UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re: Gold King Mine Release in San Juan County, Colorado on August 5, 2015 *This Document Relates to:* *No. 16-cv-465-WJ/LF* *No. 16-cv-931-WJ/LF* *No. 18-cv-319-WJ*	No. 1:18-md-02824-WJ

DEFENDANT SUNNYSIDE GOLD CORPORATION, KINROSS GOLD U.S.A. INC., AND KINROSS GOLD CORPORATION'S COMBINED REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION:

It is undisputed that SGC's reclamation work, including installing numerous engineered concrete bulkheads, was performed in Colorado, under the direct supervision of Colorado regulators, in accordance with the express requirements of a Consent Decree entered by a Colorado court. It is undisputed that SGC's reclamation work was designed and intended to retain water *in Colorado*. It is undisputed that SGC's reclamation was successful and improved water quality. The Sovereign Plaintiffs apparently do not agree with how Colorado regulates mining and reclamation activities within Colorado's borders. That disagreement, however, does not permit them to assert tort claims in states without jurisdiction over Colorado activities and without personal jurisdiction over SGC, KGUSA, or KGC (collectively the "Mining Defendants").[1]

[1] As separate and distinct legal entities, SGC, KGUSA, and KGC all have unique jurisdictional and substantive defenses to the claims asserted against them. Where the defenses overlap, this reply brief combines the arguments. Where the positions are distinct, this reply brief makes that distinction.

It is undisputed that EPA and its contractors caused the August 5, 2015 Gold King Blowout. As the Sovereign Plaintiffs themselves state, "Defendant United States Environmental Protection Agency (the 'EPA') and its contractors triggered the catastrophic Gold King Mine spill on August 5, 2015." Doc. 61 at 17.[2] "There is no reasonable dispute that the Contractor Defendants, along with the Environmental Protection Agency ('EPA'), caused the blowout." Doc. 58 at 13. The Sovereign Plaintiffs also concede that none of the Mining Defendants were on site on August 5, 2015 and none had anything to do with EPA or its contractors' investigation, planning, or activities that day.

Instead, SGC is accused of lawfully and successfully reclaiming property in Colorado, and of faithfully complying with its permits, a Colorado Consent Decree, and numerous Colorado regulations and regulatory directives. KGUSA and KGC, in turn, are accused of failing to direct SGC to abandon or alter its successful reclamation practices and contravene what Colorado mandated. The agency required and court sanctioned reclamation measures SGC undertook were put in place to improve the water quality of the Animas River, and those measures have, without question, been effective. But for the unforeseeable, "inexplicable," and "reckless" actions of EPA and its contractors on August 5, 2015, the downstream Sovereigns would have no reason to suggest that any Mining Defendant took any action at all in, or directed toward, Utah or New Mexico.

The Sovereign Plaintiffs contend that SGC, which has no presence and conducts no business in either New Mexico or Utah, is nevertheless subject to personal jurisdiction in both states because it owns property in Colorado and successfully engaged in effective reclamation activities there. In essence, they claim that SGC should have foreseen that the federal

[2] Citations are to the ECF page number and not the page number of the brief itself.

government might someday recklessly excavate into a different mine, and because SGC failed to see that conduct coming, SGC is subject to personal jurisdiction in any state where the released water might flow. Similarly, they claim that some common directors and shared employee email addresses transform SGC into an "agent" of KGUSA and KGC, and thus make KGUSA and KGC vicariously responsible for SGC's lack of clairvoyance.

In reality, no Mining Defendant has ever purposefully directed any activities toward Utah or New Mexico. The capture and retention of water in Colorado undertaken to improve water quality is not, and cannot possibly be, an activity "purposefully directed' toward Utah or New Mexico. The fact that KGUSA and KGC did not control SGC's activities and require bulkhead removal demonstrates only that SGC operated independently and appropriately as a subsidiary. KGUSA and KGC are not owners, operators, or arrangers and have no CERCLA liability as a matter of law. The Sovereign Plaintiffs' claims are preempted by the Clean Water Act and CERCLA, and complete relief is not available without the State of Colorado. Finally, the idea that punitive damages are available when the claim at issue indisputably arises from SGC's adherence to the law, Colorado regulations, and the Consent Decree is nonsensical. For all of these reasons, the claims against the Mining Defendants should be dismissed.

II. ARGUMENT:

A. This Court lacks personal jurisdiction over each Mining Defendant.

1. Undisputed jurisdictional facts.

SGC is a Delaware corporation, and its principal place of business is in Colorado. SGC does not do business in Utah or New Mexico, is not licensed to do business in Utah or New Mexico, does not have a registered agent in Utah or New Mexico, and does not own, lease or maintain any property in Utah or New Mexico. SGC has no employees in Utah or New Mexico.

SGC has never availed itself of the privilege of doing business in Utah or New Mexico. This suit does not arise out of or relate to SGC activities in Utah or New Mexico because there have been none. Declaration of Kevin Roach, Doc. 42-2.

KGUSA is a Nevada corporation, with its principal place of business in Colorado. KGUSA does not do business in Utah or New Mexico, is not licensed to do business in Utah or New Mexico, does not own, lease or maintain property in Utah or New Mexico, and did not conduct, and does not conduct, any business in New Mexico. This suit does not arise out of or relate to KGUSA activities in Utah or New Mexico, and the claims do not arise from or relate to any action that KGUSA has ever purposefully directed at either Utah or New Mexico. Declaration of Martin Litt, Doc. 42-3.

KGC is a Canadian corporation, with its principal place of business in Toronto, Canada. KGC does not do business in Utah or New Mexico, is not licensed to do business in Utah or New Mexico, does not have a registered agent in Utah or New Mexico, and does not own, lease or maintain any property in Utah or New Mexico. KGC has no employees in Utah or New Mexico. KGC has never availed itself of the privilege of doing business in Utah or New Mexico. This suit does not arise out of or relate to KGC activities in Utah or New Mexico because there have been none. Declaration of Kathleen Grandy, Doc. 42-4.

In addition to the undisputed facts set forth above, the Sovereign Plaintiffs concede several additional facts. The successful reclamation work undertaken pursuant to the Consent Decree was done by SGC before KGUSA acquired SGC's corporate parent in 2003. Doc. 67 at 16. The engineered concrete bulkheads SCG installed "were designed to block the discharges" and impound water in Colorado. *Id*. The work was done pursuant to a reclamation plan required by Colorado regulators and reflected in the Consent Decree. *Id*. KGUSA and KGC are accused

of allowing SGC to leave that reclamation work in place. *Id.* at 17. Ultimately, the Sovereign Plaintiffs allege, "The Mining Defendants' [SGC's] decision to install the bulkheads—and their subsequent refusal to remove them—is the root cause of the hazardous conditions that culminated in the August 5 blowout at the Gold King Mine." *Id.* This activity—installing engineered concrete bulkheads and then leaving them in place to reduce discharges—took place in Colorado, pursuant to Colorado regulation and a Colorado court ordered Consent Decree, and was intended to and did improve water quality in Colorado. It was not purposefully directed at New Mexico or Utah.

