UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

In re: Gold King Mine Release in San Juan County, Colorado on August 5, 2015	)	MDL No. 1:18-md-02824-WJ
THIS DOCUMENT RELATES TO: ALL CASES	)	

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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The Federal Defendants moved to dismiss all pending claims against EPA and the United States, including the Sovereign Plaintiffs' claims against EPA under RCRA, the CWA and CERCLA,[1] and Plaintiffs' claims against the United States under the FTCA.[2] *See generally* ECF No. 44 ("U.S. Br."). Plaintiffs' response fails to show a legal basis for their environmental or tort claims against the Federal Defendants. *See* ECF No. 61 ("Pl. Br."). Plaintiffs wrongly complain that the EPA has failed to live up to its commitment to take responsibility for the Gold King Mine spill. This is belied by the fact that EPA has spent well over $29 million on past and continuing response efforts since the August 2015 blowout, including building and maintaining a treatment facility and investigating contamination throughout the Bonita Peak Mining District.[3] However, as we show below, based on the allegations of their complaints, Plaintiffs are not legally entitled to any of the other remedies they seek against the Federal Defendants.

I. SOVEREIGN PLAINTIFFS' CWA AND RCRA CLAIMS ARE JURISDICTIONALLY BARRED.

A. CERCLA Section 9613(h) Bars New Mexico's and Utah's CWA Claims and Utah's RCRA Claim.

CERCLA § 9613(h) "strip[s] federal jurisdiction from *any challenge* that would interfere" with a CERCLA response action. *Cannon v. Gates*, 538 F.3d 1328, 1332-33 (10th Cir. 2008) (emphasis added). The jurisdictional bar of § 9613(h) is not limited to claims brought by responsible parties nor is it limited to claims that seek to slow or prevent cleanup actions. *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249-50 (10th Cir. 2006) (barring New Mexico's

[1] This Reply uses the same short forms and acronyms introduced by EPA's opening motion.

[2] A new complaint was filed after the Federal Defendants' motion and is not addressed here.

[3] "One Year After the Gold King Mine Incident: A Retrospective of EPA's Efforts to Restore and Protect Impacted Communities," (Aug. 1, 2016) ("One Year Report"), Ex. 7, at 15-16. More precisely, EPA had spent approximately $29.5 million as of July 15, 2016, less than a year after the blowout occurred. *Id.* EPA's current total expenditures undoubtedly are far higher.

claims when New Mexico was not a potentially responsible party); *Cannon*, 538 F.3d at 1336 (barring a suit that sought to "hasten the government's cleanup efforts through injunctive relief"). Lawsuits that aim to substitute a court-ordered remedy for EPA's "flexible and dynamic" process of evaluating contamination and choosing appropriate cleanup actions are prohibited "challenges." *Gen. Elec.*, 467 F.3d at 1249-50. The injunctive remedies that New Mexico and Utah seek under the CWA and RCRA are such challenges, and therefore barred.

New Mexico and Utah acknowledge that EPA is conducting CERCLA response actions to address releases of hazardous substances from mines and mine features within the Bonita Peak Mining District NPL Site. *See* Pl. Br. at 4. As previously explained, U.S. Br. at 14-15, EPA's ongoing investigation is not limited to particular mines. *See* Thomas Decl., ECF No. 44-5, ¶ 6. New Mexico, however, in an attempt to avoid the bar of § 9613(h), claims to target unidentified "inactive and abandoned mines, which threaten water quality in the Lower Animas and Upper San Juan Rivers." Pl. Br. at 4. New Mexico's argument fails to acknowledge that EPA's listing and ongoing investigation includes inactive and abandoned mines throughout the Bonita Peak Mining District. *See* Thomas Decl. ¶ 6. The relief New Mexico seeks—CWA enforcement as to unnamed mines—directly interferes with EPA's response actions.

Utah's claim focuses only on contamination from the Gold King Mine, Pl. Br. at 13, and is similarly barred. The Gold King Mine is the subject of investigation and remedial action as part of the Bonita Peak Mining District response action. *See* Thomas Decl. ¶ 14. Utah's claim thus represents a challenge to EPA's response actions. *See Cannon*, 538 F.3d at 1335 (a request for injunctive relief ordering remediation of a plaintiff's property constituted a challenge).

