such instances, "the employee has no rightful option but to adhere to the directive," and there is "no discretion in the conduct for the discretionary function exception to protect." *Berkovitz*, 486 U.S. at 536. Here, separate and apart from its contractual duties, EPA failed to

comply with a variety of applicable regulations as described below. The discretionary function exception therefore does not apply. *See Tobar v. United States*, 731 F.3d 938, 946-47, 949 (9th Cir. 2013) (taking plaintiff's allegations as true that the government "violated its own regulations and policies" and holding that the discretionary function exception would not bar claims based on those non-discretionary duties); *Dickerson*, 875 F.2d at 1581 (holding discretionary function exception inapplicable where a federal agency failed to follow EPA regulations); *U.S. Fidelity*, 837 F.2d at 120 ("[A]n agency's violation of its own mandatory regulations is not a discretionary act.").

First, EPA was required to comply with its own regulations and with applicable Occupational Health and Safety Administration ("OSHA") regulations, including 40 C.F.R. § 300, 29 C.F.R. § 1910.120, and 29 C.F.R. § 1926. *Cf. Dickerson*, 875 F.2d at 1581 ("CERCLA's provisions suggest an ongoing safety obligation . . . which would be inconsistent with the Government's argument that it was a discretionary decision . . . to transfer all potential liability to its independent contractor by delegating completely to it the safety responsibilities for disposal[.]"); *Matthews v. United States*, 720 F. Supp. 1535, 1541 (D. Kan. 1989) (holding that a "government employee had no choice but to ensure compliance with" mandatory regulations). Indeed, EPA's Task Order required that "[a]ll activities directed by EPA's [OSC] must remain consistent with" 40 C.F.R § 300, also known as the "National Contingency Plan" or "NCP". (NN FAC ¶ 67.) Section 300.150(a) of the NCP provides that "[r]esponse actions under the NCP will comply with the provisions for response action worker safety and health in 29 C.F.R. § 1910.120," which is titled "Hazardous waste operations and emergency response." 40 C.F.R. § 300.150(a); 29 C.F.R. § 1910.120. Part 1910.120(a)(2)(i), in turn, makes clear that "[a]ll requirements of part 1910 and part 1926 of title 29 of the Code of Federal Regulations apply pursuant to their terms to

hazardous waste and emergency response operations whether covered by this section or not." 29 C.F.R. § 1910.120(a)(2)(i).[10] The applicable OSHA regulations cover subject matter ranging from particular safety requirements for hazardous waste responses to "[s]pecific excavation requirements" governing all excavation work. *See*, *e.g.*, 29 C.F.R. § 1926.651; 29 C.F.R. § 1910.120. The Sovereign Plaintiffs have alleged that EPA and its contractors violated these regulations by, among other things, (a) "failing to provide the required support system to stabilize the mine portal prior to excavation," as required by 29 C.F.R. § 1926.651(i); (b) failing to "engage an employee, consultant, or other agent with the requisite level of engineering experience to inspect the Gold King Mine conditions," as required by 29 C.F.R. § 1926.651(k); (c) failing to "ramp up to a higher elevation before excavating," as required by 29 C.F.R. § 1910.120(b)(1)(iii); (d) failing to have an adequate emergency response plan in place, as required by 29 C.F.R. § 1910.120(l); and (e) failing to train its employees properly, as required by 29 C.F.R. § 1910.120(e)(7). (NN FAC ¶ 174; *see id.* ¶¶ 98-99, 103-04, 107, 175; NM FAC ¶¶ 175, 205 & n.8; UT FAC ¶¶ 53-54, 82.) The Navajo Nation also alleges that EPA and its contractors failed to timely notify downstream communities of the spill, as required by 400 C.F.R. § 300.135(j)(1). (NN FAC ¶ 175.) The Contractor Defendants make no effort to respond to these allegations and do not dispute that the Sovereign Plaintiffs have alleged that EPA and its contractors violated OSHA and EPA regulations.

Second, EPA's premature excavation also violated provisions of the Federal Mine Safety and Health Act of 1977 ("MSHA") and Title 30, Code of Federal Regulations, Part 75, which are

[10] Additionally, the site Health and Safety Plan that was incorporated into the final work plan and reviewed and accepted by EPA OSC states that "[a]ll work will be performed in accordance with applicable Federal 29 CFR 1910 and 1926 Health and Safety Regulations and the Federal 29 CFR 1910.120 Hazardous Waste Site Safety Regulations." (NN FAC ¶ 93.)

intended to protect workers from uncontrolled releases of impounded water in abandoned mine workings. (NM FAC ¶ 176 & n.7; NM FAC ¶ 176; UT FAC ¶ 54); *see also* 30 C.F.R. § 75.372 (requiring "up-to-date map of the mine drawn to a scale of not less than 100 nor more than 500 feet to the inch"); *id.* § 75.388(a)(2) (requiring mine operators to drill boreholes as the working place approaches within 200 feet of an area of the mine not shown by certified surveys); *id.* § 75.1200 (requiring mine operators to maintain an "accurate and up-to-date map" of a mine "in an area on the surface of the mine"). The Contractor Defendants do not dispute that MSHA regulations applied to EPA's conduct at Gold King and do not dispute that Plaintiffs have properly pleaded violations of those regulations.