2. There has been no purposeful activity directed at New Mexico or Utah.

The parties agree that "[S]pecific personal jurisdiction requires (1) minimum contacts to show that (a) the defendant purposefully directed its activities at the forum state, and (b) the plaintiff's cause of action arose out of those activities; and (2) the exercise of jurisdiction would be reasonable and fair." Doc. 67 at 20; *Old Republic Ins. Co. v. Continental Motors, Inc.*, 877 F.3d 895, 909 (10th Cir. 2017). To establish specific personal jurisdiction, as the Tenth Circuit has explained, a plaintiff must present evidence of "(a) an *intentional action* … that was (b) *expressly aimed* at the forum state … with (c) *knowledge* that the brunt of the injury would be felt in the forum state." *Old Republic Ins. Company*, 877 F.3d at 907 (emphasis added); *McManemy v. Roman Catholic Church of Diocese*, 2 F.Supp.3d 1188, 1199 (D.N.M. 2013). The Sovereign Plaintiffs have not alleged facts sufficient to meet this test.

The Sovereign Plaintiffs suggest that the test is met simply because SGC took *some* action in Colorado. In doing so, they focus on the first prong of the test, but ignore parts (b) and (c). They claim that the act of capturing water in Colorado subjects SGC to jurisdiction in New Mexico and Utah because it was foreseeable that water, if released, would flow downstream. As

the Tenth Circuit has held, however, foreseeability does not create jurisdiction. Rather, a plaintiff "must establish…not only that defendants foresaw (or knew) that the effects of their conduct would be felt in the forum state, but also that defendants undertook intentional actions that were expressly aimed at that forum state." *Whiting v. Hogan*, 855 F.Supp. 2d 1266, 1281(D.N.M. 2012); *Resource Assoc. Grant Writing & Eval. Serv., Inc. v. Southampton Union Free School Dist.*, 193 F.Supp. 3d 1200, 1222 (D.N.M. 2016).

The "intentional and wrongful action" element requires not that a defendant take just *any* action, but as the Supreme Court explained in *Calder v. Jones*, 465 U.S. 783 (1984), the actions must be *expressly aimed* at and *intended to cause injury* in the forum state:

> Petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were *expressly aimed* at California. Petitioner South wrote and petitioner Calder edited an article that they *knew* would have a potentially devastating impact upon respondent. And they *knew that the brunt of that injury* would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.

Calder v. Jones, *Id*. at 789 (emphasis added). In other words, as the Tenth Circuit has held, the defendant's actions must be "performed for the *very purpose* of having their consequences felt in the forum state[.]" *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (emphasis added) (internal quotation omitted).

To meet this test, the Sovereign Plaintiffs must allege and demonstrate that SGC's efforts to capture water in Colorado were *expressly aimed* at New Mexico and Utah, and that the "*very purpose*" of SGC's bulkheading was to discharge acidic water in New Mexico and Utah. Obviously, they cannot meet this test. As the Consent Decree recites, the "very purpose" of the engineered concrete bulkheads was "*to protect the waters of the State of Colorado*." Doc. 42-1 at 9 (emphasis added). The "express aim" was to retain water in Colorado. Nothing about those

actions or inactions reflects an "intent" to cause injury in New Mexico or Utah and nothing about them reflects knowledge that an injury would be felt in a downstream State. There was no reason for any of the Mining Defendants to "reasonably anticipate being haled" into New Mexico or Utah courts based on SGC's regulated conduct in Colorado. *Smith v. Cutler*, 504 F.Supp. 2d 1162, 1170 (D.N.M. 2007).

The Sovereign Plaintiffs refer to a footnote from *Old Republic* and argue that a defendant "need not 'actually intend to harm forum state residents' for jurisdiction to be proper." Doc. 67 at 21. The footnote actually states, "We instead ask whether the defendant *intended* its online content to *create effects* specifically *in the forum state*." *Old Republic*, 877 F.3d at 917 n.35. Obviously, when the objective was to retain water in Colorado, and the *intent* was to "improve water quality" in Colorado, SGC could not have intended to "create effects" in either New Mexico or Utah. Indeed, the only effect that SGC intended and achieved was improved water quality.

The 2007 EPA proposal, Exhibit A to the Declaration of John Gilmour, clearly describes both the intent of SGC's bulkheading and the positive impact of SGC's actions. Doc. 67-2. In describing SGC's remedial measures conducted pursuant to the Consent Decree, the document notes, "Three bulkheads were placed in this tunnel *to stop water discharges*." Doc. 67-2 at 3 (emphasis added). The proposal goes on to describe SGC's successful compliance with the Consent Decree. As the Sovereign Plaintiffs allege, before the effective bulkheading, the American Tunnel was discharging "roughly 1,700 gallons of acid mine drainage per minute." Doc. 67 at 16 (citing NM FAC ¶ 30). SGC's efforts drastically reduced this drainage:

> Under jurisdiction of a court consent decree to terminate their discharge permit, SGC installed several bulkheads within the Sunnyside Mine *which has greatly reduced the amount of discharge out of the American tunnel*. Seventy to 100 GPM continues to discharge presumably from near surface, 'natural' ground

> water flows. All terms of the consent decree were met by SGC and in January of 2003 the treatment facility, operations, and permit were transferred to Gold King Corp., which owned much of the land intersected by the American tunnel.

Doc. 67-2 at 4 (emphasis added). Actions that cut discharges from 1,700 to 100 gallons per minute were obviously undertaken to improve water quality, and their intended and actual effect was to avoid pollution, not to direct it toward a downstream state.

SGC, along with state and federal regulators in Colorado, intended for the engineered concrete bulkheads to improve water quality by restoring the natural hydrology surrounding the Sunnyside Mine. If the Sovereign Plaintiffs disagreed with that approach, their remedy was to participate in the permitting process, rather than more than a decade later attempting to subject the Mining Defendants to personal jurisdiction hundreds of miles downstream. See 33 U.S.C. § 1341(a)(2). As the Seventh Circuit explained following remand of *Illinois v. Milwaukee*:

> Illinois' basic grievance is that the permits issued to Milwaukee pursuant to the Act do not impose stringent enough controls on the discharges. Nevertheless, Illinois failed to participate in the permit issuing process when the Milwaukee permits were issued. *See Milwaukee II*, 451 U.S. at 325, 326, 101 S.Ct. at 1796, 1797. In light of the FWCPA's preemption of federal common law, *that process seems now to be the appropriate federal forum for adjusting the competing claims of states in the environmental quality of interstate waters*. Illinois' failure to participate in that process cannot now justify unilateral application of Illinois law to these discharges. If Illinois desires more stringent protection from out-of-state discharges, it must turn in the first instance to the EPA and federal law for the equitable accommodation of its interests.

People of State of Ill. v. City of Milwaukee, 731 F.2d 403, 412-413 n.5 (7th Cir. 1984) (emphasis added). The same can clearly be said of the Sovereign Plaintiffs. They complain that SGC allegedly discharged "waste into New Mexico's and Utah's waters without having to comply with those states' laws and regulations." Doc. 67 at 22. This Court, however, is not the "appropriate federal forum" to resolve any complaint the Sovereign Plaintiffs may have with upstream discharges or the regulatory conduct of upstream sovereign states.