New Mexico and Utah characterize their CWA claims as complementing, not challenging, "CERCLA's remedial purpose." Pl. Br. at 7. But lawsuits seeking to compel CWA

compliance or enforcement constitute "challenges" barred by § 9613(h), regardless of whether such compliance would arguably "complement" EPA's ongoing response actions. *See Diamond X Ranch LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1021 (D. Nev. 2014) (barring claim for injunctive relief to compel CWA compliance regarding discharges subject to an ongoing CERCLA response); *see also McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (same). Specifically, New Mexico's claim to compel EPA to "enforce the CWA" at inactive and abandoned mines, *see* Pl. Br. at 4, would require dictating actions that would interfere with EPA's ongoing CERCLA process, and is therefore barred.

Utah's emphasis on "investigation and remediation" of contamination and pollutants that found their way downstream to Utah, Utah Am. Comp. ¶¶ 123, 129, does not save its CWA or RCRA claim. *See Gen. Elec.*, 467 F.3d at 1248-49 (barring New Mexico's claims that alleged that the remedy selected was "underinclusive and inadequate"). The relief that Utah seeks, regardless of whether it complements EPA's response at the Gold King Mine, is directly "related to the goals of the cleanup," *Razore v. Tulalip Tribes*, 66 F.3d 236, 239 (9th Cir. 1995), as it targets contamination from the Gold King Mine where EPA has implemented some of its most robust response actions within the NPL Site. *See* Thomas Decl. ¶¶ 6, 14. Both the RCRA and CWA claims thus interfere with EPA's ongoing cleanup assessment, which is precisely what § 9613(h) forbids. *See, e.g., McClellan*, 47 F.3d at 330 (challenges include claims that seek to improve upon a CERCLA cleanup); *Cannon*, 538 F.3d at 1334-35 (injunctive relief to remediate property subject to CERCLA "monitor[ing], assess[ment], and evaluating" would "interfere with the Government's ongoing removal efforts").

Contrary to the States' arguments, Pl. Br. at 6-7,their claims here are not analogous to those asserted by the State of Colorado in *United States v. Colorado*, 990 F.2d 1565 (10th Cir.

1993). In *Colorado*, the State sought to enforce its hazardous waste laws at a site undergoing a CERCLA response action. *Id.* at 1576, 1579. Here, the States are not seeking to enforce their hazardous waste laws against EPA, and therefore *Colorado* is not relevant authority. *See id.* at 1578-79 (limiting the scope of the holding to enforcement actions under state hazardous waste laws that have been authorized to be enforced in lieu of RCRA).

Finally, New Mexico's and Utah's support of the actions EPA is taking at the Bonita Peak Mining District, Pl. Br. at 4, is irrelevant to whether the § 9613(h) bar applies. The States' CWA claims and Utah's RCRA claim seek to impose on EPA the States' view of "what measures actually are necessary to clean-up the site and remove the hazard." *McClellan Ecological Seepage Situation*, 47 F.3d at 327; *see Cannon*, 538 F.3d at 1335-36. Such actions are jurisdictionally barred by section 9613(h). *See, e.g.*, *Gen. Elec.*, 467 F.3d at 1248-49.[4]

B. Utah's RCRA Claim Is Barred by RCRA's Limitations on Citizen Suits.

Utah's RCRA claim is barred for the additional reason that RCRA precludes the commencement of imminent and substantial endangerment citizen suits if the Administrator, in order to restrain or abate acts or conditions which may have contributed to the activities which may present the alleged endangerment, has undertaken certain response actions. 42 U.S.C. § 6972(b)(2)(B). This bar does not require a showing that a claim is a challenge to a response action, or that EPA is engaged in response actions in Utah. Here, Utah alleges an endangerment

[4] Sovereign Plaintiffs suggest that it is "problematic" to apply § 9613(h) because EPA issued the NPL listing after New Mexico filed its original complaint. Pl. Br. at 4 n.2. Section 9613(h) bars "any challenge" to response actions, even response actions commenced after a complaint is filed. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 879 (D.C. Cir. 2014). Nor does § 9613(h)'s applicability depend on whether EPA is alleged to be liable. *See id*. at 873, 875 (though plaintiff alleged that the United States operated the site at issue, § 9613(h) barred plaintiff's RCRA claim). Further, EPA is not raising § 9613(h) to "escape its liability as a responsible party" under CERCLA, Pl. Br. at 4 n.2; EPA has asserted § 9613(h) only as a bar to the States' CWA and RCRA claims.