Third, EPA's discretion was also constrained by the Colorado Mined Land Reclamation Act ("MLRA"). (NM FAC ¶¶ 174-75 [*citing* Colo. Rev. Stat. § 34-32-116.5(5), 2 Colo. Code. Regs. § 407.1, Rule 6.4.21(6)(a)].) EPA and its contractors were required, but failed, to comply with the MLRA's water control provisions before attempting to drill into the Gold King Mine. Once again, the Contractor Defendants do not acknowledge Plaintiffs' allegation that EPA violated the MLRA or argue, in light of that allegation, that the discretionary function exception applies.

At bottom, EPA lacked any discretion to violate the state and federal regulations identified above, which were mandatory for EPA in conducting its response action. *See Tobar*, 731 F.3d at 946-47; *Dickerson*, 875 F.2d at 1581; *Matthews*, 720 F. Supp. at 1541; 40 C.F.R. § 300.150(a). Because EPA lacked discretion to ignore these regulations and its own voluntarily assumed contractual duties, it cannot meet the first prong of the *Berkovitz* test, rendering the discretionary function exception inapplicable here—and, in turn, precluding the application of the GCD. *See, e.g., Bell*, 127 F.3d at 1229-30.

4. EPA's reckless excavation contrary to its plans was not susceptible to policy considerations.

Even if EPA somehow exercised discretion despite its contractual duties and applicable, mandatory regulations, it was not the kind of discretion the discretionary function exception was "designed to shield." *Berkovitz*, 486 U.S. at 536. The purpose of the exception is to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy" through tort suits. *Id*. at 536-37. The exception is not to be used to "create inconsistent liabilities between private and government employees performing identical acts," *Marlys Bear Med. v. U.S. ex rel. Sec'y of Dep't of Interior*, 241 F.3d 1208, 1213 (9th Cir. 2001), or to protect the federal government from liability for "ordinary garden-variety negligence," *Aslakson v. United States*, 790 F.2d 688, 693-94 (8th Cir. 1986), lest the exception swallow virtually all tort liability for the federal government. Here, the Contractor Defendants seek protection from liability not from discretionary decisions EPA made at Gold King, but instead for EPA's (and the contractors') decision to *abandon* its work plan and negligently bore into the mine without necessary safety protocols. But these decisions did not involve the permissible exercise of discretion rooted in policy, so the discretionary function exception (and GCD) cannot apply.

The Contractor Defendants insist that in excavating the Gold King Mine, EPA "had to weigh numerous policy considerations," including "environmental impacts," "safety," "the impacts of any activity on the conditions of other inactive mines in the area," "delay[]," "scheduling," "utility and practicality," the "availability of equipment and other resources," and "costs." (Mot. at 44). But they cannot explain why the actions Plaintiffs challenge—including excavating at the wrong elevation, without proper equipment, and before Harrison Western arrived—were susceptible to these choices given that they were in derogation of EPA's work plan. (NN FAC ¶¶ 98-103; NM ¶¶ 96, 101, 104-105, 173, 205; UT FAC ¶¶ 45-48, 51-52, 55-59, 85.)

By the time excavation began, EPA had *already* allocated resources, elected a safety plan, and made decisions about environmental impacts, impacts on other mines, and scheduling. Failing to properly implement decisions made in the past is not susceptible to the policy choices that may have undergirded the original decisions. *Ayala v. Joy Mfg. Co.*, 877 F.2d 846, 849 (10th Cir. 1989) (holding that the negligent installation of mining electrical equipment "involved no [] policymaking choices"); *Aslakson*, 790 F.2d at 693 (holding that the discretionary function exception did not apply to a plaintiff's challenge to "a decision made by [government] officials charged with the responsibility of implementing an already established policy"); *Marlys Bear Med.*, 241 F.3d at 1215 ("The decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not."); *Indian Towing v. United States*, 350 U.S. 61, 69 (1955) (holding that once the government "exercised its discretion" to build a lighthouse, it was "obligated to use due care" to keep the light in good working order);[11] *Coffey v. United States*, 906 F. Supp. 2d 1114, 1162 (D.N.M. 2012) ("Once the BIA exercised discretion to transfer inmates, . . . [it] was obligated to use due care[.]"). No matter how it attempts to repackage the issue, the Contractor Defendants "cannot claim that both the decision to take safety