In the interstate pollution context, even in the case of intentional upstream discharges, a condition not present here, the Clean Water Act and its federalism impacts must be considered. The assertion of personal jurisdiction over the Mining Defendants is intertwined with the Clean Water Act and its preemptive effect as set forth below. When evaluating personal jurisdiction, "The sovereignty of each State . . . implies a limitation on the sovereignty of all its sister States." *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980); *see also Bristol-Meyers Squibb v. Superior Ct. of CA*, 137 S.Ct. 1773, 1780-1781 (2017). With interstate water, the Clean Water Act changes the jurisdictional assessment:

> We agree that, given the existence of a federal common-law claim at the commencement of the suit, *prior to the enactment of the 1972 Amendments*, personal jurisdiction was properly exercised and venue was also proper.

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 312, n.5 (emphasis added). Once the Clean Water Act was put into place, property owners like SGC, operating in a source state like Colorado, should reasonably expect to be subject to the laws and jurisdiction of Colorado, not to jurisdiction in any downstream state.

To support their suggestion that discharging water in an upstream state constitutes an "express aiming" at downstream jurisdictions, the Sovereign Plaintiffs cite to four inapplicable and outdated decisions. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971), for instance, pre-dated the Clean Water Act and involved the Supreme Court refusing to exercise its original jurisdiction to hear a state common law nuisance case arising out of interstate water pollution. The Court's analysis in *Wyandotte* was partially overruled in *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 n.3 (1972) and then completely repudiated in *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317-8 (1981).

Pakootas v. Teck Cominco Metals, Ltd., 2004 WL 2578982 (E.D.Wash. 2004), *aff'd* 452 F.3d 1066, 1072 (9th Cir. 2006), was a federal district court decision where the 9th Circuit only noted, "On this appeal, Teck does not challenge the district court's determination that it had personal jurisdiction over Teck." None of the Clean Water Act implications discussed above were at issue. *Pakootas* involved allegations of an intentional, unregulated, unpermitted discharge of pollutants into international waters. SGC, by contrast, is accused of successfully bulkheading a permitted mine with an intention that water both remain *in* Colorado and be *cleaner* as a result.

Welch v. PUC Servs., Inc. 2007 WL 2818805 (W.D. Mich. Sept. 25, 2007), involved another intentional, international discharge of sewage into the St. Mary's river. Because the discharge was in Canada, there was again no analysis of the Clean Water Act's jurisdictional ramifications. Finally, *Violet v. Picollo*, 613 F. Supp. 1563 (D.R.I. 1985), arose out of third party transportation of hazardous materials to a contaminated hog farm in Rhode Island and predated much of the interstate pollution jurisdictional analysis that has developed in the last 30 years.[3] It certainly does not justify personal jurisdiction over all upstream entities and their corporate affiliates.

3. There has been no "agency" showing sufficient to sustain personal jurisdiction over KGUSA or KGC.

The Sovereign Plaintiffs suggest that jurisdiction exists over KGUSA and KGC because SGC is subject to such jurisdiction and SGC is the "agent" of the KGUSA and KGC "principal."

[3] On one of the few occasions the *Welch* case has been discussed, its analysis was rejected. "[T]his Court finds that despite CERCLA's compensatory scheme, such a broad reading would allow 'minimum contacts' to essentially equal 'no contacts.' As a result, such a broad reading of CERCLA necessarily impedes upon the constitutional limitations of minimum contacts as defined by the Supreme Court." *Crown Cork & Seal Co., Inc. v. Dockery*, 886 F.Supp. 1253, 1259 n.4 (M.D.N.C. 1995).

Doc. 67 at 26. As set forth above, SGC's activities were directed at improving water quality in Colorado, making personal jurisdiction over SGC in New Mexico or Utah entirely inappropriate. Without jurisdiction over the agent, there can be no jurisdiction over the principal. Even if the Court is inclined to look into this issue further, the documents attached to Sovereign Plaintiffs' response do not justify personal jurisdiction over any Mining Defendant.

Any "agency" or "alter ego" analysis must start with the presumption that jurisdiction over a subsidiary does *not* establish jurisdiction over a parent. "Judicial jurisdiction over a subsidiary corporation does not of itself give a state judicial jurisdiction over the parent corporation [even if] the parent owns all of the subsidiary's stock." *Jemez Agency, Inc. v. Cigna Corp*., 866 F.Supp. 1240, 1343 (D.N.M. 1994) (quoting *Restatement (Second) of Conflicts of Laws* § 52 cmt. B (1971)); s*ee also Walker v. THI of New Mexico at Hobbs Center*, 801 F.Supp. 2d 1128 (D.N.M. 2011); *Lucero v. Carlsbad Med. Ctr., LLC*, 2018 WL 3209406, *3 (D.N.M. June 29, 2018).

Critically, the conduct allegedly giving rise to liability in this case—successfully installing bulkheads to retain water in Colorado—was undertaken *before* KGUSA or KGC had any interest in SGC's corporate parent. The fact that KGUSA and KGC did not order SGC to remove the bulkheads does not establish, or even suggest, that SGC was an agent or alter ego. Rather, it reflects that SGC operated appropriately and independently. The notion that a failure by KGUSA or KGC to direct and control the activities of SGC somehow transforms SGC into an agent or alter ego defies logic. The suggestion that simply by not controlling the activities of an indirect corporate subsidiary, a corporate affiliate somehow commits a purposeful act directed at

New Mexico and Utah is equally absurd.[4]

The fact that SGC became part of the Kinross corporate family in 2003 has little to do with the analysis. Terms such as "we," "us," or "our" appearing in legal filings or a website makes no difference. "[G]eneral references by a parent corporation to the business of a subsidiary as being part of the business of the parent" are not sufficient to create parental liability. *Weisler v. Community Health Sys., Inc.*, 2012 WL 4498919, *5 (D.N.M. Sept. 27, 2012); *see also Lucero*, 2018 WL 3209406 at *4 (quoting *Berry v. Bryant*, 2012 WL 12819204, *5 (D.N.M. Mar. 15, 2012)).

Review of the exhibits the Sovereign Plaintiffs attach to demonstrate KGUSA and KGC "control" over SGC reflects no such thing. Some note the use of a common email address by employees of both the parent corporation and its subsidiaries. *See* Doc. 67-3, 67-4, 67-5. That practice simply reflects the reality of modern day corporate communication, not overarching control. "Similarly, the use of same email addresses, i.e., '@first energycorp.com' by the employees of the parent corporation and its subsidiaries does not show that FEC exercises greater than normal control over its subsidiaries. The Court observes that this is a common practice among consolidated companies." *Rice v. First Energy Corp.*, 2018 WL 4282850, *9 n.9. (W.D. Pa. Sept. 7, 2018). Ex. E describes a general Health and Safety Standard the parent corporation adopted for the entire corporate family. Doc. 67-6. It demonstrates nothing about excessive control or alter ego liability. The fact that a drilling subcontractor performing some

[4] Any notion that SGC was undercapitalized is also a red herring. There is no claim, and no evidence to suggest, that SGC left the bulkheads in place because it could not afford to remove them. Rather, all of the evidence demonstrates that the bulkheads remained because the State of Colorado mandated them, and because they did what they had been designed to do, i.e., retain water in the State of Colorado and thereby improve water quality.

unrelated remedial investigation work in Colorado identified its client as "Kinross" rather than "SGC" cannot create personal jurisdiction over KGUSA or KGC in New Mexico or Utah.