due to hazardous substances released from the Gold King Mine in 2015 that flowed downstream and are now located in Utah. Utah Am. Compl. ¶¶ 120-121. The release of hazardous substances from the Gold King Mine is the act or condition that contributed to the alleged endangerment. As EPA previously explained, U.S. Br. at 20-21, EPA is engaged in removal actions to restrain or abate the release of hazardous substances from the Gold King Mine, has incurred costs to initiate a Remedial Investigation and Feasibility Study, and is diligently proceeding with remedial action.[5] Under § 6972(b)(2)(B)(ii) and (iii), Utah's RCRA claim is barred.

II. NEW MEXICO AND UTAH HAVE FAILED TO STATE CLAIMS UNDER THE CWA, 33 U.S.C. § 1365(h).

New Mexico and Utah concede that to bring a claim under 33 U.S.C. § 1365(h), each state must allege a violation of an "effluent standard or limitation" by a "person" in another State; that the Administrator has not taken enforcement action consistent with § 1319; and that the alleged failure to enforce is causing an adverse effect or violation of a water quality requirement in the downstream state. Pl. Br. at 11-12, 16-17; U.S. Br. at 22-25. The states also concede that § 1365(h) implicates the Executive's enforcement discretion, and so any cause of action under this provision must comport with the dictates of *Heckler v. Chaney*, 470 U.S. 821 (1985). Pl. Br. at 13-16. Neither state has pled the elements they agree are required, and their CWA claims must be dismissed.

[5] Sovereign Plaintiffs' opposition contains a puzzling footnote, which includes a motion to strike a portion of Ms. Thomas' Declaration. *See* Pl. Br. at 8 n. 5. Sovereign Plaintiffs assert that Ms. Thomas referred in paragraph 8 of her declaration to a study performed by an EPA research and development branch and "offered her legal opinion" that the research is a response action under CERCLA. *Id.* Ms. Thomas did not offer such a legal opinion or any other statement that should be stricken. Thomas Decl. ¶¶ 8, 10. Ms. Thomas described a study performed by EPA's Office of Research and Development in paragraph 10 of her declaration, not paragraph 8. *Id.* In neither paragraph 8 nor 10 did Ms. Thomas state that the research is a response action under CERCLA. *Id.* Thus, Sovereign Plaintiffs' motion to strike should be denied.

A. New Mexico's and Utah's Allegations Fail to State A Claim Under the CWA.

New Mexico does not allege, as it must, that any identified person (here, a specific abandoned or inactive mine) has violated an "effluent standard or limitation" by discharging pollutants without a permit, and that the Administrator failed to take enforcement action against that specific mine. *See* U.S. Br. at 22-25. Rather, it asserts that Colorado's failure "to enforce the CWA's permitting system . . . causes discharges of pollutants without a permit" by other persons—*i.e.*, the mines. Pl. Br. at 12. New Mexico further contends that the Administrator acted unlawfully when he did not do something about Colorado's failure, perhaps by permitting the mines himself. Pl. Br. at 11 & n.9. But, Colorado's failure to issue a permit to a point source is not a violation of an "effluent standard or limitation" as that term is defined by the Act. § 1311(a) (defining term as "the discharge of any pollutant by any person" without complying with specified provisions). Nor does Colorado's failure to issue a permit to a mine *cause* that mine to violate the law, and discharge pollutants without a permit. *See* Pl. Br. at 12 & n.10.[6] If this were true, Colorado (and by extension New Mexico and Utah too) would be the legal cause, and so liable, for every discharge of a pollutant without a permit within their borders.