[11] Some courts have expressed skepticism as to *Indian Towing*'s applicability in the discretionary function exception context. *E.g.*, *Harrell v. United States*, 443 F.3d 1231, 1237 (10th Cir. 2006) (concluding that *Indian Towing* is not "persuasive authority in the context of the discretionary function exception"). However, the Supreme Court has repeatedly reaffirmed *Indian Towing*'s applicability to the second prong of the exception. *See Berkovitz*, 486 U.S. at 538 n.3 (holding that *Indian Towing* "illuminates the appropriate scope of the discretionary function exception"); *United States v. Gaubert*, 499 U.S. 315, 326 (1991) (recognizing *Indian Towing*'s holding that negligently failing to maintain the lighthouse "did not involve any permissible exercise of policy judgment"); *see also Swafford v. United States*, 839 F.3d 1365, 1371-72 (11th Cir. 2016) (explaining that *Indian Towing* stands for the proposition that once the federal government exercises its discretion to undertake a particular project, failing to do so safely "is simply not a permissible exercise of policy judgment." Here, the Sovereign Plaintiffs argue that EPA's decision to disregard the work plan and excavate in an unsafe manner was—like the failure to maintain the lighthouse in *Indian Towing*—not susceptible to policy considerations.

measures and the negligent implementation of those measures are protected policy decisions. This argument would essentially allow the government to administratively immunize itself from tort liability under applicable state law as a matter of policy." *Marlys Bear Med.*, 241 F.3d at 1215 (internal quotation marks and citation omitted); *see also Garcia v. United States*, 709 F. Supp. 2d 1133, 1150 (D.N.M. 2010) ("If one were to think creatively, one could always find some policy or other that one's actions might impact.").

In arguing that EPA's decision to excavate on August 5, 2015, was a protected exercise of discretion, the Contractor Defendants primarily rely on *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992), and *U.S. Fidelity*, 837 F.2d 116. But both *Daigle* and *U.S. Fidelity* involved broad-based challenges to the timing of environmental projects. *See Daigle*, 972 F.2d at 1542 (plaintiffs alleged that the Army "rushed into [a] clean-up without proper planning"); *U.S. Fidelity*, 837 F.2d at 123 (plaintiffs challenged a "timing decision"). Neither case is like this one, where the Sovereign Plaintiffs challenge the botched, negligent implementation of a predetermined plan. Nor do the Contractor Defendants' other cases—*United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), and *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216 (10th Cir. 2016)—involve facts analogous to these. Both involved situations in which the government designed programs based on policy considerations—a spot-check program for detecting aircraft defects, in *Varig Airlines*, and a strategy for fighting a particular wildfire, in *Hardscrabble Ranch*—and then implemented those programs as planned. *See Varig Airlines*, 467 U.S. at 819-20; *Hardscrabble Ranch*, 840 F.3d at 1222.

In addition, it is settled that technical and safety determinations, like those at issue here, do not trigger the discretionary function exception. *Ayala*, 877 F.2d at 848-49; *see also Myers v. United States*, 652 F.3d 1021, 1032 (9th Cir. 2011) ("[M]atters of scientific and professional

judgment—particularly judgments involving safety—are rarely considered to be susceptible to social, economic, or political policy."); *Boyd*, 881 F.2d at 898 (refusing to apply exception for failure to warn swimmers of dangerous conditions). Here again, the Contractor Defendants ignore Plaintiffs' detailed allegations about how EPA mishandled the excavation at Gold King, and contend that Plaintiffs are really just arguing that the EPA "could have done a better job." (Mot. at 45.) Not so. As set forth above, Plaintiffs allege that EPA and its contractors inexplicably abandoned their established plan and charged into the Gold King Mine before anyone was prepared to deal with the blowout that was anticipated, which the plan was designed to prevent, and upon which the OSC sought a second opinion on in order to avoid a blowout. (*E.g.*, NN FAC ¶¶ 68, 74; NM FAC ¶¶ 95-99, 105, 110, 172; UT FAC ¶¶ 51-52, 55-59, 85.) The many technical and safety missteps made by EPA and its contractors did not implicate policy considerations.