The Sovereign Plaintiffs make much of the unremarkable proposition that some corporate officers within the KGC family of entities at times wear different hats. There is nothing remarkable, however, about corporate employees serving different roles for different corporate entities and the Supreme Court plainly stated as much in *Bestfoods*. "[D]irectors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." *United States v. Bestfoods*, 524 U.S. 51, 66 (1998) (quoting *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997)). As a result, there is a presumption that officers or directors are "wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary." *Id.* (internal citation omitted). The Sovereign Plaintiffs have alleged nothing to overcome this presumption.

Finally, to subject a parent corporation to jurisdiction based on the suggestion that it is using its subsidiary as an "alter ego" requires a "demonstration of improper or fraudulent purpose for incorporation[.]" *Jemez Agency, Inc.*, 866 F.Supp. at 1345. "Mere control by the parent corporation is not enough to warrant piercing the corporate veil. Some form of moral culpability attributable to the parent, such as use of the subsidiary to perpetrate a fraud is required." *Scott v. AZL Resources, Inc*. 753 P.2d 897, 900 (N.M. 1988); *Quarles v. Fuqua Indus., Inc*., 504 F.2d 1358, 1362 (10th Cir. 1974). There is no such allegation here.

Most importantly, the Court need not get sidetracked with these extraneous exhibits. The actions in question in this lawsuit involve installing engineered concrete bulkheads—conduct undertaken before KGUSA or KGC had any interest in SGC's parent—and leaving those bulkheads in place. None of the Sovereign Plaintiffs' exhibits have anything to do with these

issues. At most, they reflect normal corporate affiliate interactions. The undisputed facts have not changed. Everything SGC did, or failed to do, was done in Colorado and at the direction of Colorado. To the extent that KGUSA or KGC "failed" to direct the activities of SGC, they acted exactly as corporations are supposed to act with their subsidiaries. Most importantly, SGC's actions were always intended to and did in fact improve water quality. There was never any purposeful action, by any Mining Defendant, expressly intended to cause injury in New Mexico or Utah. Consequently, the Mining Defendants are not subject to personal jurisdiction in New Mexico or Utah.

4. The exercise of jurisdiction over the Mining Defendants would be unreasonable.

In addition to requiring sufficient minimum contacts to demonstrate purposeful direction at the forum state, due process requires that the exercise of jurisdiction must be "reasonable and fair." *Old Republic Ins.*, 877 F.3d at 909.[5] The Tenth Circuit has held that in evaluating the "reasonableness" of asserting personal jurisdiction over a non-resident defendant, courts should apply a "sliding scale." "[T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1280 (10th Cir. 2005) (citations omitted). Here, there are *no* minimum contacts between the Mining Defendants and New Mexico or Utah. As a result, to find the assertion of jurisdiction unreasonable requires a minimal showing.

[5] Sovereign Plaintiffs suggest that any argument that the assertion of jurisdiction would be "unreasonable" has been waived since it was not raised in the Mining Defendants' opening brief. Doc. 67 at 20. Sovereign Plaintiffs are mistaken—*see* Doc. 42 at 13. The Mining Defendants did not analyze the various "unreasonable" factors because there has been no purposeful direction and thus no need to address the factors. As the Sovereign Plaintiffs chose to discuss those factors in their response, they are addressed in this reply.

To assess the "reasonableness" of jurisdiction, courts consider the following factors:

> (1) The burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental social policies.

OMI Holdings, Inc. v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1091 (10th Cir. 1998). Analysis of each of these factors demonstrates the "unreasonableness" of jurisdiction over the Mining Defendants in either New Mexico or Utah. As was set forth by uncontroverted affidavit, none of the Mining Defendants have any meaningful presence in either state. The relevant witnesses and the Gold King Mine where the blowout occurred are in Colorado. New Mexico and Utah may have an interest in resolving this dispute, but that interest cannot be addressed by filing suit in a state where the Mining Defendants are not subject to jurisdiction. There is no reason why litigating in Colorado would be any less inconvenient for Utah and New Mexico than litigating in New Mexico and Utah would be inconvenient for the Mining Defendants.[6] The fourth and fifth factors are reflected in the Clean Water Act and the required application of the law of the forum state to the events in question. As the Supreme Court found in *Ouellette* and as discussed more fully below, the Clean Water Act reflects a congressional decision that disputes involving interstate waters must be decided according to the law of the source state—Colorado—and *in* Colorado.[7]

---

[6] This unreasonableness factor applies with even greater force in the case of a foreign defendant like KGC. "When the defendant is from another country, this concern is heightened and 'great care and reserve should be exercised' before personal jurisdiction is exercised over the defendant." *OMI Holdings, Inc.*,149 F.3d at 1096 (quoting *Asahi Metal Industry Co. v. Superior Court of California*, , 480 U.S. 102, 114 (1987)).

[7] The Sovereign Plaintiffs cite to *Payless Shoesource, Inc. v. Joye*, 2012 WL 646024, *5 (D.Kan. Feb 27, 2012), to support their position, claiming "this factor weighed in favor of jurisdiction in California where dispute concerned California property and was governed by California law."

5. No jurisdictional discovery will establish personal jurisdiction over the Mining Defendants.

The facts demonstrating the lack of personal jurisdiction over any Mining Defendant in New Mexico or Utah are not disputed. No amount of discovery will change them. "The burden of demonstrating a legal entitlement to jurisdictional discovery" rests on the party seeking the discovery. *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1189 n.11 (10th Cir. 2010). Jurisdictional discovery is properly denied where there is a low probability that jurisdictional discovery would impact the outcome of the case. *See Bell Helicopter Textron, Inc. v. Heliqwest Intern., Ltd.*, 385 F.3d 1291, 1299 (10th Cir. 2004); *see also Grynberg v. Ivanhoe Energy, Inc.*, 490 Fed. Appx. 86, 102–03 (10th Cir. 2012) (unpublished). No jurisdictional discovery will establish personal jurisdiction over any Mining Defendant.

As the Tenth Circuit concluded in *OMI Holdings*, "Our personal jurisdiction analysis requires that we draw a line in the sand. At some point, the facts supporting jurisdiction in a given forum are so lacking that the notions of fundamental fairness inherent in the Due Process Clause preclude a district court from exercising jurisdiction over a defendant." *OMI Holdings*, 149 F.2d at 1098. This is such a case.

B. The Clean Water Act preempts the Sovereign Plaintiffs' claims.

Faced with overwhelming case law and the law of this case as set forth in Judge Armijo's decision regarding Clean Water Act preemption, the Sovereign Plaintiffs say little about the Clean Water Act in the apparent hope that it will "just go away." Doc. 67 at 41-43. They also concede that they "do not believe reconsideration of Judge Armijo's Order is appropriate at this

---

Doc. 67 at 31. The instant dispute concerns property in Colorado, and as the Court has already concluded, is governed by Colorado law.

time on any issue." Doc. 67 at 42 n.9. As was set forth in the Mining Defendants' opening brief, Judge Armijo got it right and the Clean Water Act preempts the Sovereign Plaintiffs' claims.

Initially, the Sovereign Plaintiffs mistakenly argue that the Mining Defendants have only contended that the Clean Water Act requires application of Colorado law to their claims, suggesting that the statutory and tort claims can all proceed, just governed by Colorado law. Doc. 67 at 41. Colorado law clearly applies to this dispute, as found by the Supreme Court in *Ouellette* and as found by Judge Armijo. Clean Water Act preemption, however, goes beyond a choice of law analysis. Because the United States Supreme Court has conclusively held that the Clean Water Act preempts application of downstream state law to upstream regulated discharges, downstream claims are preempted.