Contrary to New Mexico's argument, moreover, nothing in § 1319 mandates that EPA take enforcement action when a state fails to issue a permit to a point source. *See* Pl. Br. at 12. Rather, the CWA prescribes an entirely different procedure to address a state's alleged failure to administer effectively its permitting program. The CWA provides that EPA may withdraw a state's permitting authority if that state has not complied with the requirements set by

[6] New Mexico analogizes Colorado's administration of a permitting program to a state's reclamation activity. Pl. Br. at 12 n.10. But, on-the-ground reclamation activity where a state is actively operating a mine as in *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159 (4th Cir. 2010), is obviously distinct from the administration of a statewide permitting program.

§ 1342(c)(2). To begin this process, an entity must first file an administrative petition with EPA asking that the state's permitting authority be withdrawn. 40 C.F.R. §§ 123.63(a), 123.64(b)(1). If the petition is denied, the entity may then seek review of the denial directly in the court of appeals. 33 U.S.C. § 1369(b)(1)(D). Notably, EPA can take the step New Mexico urges here—the withdrawal of Colorado's permitting authority—only where it first holds a "public hearing" and offers the state the opportunity to take "corrective action." *Id*. Allowing New Mexico to seek withdrawal of Colorado's permitting authority under § 1365(h), would create an end run around the requirements set by §§ 1342 and 1369. New Mexico does not grapple with this inconsistency. Indeed, it appears unaware of this avenue for review, describing its § 1365(h) claim as its "only recourse." Pl. Br. at 18-19 n.15.

Utah's § 1365(h) claim is on even weaker ground than New Mexico's. It alleges "EPA has failed to enforce a CWA standard or limitation by causing the August 5, 2015 blowout." Pl. Br. 13. Utah insists that—unlike claims under the CWA's citizen-suit provision § 1365(a), which may be brought only to address ongoing violations, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found*., 484 U.S. 49, 57 (1987)—a claim under § 1365(h) can be brought for wholly past violations. This is so, Utah asserts, because § 1365(h) creates a cause of action for a violation that "is causing a violation of any water quality requirement in [a plaintiff governor's] state." Pl. Br. at 16. Utah ignores critical language from § 1365(h).

Section 1365(h), like § 1365(a), is written in the present tense. It provides that a state governor may bring suit "where there is alleged a failure of the Administrator to enforce an effluent standard or limitation" which "[1] *is occurring* in another State and [2] *is causing* an adverse effect on the public health or welfare in his State, or *is causing* a violation of any water quality requirement in his State." *Id*. (emphasis added). Under the plain language of the statute, a

cause of action is available only where a violation "is occurring" and causing one of the enumerated harms downstream. Contrary to this language, Utah would find a cause of action whenever there is "a violation *at some point in time*, a failure to enforce, and an ongoing violation of a water quality requirement." Pl. Br. at 16 (emphasis added). This reads out of the statute both the requirement that the violation be presently occurring, and that the violation be taking place in another state. *Id*. This is untenable, not only because it is irreconcilable with *Gwaltney*'s construction of the CWA's analogous citizen suit provision, but because it fails to "give effect . . . to every word of the statute." *Quarles v. United States. ex rel. Bureau of Indian Affairs*, 372 F.3d 1169, 1172 (10th Cir. 2003).

Utah admits that its allegation would require EPA to bring enforcement action against itself, although it cites no case where EPA has actually done so. Pl. Br. at 14 (characterizing claim as whether "EPA has a duty to bring enforcement actions or sanctions its employees . . .."). Utah dismisses the constitutional implications of its claim, but Utah's analogy to "remedial actions at federal facilities" fails. Those actions involve cooperative executive action, not a statutory mandate requiring the executive to bring enforcement action against itself. *Id*.

B. *Heckler v. Chaney*'s Presumption Against Judicial Review of the Executive's Exercise of Enforcement Discretion Requires Dismissal of the CWA Claims.

New Mexico and Utah argue that 33 U.S.C. § 1365(h) overcomes *Heckler v. Chaney*'s presumption against judicial review of an agency's exercise of enforcement discretion by allowing a claim based on the Administrator's "failure to enforce." Pl. Br. at 16-18. This is incorrect. *Heckler* holds that a claim alleging that an agency failed to take enforcement action is cognizable only if a statute both "indicate[s] an intent to circumscribe agency enforcement discretion, *and* has provided meaningful standards for defining the limits of that discretion." 470