Finally, the Contractor Defendants contend that failing to apply the discretionary function exception here would amount to "second-guessing" policy choices made by EPA. (Mot. at 42.) But no second-guessing is necessary to understand that the Gold King Mine spill was a colossal blunder on the part of EPA and its contractors, not the measured, deliberate policy decision the Contractor Defendants now wish it had been. To avoid responsibility for this mistake, the Contractor Defendants ask this Court to extend the discretionary function exception to protect the government (and, by extension, the Contractor Defendants) from negligence far removed from any "legislative [or] administrative decision[] grounded in social, economic, and political policy." *See Berkovitz*, 486 U.S. at 536-37. "If [the Court] were to accept th[is] broad interpretation of the discretionary exception, it is difficult to perceive which duties under tort law could not be avoided by a similar policy decision to ignore them." *Smith*, 546 F.2d at 877. Accordingly, because EPA's negligent implementation of its work plan is not susceptible to policy considerations, the

discretionary function exception does not apply to EPA's conduct and cannot support an application of the GCD. *See Ayala*, 877 F.2d at 848-49. The Contractor Defendants also do not (and cannot) address CERCLA's savings clauses that expressly preserve state law remedies against response action contractors. *See* Section II.A, *infra*.

In sum, (1) EPA's actions at Gold King were not discretionary—because EPA was bound by its contracts and by mandatory regulations—*and* (2) whatever discretion EPA exercised at Gold King was not grounded in policy. *See United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). Because neither element of the discretionary function exception is met, the Contractor Defendants are not entitled to avail themselves of the government contractor defense, and the Court should deny their motion.

5. **The Sovereign Plaintiffs have not pleaded that the Contractor Defendants received and complied with precise instructions or warned EPA of dangers.**

Finally, even if they had met the threshold requirements of identifying a federal interest, a conflict, and a discretionary function—which they have not—the Contractor Defendants may only invoke the GCD if the Sovereign Plaintiffs' amended complaints allege that: (1) the EPA gave the Contractor Defendants "reasonably precise specifications," (2) that the Contractor Defendants' performance "conformed to those specifications," and (3) that the Contractor Defendants warned the EPA of any "dangers" associated with its proposed plan that were known to them but not the EPA. *See Boyle*, 487 U.S. at 512. The Sovereign Plaintiffs' amended complaints plainly do not allege these elements.

The Contractor Defendants cannot identify on the face of the Sovereign Plaintiffs' pleadings any reasonably precise specification that the EPA gave to its contractors. They cite to a single paragraph in New Mexico's FAC, which says only that "EPA began work . . . under the direction of OSC Steven Way." (NM FAC ¶ 81.) This is not the stuff of "reasonably precise

specifications." *See In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 461 (5th Cir. 2010) (holding that reasonably precise specifications require governmental discretion over "significant details and all critical design choices"). The Contractor Defendants do not cite Utah's amended complaint at all. And although they make a more serious effort with respect to the Navajo Nation's FAC, the paragraphs the Contractor Defendants cite establish no more than that EPA reviewed and approved a variety of work plans. (NN FAC ¶¶ 88, 93, 96-97.)

To be sure, the Navajo Nation's FAC does lay out in some detail how, precisely, the excavation was *supposed to* occur at Gold King, both under the approved work plan and under instructions delivered by EPA's OSC, Way. (*See, e.g.*, NN FAC ¶¶ 89.) But the Contractor Defendants ignore these allegations, for an obvious reason: as the Navajo Nation alleges, they "blatantly disregarded" the OSC's "explicit instructions" and excavated "contrary to the work plan." (*Id.* ¶¶ 102-03.) As Judge Armijo explained, although the Sovereign Plaintiffs' allegations "allow an inference that [Way] gave reasonably precise instructions and, arguably, that the work plan contained reasonably precise instructions," EPA and its contractors are alleged to have "substantially deviated" from those instructions without receiving any new, precise instructions. (February 2018 Order at 58 ("[T]he Court cannot determine that ER followed EPA's reasonably precise instructions.").)

Finding no assistance in the Sovereign Plaintiffs' pleadings, the Contractor Defendants turn again to *Richland-Lexington*, arguing that it is "align[ed]" with "this case." (Mot. at 47.) But *Richland-Lexington* is clearly distinguishable, both procedurally and substantively. The case arose on summary judgment and relied extensively on a developed evidentiary record. The record revealed that rather than deviating from EPA's instructions, like the Contractor Defendants did

here, the contractor in *Richland-Lexington* "conformed to the EPA's directives." 854 F. Supp. at 423.

Finally, the Sovereign Plaintiffs' amended pleadings—as Judge Armijo recognized—"simply do not speak" to the question whether the Contractor Defendants "revealed to EPA any dangers regarding the cleanup activity unknown to EPA." (February 2018 Order at 59.) The Contractor Defendants' only argument to the contrary is that EPA was aware of "numerous" risks, (Mot. at 48), but this of course answers the wrong question—what EPA *did* know about, rather than what it did not.