In *Milwaukee v. Illinois and Michigan*, the Supreme Court found that Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. at 317. The Court expanded upon these conclusions in *Ouellette*, finding that downstream regulation or relief through litigation would conflict with the regime Congress established in the CWA and so was preempted:

> After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'

479 U.S. 481 (1987) 493 (quoting *Hillsborough County Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)).

Faced with this broad preemption, the Sovereign Plaintiffs raise the two savings clauses found in 33 U.S.C. § 1370 and 33 U.S.C. § 1365(e). These are the same savings clauses New Mexico raised in opposition to ER's motion and which Judge Armijo wisely rejected. Judge Armijo first discussed the Supreme Court's analysis of both §1370 and §1365(e) in *Ouellette*:

> The [Supreme] Court stated that the language at Section 1370 only preserves the authority of a state to regulate waters within its boundaries. Id. at 493. As to Section 1365(e), the Court noted that it applied only to "this section," namely, the section that allows citizen suits. Id. at 493. The Court stated that Section 1365(e), therefore, did "not purport to preclude preemption of state law by other provisions of the Act." The Court then stated:
>
> > After examining the CWA as a whole, its purpose and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress…*Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause*, we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

Doc. 203[8] at 65 (quoting *Ouellette*, 479 U.S. at 493-494) (emphasis added) (citations omitted).

This conclusion was reinforced by the 5th Circuit in the Deepwater Horizon litigation:

> Notably, *Ouellette* also confronted and rejected the contention that two provisions of the CWA, which preserved a State's right to regulate its waters and an injured party's right to seek relief under 'any statute or common law,' authorized the nuisance suit under the affected state's law rather than that of the point source state. According to the Court, neither savings clause, carefully read, would stand for so broad a proposition.

In re Deepwater Horizon, 745 F.3d 157, 167 (5th Cir. 2014) (internal citation omitted). The savings clauses do nothing for the Sovereign Plaintiffs.

The Sovereign Plaintiffs next suggest that even if their common law claims are preempted, their statutory claims might survive. The 5th Circuit specifically rejected this idea as well:

> Allowing up to five states along the Gulf Coast to apply their individual laws to discharges arising on the Shelf would foster the legal chaos described by *Ouellette*. That three Gulf coast states submitted amicus briefs in this appeal, and all five Gulf Coast states filed suits to recover damages based on particular state laws testifies to the problem. Moreover, just as with entities operating in point-

[8] "Doc. 203" refers to Document 203 in the original docket, the *Memorandum Opinion and Order, State of New Mexico v. US EPA et al.*, No. 1:16-cv-00465-MCA-LF (D.N.M. Feb. 12, 2018), ECF No. 203.

> source states, if entities engaged in developing the OCS were subjected to a multiplicity of state laws in addition to federal regulations, they could be forced to adopt entirely different operational plans or in the worst case be deterred by the redundancy and lack of regulatory clarity from even pursuing their OCS plans. The reasons for avoiding redundant or conflicting legal regimes are equally potent whether the point source is located in a state or a federal enclave.

Id. at 170-171. The Supreme Court reached the same conclusion in *Ouellette*:

> The possibility that a source will have to meet a number of different standards is relatively small in this case, since Vermont is the only State that shares Lake Champlain with New York. But consider, for example, a plant that discharges effluents into the Mississippi River. A source located in Minnesota theoretically could be subject to the nuisance laws of any of the nine downstream States.

Ouellette, 479 U.S. at 496 n.17. The Mining Defendants cannot be subject to the laws of New Mexico, Utah, Arizona, California, and presumably the nation of Mexico simply because SGC is a regulated entity owning property in a headwaters state.

Finally, the Sovereign Plaintiffs suggest that because the Gold King Blowout was "unpermitted," none of the Clean Water Act preemption analysis applies. Doc. 67 at 43. Again, Judge Armijo plainly rejected this suggestion. "Thus, the lack of a permit for the August 5, 2015 release does not alter the conclusion that the CWA preempts application of New Mexico law to a discharge with a point source in Colorado." Doc. 203 at 65-66. In addition, SGC had a permit for all of its activities. It had discharge permits when it operated the Sunnyside Mine and as required during mine reclamation. The bulkheading work itself was the subject of its own reclamation permit and that reclamation permit is still in effect. *See* http://mining.state.co.us/Reports/MiningData/Pages/SearchByOperator.aspx.

In addition, the Consent Decree states, "All activities undertaken by SGC pursuant to this Consent Decree will be undertaken in accordance with the requirements of all applicable local, state and federal statutes, regulations, and ordinances." Doc. 42-1 at 26. In other words, everything SGC did before and pursuant to the Consent Decree, including installing the

engineered concrete bulkheads, was regulated and permitted. The fact that the Gold King Blowout was not is irrelevant to any analysis of the Mining Defendants' liability.

The Sovereign Plaintiffs suggest that perhaps while a discharge is permitted, claims based on that permitted discharge would be preempted, but in the case of successful remediation, reclamation, and permit release, downstream states are free to assert claims regarding upstream work. Doc. 67 at 43. Such an approach is nonsensical and would lead to the situation where a permittee in an upstream state would be encouraged to *never* complete reclamation and seek permit release because doing so would trigger expansive liability to downstream states. In addition, SGC cannot simply ignore Colorado law and "un-do" permitted mine reclamation. CRS § 34-32-116 provides that "Every operator to whom a permit is issued pursuant to the provisions of this article shall perform such reclamation as is prescribed by the reclamation plan adopted pursuant to this section." SGC was obligated to follow Colorado regulatory dictates and did so.

The practical effect here is complete preemption. Colorado required bulkheading. The Consent Decree resolved any SGC liability for the consequences of that bulkheading:

> In consideration of the actions to be performed by SGC under this Consent Decree, the Division covenants not to sue or to take administrative action against SGC for seeps or springs which may emerge or increase in the Upper Animas River or Cement Creek drainages following installation of bulkhead seals in the American or Terry Tunnels, *during the term of this Consent Decree and thereafter*, if SGC fulfills the requirements of the Consent Decree, there is a Successful Permit Termination Assessment pursuant to paragraph 14 and permit termination is achieved.

Doc. 42-1 at 30-31 (emphasis added). Under Colorado law as set forth in the Consent Decree, there will be no action for seeps or springs which may arise as a consequence of the successful bulkheading. The same result should apply to the Sovereign Plaintiffs' claims.

Complying with regulatory dictates and leaving the Court ordered reclamation in place creates no liability or actionable conduct. As the 4th Circuit noted in *North Carolina, ex. rel. Cooper v. TVA*, "An activity that is explicitly licensed and allowed by Tennessee law cannot be a public nuisance." 615 F.3d 291, 310 (4th Cir. 2010). Even applying Colorado law, there would be no viable claim for the Sovereign Plaintiffs to assert. There is no negligence, much less gross negligence, no public or private nuisance, no trespass, and certainly no liability for violating an inapplicable Utah statute.

SGC reclaimed the Sunnyside Mine in accordance with its permits, the dictates of the relevant Colorado regulatory agencies, and the obligations imposed in the Consent Decree. By the time KGUSA and KGC acquired an indirect interest in SGC in 2003, the bulkheading had been successfully completed. No Mining Defendant should now be subjected to indeterminate tort claims from every downstream entity through which their regulated discharges might have reason to pass.