U.S. at 834-35 (emphasis added); EPA Br. at 22-25. While § 1365(h) "indicate[s] an intent to circumscribe agency enforcement discretion" because it refers to the Administrator's failure to enforce, this alone is insufficient. Pl. Br. at 15-17. Rather, a claim under § 1365(h) is viable only to the extent the CWA provides a "definite standard" by which to judge EPA's exercise of discretion. *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir. 1988).[7]

Taking into account both *Heckler*, and the narrow reading given to waivers of sovereign immunity, to invoke § 1365(h) a state governor must allege a discharge of a pollutant, by an identified person, that is ongoing, causing harm downstream, and which the Administrator has failed to take action against consistent with section 1319(a). U.S. Br. at 25.[8] EPA did not contend that, under this construction, *all* claims under § 1365(h) are "immune from judicial review" making the provision "inoperative" as the States argue—just that the States' claims here are insufficient. Pl. Br. at 15.

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[7] The States attempt to distinguish *Heckler* by asserting that EPA has adopted a policy of "total *non*-enforcement" which *Heckler* indicated "might" be reviewable. Pl. Br. at 18-19; *Heckler*, 470 U.S. 831-32 n.4. Neither state alleged that EPA adopted a policy abdicating its enforcement duties under the CWA, and they cannot salvage their claims by recasting them differently now. *See* NM Am. Compl. ¶ 162; UT Am. Compl. ¶ 128. As *Heckler* explained, "an agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." 470 U.S. 831-32. That logic applies with equal force here, particularly given EPA's extensive work at the Bonita Peak Mining District site. *See supra*.

[8] The States fault EPA for failing to "address[ ] the statutory language" in its construction of § 1365(h), but the savings clauses in §§ 1365(e) and 1370 have nothing to do with the scope of the waiver of sovereign immunity under § 1365(h). Pl. Br. at 14. Instead, these sections address interactions between state law and the CWA. § 1365(e) (§ 1365 does not restrict other rights "under any statute or common law"); § 1370 (Act does not limit states from adopting or enforcing other standards addressing pollution). The States also argue that EPA conflates §§ 1365(a) and 1365(h), but do not describe why. Pl. Br. at 14-15. EPA's reading of § 1365(h) allows for a (properly pled) claim to compel EPA to take enforcement action under § 1319, with the nature of that enforcement action left to EPA's discretion. By contrast, § 1365(a) allows a state to bring a citizen suit directly against a person violating an effluent standard or limitation.

The States next insist that § 1319 provides the required "definite standard" by which to evaluate EPA's exercise of its discretion because this section allegedly imposes a "mandatory duty" on EPA to bring enforcement proceedings. *See* Pl. Br. at 17. As an initial matter, a mandatory duty does not exist merely because a statute employs the word "shall." *See id*. Rather, mandatory duties must be set forth by the statute in unequivocal terms. *Dep't of Energy v. Ohio*, 503 U.S. 607 (1992). The Tenth Circuit considered whether the use of the word "shall" in 33 U.S.C. § 1319(a)(3)—the provision immediately preceding § 1319(a)(2), which includes similar language—imposed a mandatory duty on the Administrator. *Amigos Bravos v. EPA*, 324 F.3d 1166, 1171-72 (10th Cir. 2003). Consistent with all other courts of appeals to have reached the issue, the Tenth Circuit held that § 1319(a)(3) did not "restrict the Administrator's discretion." *Id*. (citing cases). The States' reliance on district court decisions from other circuits predating *Amigos Bravos* does not provide a basis to distinguish this precedent. Pl. Br. at 17 n.12.

In any event, the relevant question here is whether § 1319 provides a "definite standard" by which to judge the contested actions *in this case*: EPA's alleged failure to permit or bring enforcement action against hundreds of unidentified mines, or to clean up downstream pollution in Utah. Section 1319 does not address the "failure to permit" claim, which is quintessentially a challenge to "particular programs [EPA has] establish[ed] to carry out [its] legal obligations." *Lujan v. Defenders of Wildlife*, 504 US 555, 568 (1992). The Supreme Court has expressly held that such a challenge is "rarely if ever appropriate for federal court adjudication" because redressability cannot be established. *Id*. *See also Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004) (explaining that a "broad programmatic attack" is not amenable to judicial review). Indeed, New Mexico's argument on standing makes clear that its challenge is a programmatic one: New Mexico asserts that all EPA would need to do if found liable is "to ensure that

Colorado enforces the NPDES program in a single geographic area." Pl. Br. at 19. To the extent New Mexico seeks to force Colorado to administer its permitting program differently (or not at all), it must follow the administrative petition procedure set forth by the Act. *See supra* at 6-7. Lastly, Utah does not identify anything in § 1319 that requires EPA to clean up pollution in Lake Powell, and the statute does not expressly provide for such relief. Thus, New Mexico's and Utah's CWA claims must be dismissed.