Accordingly, because the GCD does not appear plainly on the face of the Sovereign Plaintiffs' complaints, the Court should deny the Contractor Defendants' motion.

C. The government contractor defense is not jurisdictional.

For all of the foregoing reasons, the GCD does not protect ER and Weston from liability at this stage. But ER and Weston make one more significant error worth correcting: they assert that the GCD, if present, deprives the Court of jurisdiction over tort claims against contractors. Not so. "Although the source of the government contractor defense is the United States' sovereign immunity," the defense "does not confer sovereign immunity on contractors." *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259, 1265 (9th Cir. 2010). Instead, the contractor only receives "a corollary financial benefit flowing from *the government's* sovereign immunity." *Id.*; *see also Kuwait Pearls Catering Co., WLL v. Kellogg Brown & Root Servs.*, 2016 WL 1259518, at *22 (S.D. Tex. Mar. 31, 2016) ("[T]he Fifth Circuit has concluded that the government contractor defense is not jurisdictional[.]"), *vacated on other grounds*, 853 F.3d 173 (5th Cir. 2017); *Acoustic Processing Tech., Inc. v. KDH Elec. Sys.*, 724 F. Supp. 2d 128, 131 (D. Me. 2010) ("[T]his

government contractor defense is not a jurisdictional argument, but an affirmative defense."). The Contractor Defendants cite no case law to the contrary.[12]

V. The Sovereign Plaintiffs have stated state law claims.

A. The State of Utah's state law statutory claims are not barred by the Clean Water Act.

The Contractor Defendants also argue that Utah's statutory claims are preempted by the Clean Water Act ("CWA"). But as with CERCLA, Congress enacted the CWA to supplement and preserve State laws protecting the environment, except where they impose effluent standards that are incompatible with the CWA standards in a permit issued under its National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342; *see generally EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205-208 (1976) (describing NPDES system). Thus, the CWA expressly preserves such state-law remedies with at least two separate savings clauses. *First*, Section 1370 entitled "State authority," provides that:

> nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; . . . or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370. *Second*, Section 1365(e) entitled "Statutory or common law rights not restricted," provides: "Nothing in this section shall restrict any right which any person (or class

[12] The Contractor Defendants represent to the Court that *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009), stands for the proposition that "[i]t is well established that such derivative immunity 'deprives federal courts of jurisdiction to hear claims.'" (Mot. at 51 (quoting *Ackerson*, 589 F.3d at 207).) This is a serious misreading of *Ackerson*, which actually held that *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), the leading derivative immunity case, "countenances *against*" the application of derivative immunity "to deprive the federal courts of jurisdiction." *Ackerson*, 589 F.3d at 207 (emphasis added). The language the Contractor Defendants quote from *Ackerson* actually comes from the Fifth Circuit's discussion of a counterfactual—"[*i*]*f* the basis for dismissing a *Yearsley* claim is sovereign immunity, *then* a *Yearsley* defense would be jurisdictional"—that the Fifth Circuit rejected. *Id.* (emphasis added).

of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." *Id.* at § 1365(e).

In its Fifth Cause of Action, Utah pleads that the Contractor Defendants violated the Utah Water Quality Act, UTAH CODE ANN. § 19-5-101 *et seq.*, which makes it unlawful to discharge a pollutant into the waters of the State and authorizes the Director of Utah's Division of Water Quality to bring a civil action against any person who violates the statute. *Id.* at §§ 19-5-107, 19-5-115(7). The Utah Solid and Hazardous Waste Act (Utah's Sixth Cause of Action), *id.* at § 19-6-101 *et seq.*, authorizes the Director of the Division of Waste Management and Radiation Control to bring a civil action against any person who has contributed to the handling or disposal of any solid or hazardous waste that presents an imminent and substantial danger to health or the environment. *Id.* at § 19-6-115. In the language of the savings clauses, the statutes are "limitation[s] respecting discharges of pollutants" and Utah is exercising its "right . . . to seek enforcement" of those "effluent standard[s] or limitation[s]," and therefore its claim fits within these definitions.

In arguing that the CWA preempts Utah's statute, the Contractor Defendants do not and cannot show the foundational fact that there was a NPDES permit allowing the discharge from the Gold King Mine of three-million gallons of toxic contaminants, or any discharge at all. The Contractor Defendants therefore fail to show that the CWA's careful permitting scheme applies in this case.