> "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless." 731 F.2d, at 414. It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.

Ouellette, 479 U.S. at 496-497 (quoting *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403, 404 (7th Cir. 1984) ("Milwaukee III")). Congress certainly did not intend for SGC to comply with Colorado regulators and a Colorado Court only to face personal jurisdiction and tort liability in New Mexico or Utah and the concept is even clearer for KGUSA and KGC.

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

Each of the Sovereign Plaintiffs assigns fault to SGC for installing engineered concrete bulkheads in Colorado and to KGUSA and KGC for not contravening the Colorado regulatory scheme and forcing SGC to remove those same bulkheads. It is undisputed, however, that the engineered concrete bulkheads were installed and maintained in place pursuant to specific directives of the State of Colorado and the court approved Consent Decree. Consequently, any adjudication of possible fault associated with installation of the bulkheads must, of necessity, include the State of Colorado.

1. A joint tortfeasor can still be a necessary party.

The Sovereign Plaintiffs initially argue that because Colorado is allegedly a "joint tortfeasor," it cannot be a required party. Doc. 67 at 44-45. The Sovereign Plaintiffs extend the "joint tortfeasor" concept too far. While it may be true that joint tortfeasors are not, by definition, necessary parties in every case, *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990), a party can be *both* a joint tortfeasor and a necessary party. As the Eleventh Circuit explained in *Laker Airways, Inc. v. British Airways, PLC*, "[A] joint tortfeasor will be considered a necessary party when the absent party 'emerges as an active participant' in the allegations made in the complaint that are 'critical to the disposition of the important issues in the litigation.'" 182 F.3d 843, 848 (11th Cir. 1999) (citations omitted).

Here, Colorado, as the regulatory authority overseeing all of SGC's conduct, is much more than an alleged joint tortfeasor. With the police power it wields over SGC, along with its regulatory authority and status as a party to the Consent Decree, and because it issued discharge permits to SGC and required bulkheading as part of mine reclamation, Colorado was clearly an "active participant" in the conduct at issue. Indeed, as New Mexico has alleged, Colorado

"directed, authorized, and allowed" the activities in question. Doc. 42 at 25. As an active participant, Colorado is much more than an alleged joint tortfeasor and clearly has an interest in this proceeding. Fed. R. Civ. P. 19(a)(1).[9]

2. The Court cannot accord complete relief without Colorado.

Because Colorado is the state in charge of regulating SGC's conduct, none of the relief the Sovereign Plaintiffs seek can be granted without Colorado's presence, making Colorado a necessary party to this action. The Sovereign Plaintiffs initially suggest that because SGC satisfied its obligations under the Consent Decree, SGC is now free to ignore the Decree and simply un-do the millions of dollars' worth of effective reclamation work completed under the Decree. Doc. 67 at 46. Such a reading of regulatory requirements and court orders is absurd. Mining companies cannot agree on reclamation plans, successfully implement them under court orders and then, once the work is done, tear them up if some downstream party thinks it has a better idea.

3. Colorado has an interest in this litigation.

The Sovereign Plaintiffs next suggest that Colorado has no interest in this proceeding. How the Sovereign Plaintiffs can claim an interest in their respective water quality but Colorado cannot is not explained. EPA cannot represent Colorado's interest because EPA has delegated its authority over water quality in the State of Colorado to Colorado.

In addition, Colorado is a party to the Consent Decree. As the Sovereign Plaintiffs allege, a consent decree 'is to be construed for enforcement purposes basically as a contract." Doc. 67 at 46 (citing *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 607 (1984)).

[9] The Sovereign Plaintiffs erroneously suggest that the Rule 19(a)(1) requirements for finding a party necessary must *all* be satisfied, suggesting, "When any of these factors are missing, joinder is not necessary." Doc. 67 at 45. In fact, Rule 19(a)(1) separates the clauses by the word "or." When any *one* of these factors is present, joinder *is* necessary.

The Sovereign Plaintiffs then contend that there is "no authority for the notion that a state becomes a necessary party to litigation simply by entering into an agreement with a private party." *Id.* at 47. The *Northrop Corp. v. McDonnell Douglas Corp.*, decision cited for this proposition did note that while a "nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract (citations omitted)," there is a "correlative rule that *all parties who may be affected by a suit to set aside a contract must be present*[.]" 705 F.2d 1030, 1044 (9th Cir. 1983). This rule is well established:

> No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, *all parties who may be affected by the determination of the action are indispensable*. (citations omitted). This principle, declared by the Supreme Court more than a century ago in *Shields v. Barrow*, 17 How. 129, 15 L.Ed. 158 (1854) is codified in Rule 19 of the Federal Rules of Civil Procedure as follows[.]

Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975) (emphasis added). In *Lomayaktewa*, third parties filed suit seeking to undo a lease involving Peabody Coal and the Hopi Tribe. The Court found that the Hopi Tribe, as a party to the lease, was an indispensable party who could not be joined due to its sovereign immunity and so dismissed the case. The same result should apply here. The Consent Decree required the installation of engineered concrete bulkheads. The Sovereign Plaintiffs seek to hold the Mining Defendants liable for installing and then not removing those bulkheads. The State of Colorado, as the other party to the Consent Decree, is an indispensable party to any such challenge.

The Sovereign Plaintiffs also cite to *Northrop* for the proposition that every regulatory agency is not a necessary party to every dispute involving regulated entities. Doc. 67 at 47. The Mining Defendants do not contend otherwise. Here, however, Colorado is more than just a general regulator. Colorado is a party to the very Consent Decree that authorized and mandated the bulkheads. When the conduct challenged is specifically required by a regulatory agency, and the

agency is a party to the Consent Decree at issue, the agency is a necessary party.

The Sovereign Plaintiffs recognize that "regulatory authorities are necessary parties only in suits involving challenges to particular laws, regulations and regulatory schemes." Doc. 67 at 47. They ignore, however, the fact that their claims in this case precisely challenge Colorado's regulatory scheme. The Sovereign Plaintiffs remarkably claim that they "are not challenging the way Colorado regulates mine reclamation." Doc. 67 at 47. Saying it does not make it so. The essence of their entire claim against SGC is a challenge to the Colorado regulatory and judicial framework with which SGC complied. This fact alone makes Colorado a necessary party.

4. Without Colorado, the Mining Defendants will be subjected to double, multiple, or otherwise inconsistent obligations.

The Sovereign Plaintiffs concede that the "concern here is whether an existing party can comply with one court's order without breaching the order of another court that relates to the same facts." Doc. 67 at 49. That is exactly the situation confronting the Mining Defendants. The successful bulkheading at issue was done pursuant to State of Colorado reclamation directives and a Colorado State District Court Consent Decree. SGC could not then, and neither SGC nor KGUSA nor KGC can now, ignore the clear mandates established by those directives and the Consent Decree. Bulkheading was a key element of Colorado's reclamation plan for the area. Per the Consent Decree and regulatory directives, the engineered concrete bulkheads were put in place and were to remain in place. To implement a different water quality management strategy would violate the reclamation directives and the Consent Decree and subject SGC, KGUSA, and KGC to inconsistent legal obligations.

To allow the imposition of money damages on any Mining Defendant as a consequence of installing the bulkheads and leaving them in place would also subject the Mining Defendants to "double" or "multiple" obligations. The State of Colorado ordered bulkheads installed at a

significant cost. The Sovereign Plaintiffs seek billions of dollars in damages allegedly suffered as a result of the bulkhead installation. Imposing money damages for court ordered reclamation creates a double or multiple obligation. As a result, under both Fed. R. Civ. P. 19(a)(1)(A) and (B), Colorado is a required party to this litigation.

5. Colorado cannot be joined as a party, and therefore, the case against the Mining Defendants must be dismissed.

"Equity and good conscience" do not allow this lawsuit against the Mining Defendants to go forward without Colorado. A judgment granting the relief the Sovereign Plaintiffs' seek in Colorado's absence would not be possible and any attempt at reaching a judgment without Colorado would prejudice both Colorado and the Mining Defendants. The Sovereign Plaintiffs argue that if this case were dismissed against the Mining Defendants, the Sovereign Plaintiffs would be deprived of any remedy at all. Doc. 67 at 52. The Sovereign Plaintiffs have apparently forgotten their claims against EPA, the Contractor Defendants, and most importantly their claim that the EPA administrator should enforce the Clean Water Act differently in Colorado. The only thing the Sovereign Plaintiffs would lose would be the ability to subject the Mining Defendants to tort liability and injunctive relief in downstream states when SGC complied with the regulatory authority and court decrees of the source state where it operates and KGUSA and KGC allowed that compliance to continue.

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

The Sovereign Plaintiffs § 113(h) preemption argument is based on a narrow interpretation of the geographic scope of EPA's response action. The Sovereign Plaintiffs contend that because the BPMD is in Colorado and, to date, there has been no response action in New Mexico or Utah, there can be no CERCLA preemption. The premise of this position is

flawed. The BPMD boundaries potentially extend downstream to areas "where hazardous substance has been 'deposited, stored, placed or *otherwise come to be located*.'" Doc. 183-4 at EPAH0000200 (emphasis added). "Until the site investigation process has been completed and a remedial action (if any) selected, the EPA can neither estimate the extent of contamination at the NPL site, nor describe the ultimate dimensions of the site." *Id*.

The Sovereign Plaintiffs argue that the definition of a "site" for NPL listing purposes is different than the scope of a response action under § 104 or § 106. The Mining Defendants agree that site listing does not define the scope of any response action ultimately selected for that site. The BPMD "site" as defined by EPA extends to wherever hazardous materials have "come to be located" which, according to EPA, is potentially all the way to Lake Powell. The response actions appropriate to address the scope of that "site" have yet to be determined, but that uncertainty does not prevent the § 113(h) "blunt withdrawal" of jurisdiction.

The fact that study and investigation are far from complete is of no consequence. In *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236 (9th Cir. 1995), the plaintiffs argued that a remedial investigation/feasibility study was not a "remedial or removal action" adequate to trigger preemption. The 9th Circuit rejected the argument and precluded the claims. "CERCLA defines a removal action to include 'such actions as may be necessary to *monitor, assess, and evaluate* the release or threat of release of hazardous substances…' 42 U.S.C. § 9601(23). An RI/FS satisfies this definition." *Id.* at 239 (emphasis added). EPA is monitoring, assessing, and evaluating the "site" right now, including in New Mexico and Utah.

In addition to misapprehending the potential scope of the CERCLA response action, the Sovereign Plaintiffs argue that their claims for injunctive relief, and abatement of any nuisance or trespass, do not constitute "challenges" to the removal or remedial action selected. Doc. 67 at

61. Courts addressing this issues have all agreed that a request for injunctive relief is a "challenge" under §113(h). In *Cannon v. Gates*, 538 F.3d 1328 (10th Cir. 2008), the federal government contaminated the plaintiffs property during World War II and then failed to clean it up. The area was not listed on the NPL and the Government had simply started "preliminary efforts to investigate whether cleanup efforts were needed." *Id.* at 1332. The Court initially emphasized the breadth of § 113(h) preemption. "This 'clear and unequivocal' provision is a 'blunt withdrawal of federal jurisdiction' over challenges to ongoing CERCLA removal actions. According to its plain language, § 9613(h) strips federal court jurisdiction once the Government has begun a removal action." *Id.* at 1333 (citations omitted). The Court went on to assess the scope of that preemption:

> Section 9604(b)(1) provides that: [w]henever the President is authorized to act pursuant to subsection (a) . . . *he may undertake such investigations, monitoring, surveys, testing and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof*, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment.

Id. at 1333 (emphasis in original). It is undisputed that the EPA is investigating, monitoring, surveying, testing, and information gathering all the way to Lake Powell. *See* Doc. 183-2. Simply because EPA has not yet taken any action to "remove" any hazardous substances located in New Mexico or Utah does not preclude § 113(h) preemption.

The plaintiffs in *Cannon*, like the Sovereign Plaintiffs here, wanted EPA to clean up their property and sought an injunction to compel that cleanup. The Court found such a request for injunctive relief a "challenge" to the removal action and so clearly preempted.

> Turning to the instant case, there is no doubt that the Cannons' suit constitutes a challenge. *The Cannons requested injunctive relief ordering the remediation of their property*. Such relief would undoubtedly interfere with the Governments' ongoing removal efforts. *See Alabama v. EPA*, 871 F.2d 1548, 1559 (11th Cir.

> 1989) (holding that a suit requesting injunctive relief constituted a challenge for the purposes of § 9613(h)).

Cannon, 538 F.3d at 1335-1336 (emphasis added). The cases the Sovereign Plaintiffs cite confirm that requests for injunctive relief or abatement constitute prohibited "challenges" and are therefore preempted. "We conclude that the district court does not have jurisdiction over West Side's claim for injunctive relief because that claim constitutes a 'challenge' to the CERCLA cleanup effort over which the district court would not have jurisdiction until the cleanup was completed." *Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995).

> Under this framework, there can be little doubt that Appellants' RCRA claims are 'challenges.' This conclusion is evident from Appellants' pleadings (seeking a permanent injunction ordering that Defendants perform clean-up activities) (seeking an injunction requiring Defendant to 'perform clean-up activities' and to 'provide financial and technical assistance to the Navajo Nation to carry out the activities necessary to effect clean closure' of the Dump). The requested relief in this case goes beyond interfering with an ongoing CERCLA removal action. The injunction that Appellants seek would require specific cleanup activities that would threaten to *obviate the very point* of the remedial investigation and feasibility study. As noted above, the point of the study is to analyze the extent of contamination and to evaluate different remedial alternatives so that the Government will be able to choose the 'remedial action' that is 'appropriate under the circumstances presented' and that will 'assure[ ] protection of human health and the environment.

El Paso Natural Gas Co. v. U.S., 750 F.3d 863, 881 (D.C. Cir. 2014) (emphasis in original) (internal citations omitted).

The Sovereign Plaintiffs complain that under § 113(h), EPA could theoretically delay judicial review for years while studying the scope of a potential response action. Doc. 67 at 60. This scenario, while theoretically possible, is one for the legislature, not this Court, to rectify:

> And where federal facilities are involved, this carte blanche has the potential to be used by the Government to avoid liability. We doubt this is what Congress intended in CERCLA § 113(h). In this case, however, having found that Appellants are in fact challenging CERCLA action, it is enough for this court to join the Seventh Circuit in highlighting the problem as one that is ripe for congressional consideration.