The Contractor Defendants' reliance upon *International Paper Co. v. Ouellette* is therefore misplaced, where a group of Vermont plaintiffs sought to hold a New York polluter liable under Vermont common law for pollution that flowed across the state border on Lake

Champlain into Vermont. 479 U.S. 481, 483-84 (1987). Because the polluter had a permit for its discharges under the CWA, the Court found that "application of an affected State's nuisance law to a point source in another State would constitute a serious interference with the implementation of the Act." *Id.* at 482. The Court therefore held "[t]he Act pre-empts *the common law of an affected State* to the extent that that law seeks to impose liability on a point source in another State." *Id.* at 481 (emphasis added). The scope of that preemption is expressly limited with the Court applying a functional test:

> Our conclusion that Vermont nuisance law is inapplicable to a New York point source does not leave respondents without a remedy. *The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act.* The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.

Id. at 497 (emphasis added).

Thus, the Contractor Defendants are wrong that *Ouellette* "forecloses the Utah statutory claims." (Mot. at 53.) First, *Ouellette* concerned common law claims—the issue of whether an affected State's statutes apply to pollution in its State waters that was generated in another State was not before the Court and therefore was not decided. Second, the Contractor Defendants do not show there is an NPDES permit for the Gold King Mine discharge. Even if there was, there is no conflict between Utah's statutory claims and the CWA regulatory scheme because Utah's lawsuit does not require standards of effluent control that are incompatible with an NPDES permit under the CWA—the CWA would never allow dumping of 3,000,000 gallons of toxic waste into a river. Thus, the Court's concern in *Ouellette* that application of an affected State's common law would interfere with implementing the CWA is not implicated in this case.

The Contractor Defendants claim the Utah environmental statutes only apply to pollution in "waters of the State," but that is exactly what Utah seeks to do here. Utah's First Amended

Complaint alleges that "[t]oxic wastes from the Blowout have been and are being transported through the Animas and San Juan River system to Lake Powell in the State of Utah, among other locations. (UT FAC ¶ 61.) Utah's Causes of Action under its environmental statutes are specifically directed at pollutants from the Blowout that "are present or persist in the State of Utah's soil, sediment, and water . . . ." *Id.* at ¶¶ 108, 114. It is indisputable that a State has broad powers to regulate pollution in its own waters, and the CWA allows the States to have a significant role in protecting their own natural resources. *See* 33 U.S.C. § 1251(b); *Ouellette*, 479 U.S. at 489-90.

B. The Sovereign Plaintiffs have pleaded *prima facie* claims for negligence.

The Contractor Defendants say that a contractor at a hazardous waste site owes no duty of care to persons in other states. (Mot. at 56.) The lack of any legal authority for this position is telling. There is no rational reason that a tortfeasor's duty of care to others should end arbitrarily at a geographic boundary, and the law does not recognize such a distinction. Rather, "the court determines as a question of law the existence and scope of the duty—that is, whether the plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection." *Bd. of Cnty. Comm'rs of Cnty. of La Plata, Colo. v. Brown Grp. Retail, Inc.*, 598 F. Supp. 2d 1185, 1194 (D. Colo. 2009) (internal quotes omitted).

For purposes of a Rule 12(b)(6) motion to dismiss, a duty is considered established if the plaintiff pleads sufficient facts, "including the foreseeability of harm from the failure of the defendant to take protective action, the social utility of the defendant's conduct, the magnitude of the burden of guarding against the harm, the practical consequences of placing such a burden on the defendant, and other relevant factors" particular to the case. *Id.* The Sovereign Plaintiffs allege the Contractor Defendants had duties to "conduct all investigations and work activities at the mines with reasonable care" and "to take reasonable precautions in case of an accidental release," among

others. (UT FAC ¶ 82; *see* NM FAC ¶ 201; NN FAC ¶ 111). Given that the Contractor Defendants were working with a huge quantity of hazardous waste near a vulnerable waterway, "reasonable persons would recognize [such] a duty and agree that it exists." *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987). The Contractor Defendants' focus on who had ultimate authority to approve a work plan at the Gold King Mine misses the point entirely. The relevant question is whether the Contractor Defendants violated a duty of care in how they contributed to that plan and how they carried it out, and the Sovereign Plaintiffs' pleadings are more than adequate in that regard.

Contrary to the Contractor Defendants' assertion, the risk involved and the likelihood of injury to out-of-state persons were both entirely foreseeable. Indeed, the Task Order Statement of Work explicitly identified the risk: "Conditions may exist that could result in a blow-out of the blockages and cause a release of large volumes of contaminated mine waters and sediment from inside the mine, which contain concentrated heavy metals." (UT FAC at ¶ 37.) In the event of such a Blowout, there was only one place for the contaminated mine water and sediment to go—into Cement Creek and then to the Animas and San Juan Rivers, which flow into New Mexico, the Navajo Nation, and Utah. (*Id.* at ¶ 61.) The Contractor Defendants cannot seriously contend that they were unaware of where the rivers flow, or that exposure to "concentrated heavy metals" was likely to cause injury there.

The Sovereign Plaintiffs allege the Contractor Defendants were working with hazardous waste at the Gold King site and conducted their work in a manner that risked causing a blowout. (UT FAC ¶¶ 36-40; 42-59; NM FAC ¶¶ 95-99, 205; NN FAC ¶ 174.) They allege the Contractor Defendants' conduct allowed the hazardous waste to escape the Gold King site and degrade the environment and public health. (UT FAC ¶¶ 61-62, 86; NM FAC ¶¶ 4, 99; NN FAC ¶ 199.)

Taking similar allegations as true, the court in *County of La Plata* held that "Plaintiff adequately alleges a duty owed it by [Defendant] sufficient to overcome a 12(b)(6) motion." 598 F. Supp. 2d at 1194; *see Dept. of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1994) ("Under Colorado common law, landowners have a duty to prevent activities and conditions on their land from creating an unreasonable risk of harm to others."); *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582, 594 (Colo. Ct. App. 2007). Under those authorities, the Sovereign Plaintiffs' allegations regarding the Contractor Defendants' duties and their breach of those duties are more than adequate. Accordingly, the Court should deny the Contractor Defendants' motion.

C. The Sovereign Plaintiffs' gross negligence claims are viable under state law and CERCLA.

Relying on cases from 1902 and 1987, the Contractor Defendants argue that the Sovereign Plaintiffs' claims for gross negligence should be dismissed because Colorado law supposedly does not recognize gross negligence. But the Contractor Defendants' argument is contrary to the weight of more recent authority. In 1992, the Colorado Supreme Court discussed the differences between gross and ordinary negligence to determine whether the comparative negligence statute could be applied when the jury finds willful and wanton conduct. The Court found:

> The demarcation line between the terms [willful and wanton misconduct, willful and wanton negligence, gross negligence, reckless conduct, and reckless negligence] has led to the conclusion that the terms describe a form of aggravated negligence that differs in quality rather than degree from ordinary lack of care. *Our exemplary damages statute recognizes the distinction between negligence and willful and wanton conduct providing for the recovery of exemplary damages in addition to compensatory damages*, and prevents contribution between defendants in applicable cases.

White v. Hansen, 837 P.2d 1229, 1233 (Colo. 1992) (emphasis added) (internal cites omitted). On the basis of *White*, the District of Colorado more recently held that "gross (or willful and wanton) negligence is an independent claim for relief seeking exemplary damages, in addition to actual damages, in Colorado." *U.S. Welding, Inc. v. Tecsys, Inc.*, 2014 WL 10321666, at *15 (D. Colo.

Dec. 1, 2014), *report and recommendation adopted sub nom. United States v. Tecsys, Inc.*, 2015 WL 5174227 (D. Colo. Sept. 3, 2015), *citing* Colo. Jury Instr. 4th § 9:30 (2009). The Sovereign Plaintiffs' claims for gross negligence are therefore proper under Colorado law.

The Contractor Defendants' request to dismiss the gross negligence claims is flawed for a second reason: CERCLA allows a response action contractor to be liable for "grossly negligent" conduct. 42 U.S.C. § 9619(a)(2). Accordingly, the gross negligence claims cannot be dismissed because they are independently viable under CERCLA.

D. The Sovereign Plaintiffs' Trespass and Nuisance Claims are not barred.

The Contractor Defendants do not argue that any of the Sovereign Plaintiffs' claims for trespass, private nuisance, or public nuisance are inadequately pleaded. Instead, they repeat their arguments that these state law claims are barred under CERCLA Section 113(h) and because they supposedly seek damages for the same response costs available under CERCLA. (Mot. at 60.) As the Sovereign Plaintiffs explained above, *see* Section II, these arguments are meritless.