El Paso Natural Gas Co., 750 F.3d at 878. Moreover, the Sovereign Plaintiffs have not yet alleged that EPA's remedial activity has been unreasonably delayed justifying disregard of §113(h) preemption. Until they do so, any such claim is not yet ripe and preemption should be ordered.

The Sovereign Plaintiffs acknowledge that they seek injunctive relief and abatement remedies, albeit in New Mexico and Utah. Doc. 67 at 62. Those claims are "challenges" under CERCLA § 113(h). It is undisputed that EPA is monitoring conditions in New Mexico, within the Navajo Nation, and in Utah as part of the RI/FS process and is contemplating some remedial actions in those regions. Until that process has concluded, the Sovereign Plaintiffs' claims seeking injunctive relief or abatement are preempted.

E. The Sovereign Plaintiffs fail to state a claim against KGUSA and KGC for liability as CERCLA owners, operators or arrangers.

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

The Sovereign Plaintiffs claim that because they have alleged that KGUSA and KGC "own" the Sunnyside Mine, they can survive a Motion to Dismiss, despite the fact that they concede that SGC owns the Sunnyside Mine and KGUSA and KGC are simply corporate affiliates. Doc. 67 at 63-64. An actual ownership interest in the facility from which disposal of hazardous substances occurred is a prerequisite to CERCLA "owner" liability. As the Supreme Court made plain in *Bestfoods*, "A parent corporation (so-called because of control through ownership of another corporation's stock) is *not* liable for the acts of its subsidiaries." 524 U.S. at 63 "Nothing in CERCLA purports to rewrite this well-settled rule." *Id.* (emphasis added).

The allegation that KGUSA or KGC may own SGC or some of its shares does not establish CERCLA ownership liability, and no factual support whatsoever exists for the

Sovereign Plaintiffs' claim that KGUSA and KGC "currently own" the Sunnyside Mine. The CERCLA "owner" claims against KGUSA and KGC should be dismissed.

2. The Sovereign Plaintiffs have failed to state a claim against either KGUSA or KGC for CERCLA operator liability.

The Sovereign Plaintiffs have failed to allege any cognizable basis for classifying KGUSA or KGC as CERCLA "operators." The Supreme Court has held that in order to be considered an operator at a facility, a parent company must actually "manage, direct, or conduct operations specifically related to pollution[.]" *Id.* at 66. "The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary." *Id.* (internal quotation omitted).

The Sovereign Plaintiffs' core allegation is that SGC installed engineered concrete bulkheads and that KGUSA and KGC, by not interfering with a corporate subsidiary, allowed the bulkheads to remain in place. The Supreme Court has made it plain that "operator" liability requires some affirmative *action* to "manage, direct, or conduct operations specifically related to pollution[.]" *Id*. Here, in the case of KGUSA and KGC, there has been at most an alleged failure to act. The failure to act cannot make one an operator:

> Before one can be considered an "operator" for CERCLA purposes, one must perform affirmative acts. The failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator.

U.S. v. Township of Brighton, 153 F.3d 307, 315 (6th Cir. 1998).

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

Utah's claim that KGUSA and KGC qualify as "arrangers" under CERCLA fails for similar reasons. Arranger liability requires that a party take "intentional steps to dispose of a hazardous substance." *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1279 (10th Cir.

2017) (internal quotation omitted). As the Supreme Court has stated, "In common parlance, the word 'arrange' implies action directed to a specific purpose." *Burlington North. and Santa Fe. Ry. v. U.S.*, 556 U.S. 599, 611 (2009).

Here, Utah's arranger claim fails for the same reason the Sovereign Plaintiffs' operator claim fails. KGUSA and KGC are accused of *inaction*, not intentional action. Utah's Amended Complaint lacks any facts, let alone well-pleaded facts, that would support claims that KGUSA or KGC owned or possessed hazardous substances and *intentionally* arranged for their disposal. Instead, SGC bulkheaded its mine in Colorado to impound water in Colorado and improve water quality there. KGUSA and KGC are alleged to have failed to disregard corporate separateness and order SGC to remove the engineered concrete bulkheads. There is no intentional action taken to arrange for the disposal of any hazardous substance.

F. Based on the allegations in the Complaints, punitive damages are not available against the Mining Defendants.

The Sovereign Plaintiffs agree that in order to sustain a claim for punitive damages the defendant's conduct must rise to a "willful, wanton, malicious, reckless, oppressive or fraudulent level" and manifest "a knowing and reckless indifference toward, and a disregard of, the rights of others." Doc. 67 at 70-71. The Sovereign Plaintiffs allege that because their amended complaints accuse the Mining Defendants of "reckless and willful misconduct as having caused the highly hazardous conditions within the Sunnyside and Gold King Mines that resulted in the August 5 blowout," punitive damages are appropriate. *Id*. In an effort to sustain their request for punitive damages, the Sovereign Plaintiffs have simply painted the Mining Defendants' conduct with conclusory, pejorative adjectives. What the Sovereign Plaintiffs never address, however, is the fact that everything the Mining Defendants did was regulator ordered and Colorado court endorsed reclamation work that improved water quality in the Animas River. Private party

actions undertaken in accordance with governmental orders should not be punished. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988).

SGC's actions were all taken in compliance with and at the direction of the State of Colorado and pursuant to Colorado issued permits and the court approved Consent Decree. By the time KGUSA and KGC acquired an indirect interest in SGC in 2003, the relevant Court ordered bulkheads were already in place. Colorado, of course, was acting within its capacity as an EPA-approved governmental entity with authority to administer the Clean Water Act discharge permit program and within its authority to administer its own mine reclamation laws. The engineered concrete bulkheads were and are functioning as designed and as required by the Consent Decree. Nothing the Mining Defendants are accused of doing permits punitive damages and, therefore, the claim should be dismissed.[10]

G. Leave to amend should be denied.

In footnote 35, the Sovereign Plaintiffs seek leave to amend to the extent the Court dismisses any of their claims. While leave to amend is typically "freely given when justice so requires," whether leave should be granted is within this Court's discretion. *Las Vegas Ice and Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1184 (10th Cir. 1990). Here, any leave to amend should be denied. The first Sovereign Plaintiff Complaint was filed in May of 2016, nearly two and a half years ago. Each Sovereign Plaintiff has already filed one amended complaint. Further amendment would be both futile and untimely. No amendment of the pleadings will change the undisputed facts and law requiring dismissal.

[10] A Rule 12(b)(6) motion is appropriate when there are no circumstances under which the plaintiff would be entitled to the requested relief. Whether the request for punitive damages is treated as a claim or a remedy or a demand or a suggestion, under the facts as alleged, punitive damages are not available.

III. CONCLUSION:

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

A. This Court lacks personal jurisdiction over any Mining Defendant.

B. All claims are preempted by the Clean Water Act.

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

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

E. The Sovereign Plaintiffs fail to state a claim against KGUSA or KGC for liability as CERCLA owners, operators or arrangers.

F. The allegations in the Amended Complaints do not allow for an award of punitive damages.

DATED this 21st day of September, 2018.

Respectfully submitted,

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen

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

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

Attorneys for Defendant Sunnyside Gold Corporation

HOLLAND & HART LLP

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

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

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2018, the foregoing was filed via the U.S. District Court of New Mexico's CM/ECF electronic filing system and a copy thereof was served via the CM/ECF upon all counsel of record.

/s/ Neil G. Westesen
Neil G. Westesen