VI. The Sovereign Plaintiffs' claims are not barred by the statute of limitations.

Colorado's statute of limitations does not bar any of the Sovereign Plaintiffs' claims. The Contractor Defendants' limitations argument relies on a false premise: that the Sovereign Plaintiffs' claims against them relate to contamination that pre-dated the August 5 blowout and are thus subject to and barred by the two-year statute of limitations codified at Colo. Rev. Stat. § 12-80-102(1)(a). (Mot. at 60-61.) Not so. The Sovereign Plaintiffs are seeking damages that are directly traceable to the Contractor Defendants' actions that caused the release on August 5. The Sovereign Plaintiffs seek to recover costs they incurred in responding to the spill, (NM FAC ¶ 112; NN FAC ¶ 163; UT FAC ¶¶ 62, 86), and they continue to incur costs to monitor the residual effects of the pollutants released on August 5, (NM FAC ¶ 113-114; NN FAC ¶ 123; UT FAC ¶¶ 62, 86). The Sovereign Plaintiffs also "suffered enormous economic losses from reduced business activity

and lost tax revenue as a direct and proximate result of the Gold King Mine release." (NM FAC ¶ 115; *see also* NN FAC ¶ 122; UT FAC ¶ 62.) Furthermore, the Sovereign Plaintiffs seek damages related to the stigmatic effects of the release, which continue to this day. (NM FAC ¶ 117-118; NN FAC ¶¶ 123, 201; UT FAC ¶¶ 96, 133.) In short, because the Sovereign Plaintiffs' claims for costs and damages *against the Contractor Defendants* arise from the August 5 release, not from decades-old contamination, the claims are not barred by the statute of limitations.

The Sovereign Plaintiffs also seek costs that will be incurred to abate the nuisance and cure the trespass caused by the August 5 release. (NM FAC ¶ 211, 217; NN FAC ¶ 204; UT FAC ¶¶ 100, 137-38.) Contamination from the release has combined with previous contamination discharged from the Upper Animas River Watershed. (NM FAC ¶ 8.) But this fact is not, as the Contractor Defendants assert, grounds for dismissing the Sovereign Plaintiffs' claims. Rather, it is well-settled in CERCLA and tort cases that defendants, not plaintiffs, bear the burden of proving divisibility of a "combined and mingled" (*i.e.*, indivisible) harm. Restatement (Second) of Torts, § 433A. This rule also applies in CERCLA cases. *See Burlington N.*, 556 U.S. at 614-615 ("When two or more causes produce a single, indivisible harm, courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm."); *see also Bd. of Cnty. Comm'rs of Cnty. of La Plata v. Brown Grp. Retail, Inc.*, 768 F. Supp. 2d 1092, 1117-1118 (D. Colo. 2011) ("CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists) (citing Restatement (Second) of Torts, § 433A)). Thus, the Contractor Defendants argument that the Sovereign Plaintiffs "failed to distinguish" these two categories of contamination is impermissible burden-shifting. For these reasons, the Court should deny the Contractor Defendants' motion to dismiss the Sovereign Plaintiffs' claims based on the statute of limitations.

VII. Reconsideration of Judge Armijo's Order is not appropriate at this time.

As stated in Section I., *supra*, and while reserving their rights for appellate purposes regarding the arguments they previously asserted, the Sovereign Plaintiffs do not believe reconsideration of Judge Armijo's Order at this time is appropriate on any issue including those regarding conflict of laws. (*See* February 2018 Order at 61-68.)

CONCLUSION

For the foregoing reasons, the Court should deny the Contractor Defendants' motion to dismiss.

Dated: August 24, 2018

Respectfully submitted,

HUESTON HENNIGAN LLP

/s/ Moez M. Kaba

John C. Hueston
Moez M. Kaba
Andrew K. Walsh
523 West Sixth Street, Suite 400
Los Angeles, CA 90014

NAVAJO NATION DEPARTMENT OF JUSTICE
Paul Spruhan
Office of the Attorney General
P.O. Box 2010
Window Rock, AZ 86515

Attorneys for Plaintiff Navajo Nation

Dated: August 24, 2018

KELLEY DRYE & WARREN LLP

By: */s/ John D.S. Gilmour*
JOHN D.S. GILMOUR
515 Post Oak Blvd., Suite 900
Houston, TX 77027
Telephone (713) 355-5005
Facsimile (713) 355-5001
jgilmour@kelleydrye.com

Hector Balderas
Attorney General of New Mexico
P. Cholla Khoury
Assistant Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Telephone: (505) 827-6000
Facsimile: (505) 827-5826
Email: ckhoury@nmag.gov

Counsel for Plaintiff the State of New Mexico

Dated: August 24, 2018

SEAN D. REYES
UTAH ATTORNEY GENERAL

By: */s/ Spencer E. Austin*
SPENCER E. AUSTIN

Dated: August 24, 2018

MORRISON & FOERSTER LLP

By: */s/ Peter Hsiao*
PETER HSIAO

Attorneys for Plaintiff
THE STATE OF UTAH

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on August 24, 2018. a true and correct copy of 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 CM/ECF electronic transmission upon all counsel of record.

/s/ Moez M. Kaba
Moez M. Kaba