III. CERCLA DOES NOT PROVIDE A CLAIM AGAINST EPA UNDER THE CIRCUMSTANCES ALLEGED HERE.

A. Sovereign Immunity Bars Sovereign Plaintiffs' CERCLA Claims Against EPA.

Congress did not waive EPA's sovereign immunity from CERCLA claims when EPA's *sole* involvement at a site consists of responding under CERCLA § 9604 to releases caused by others. Sovereign Plaintiffs must identify an unequivocally expressed waiver of sovereign immunity that authorizes their CERCLA claims against EPA. *See* U.S. Br. at 29 (waivers of immunity must be unequivocally expressed and construed strictly in favor of the sovereign). The plain language of CERCLA's waiver of sovereign immunity, 42 U.S.C. § 9620(a)(1),[9] does not contain the waiver Sovereign Plaintiffs seek.

Sovereign Plaintiffs attempt to elevate the importance of three court of appeals cases that did not determine the waiver issue before this Court. None of the three circuit court cases cited by the Sovereign Plaintiffs that discussed CERCLA's waiver of sovereign immunity decided whether Congress waived sovereign immunity for claims arising from EPA's CERCLA response actions to clean up releases caused by others. In *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d

[9] Federal departments and agencies "shall be subject to, and comply with, this chapter *in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity,* including liability under [section 107]." 42 U.S.C. § 9620(a)(1) (emphasis added).

833, 841-42 (3d Cir. 1994), the Third Circuit expressly distinguished in its sovereign immunity analysis EPA actions in response to releases of hazardous substances from federal actions during World War II, and concluded that § 9620(a)(1) waives federal sovereign immunity where "the government's involvement . . . [is] *not* in response to a threatened release of hazardous materials." *Id.* (emphasis added); *see* U.S. Br. at 30. The other two court of appeals cases also assessed federal government liability for its involvement during World War II, and neither case decided the issue of EPA liability arising from its response actions. *E. Bay Mun. Util. Dist. v. U. S. Dep't of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998) ("resolving the issue [of federal immunity for response actions] would carry us far from this case."); *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002); *see also* U.S. Br. at 31 n.12.

Sovereign Plaintiffs do not persuasively distinguish the numerous district court cases cited by EPA that found no waiver of immunity when EPA is responding to releases caused by others. *See* U.S. Br. at 31. Sovereign Plaintiffs argue that these cases involved claims brought by persons potentially responsible under CERCLA, which does not include Sovereign Plaintiffs. Pl. Br. at 26-27. Regardless of whether parties contributed to the release of hazardous substances, however, they must identify an unequivocal waiver of sovereign immunity in order to sue the federal government. Plaintiffs identify nothing in § 9620(a)(1) that differentiates claims brought by States or Tribal Nations from claims brought by potentially responsible parties. Further, if this Court were to find a waiver in this case when EPA is responding to the releases of hazardous

substances caused by others, the same waiver would provide a basis for future contribution claims by potentially responsible parties based on such EPA response actions.[10]

Sovereign Plaintiffs also argue that several of the district court cases are unreliable because they discuss federal immunity for "regulatory" conduct, Pl. Br. at 25-26, but this argument misses the mark because EPA is not arguing for "regulatory" immunity. Although a few (but not all) of the district courts opinions referred to "regulatory" activities in the context of EPA response actions, Pl. Br. at 26, that reference does not diminish the fact that *every one* of those cases found that the federal government retained immunity for its cleanup activity.

Contrary to Plaintiffs' arguments, Pl. Br. at 22-24, § 9607(d)(1) does not provide a basis to hold EPA liable when its *sole* nexus to a site is to conduct a CERCLA response to a release or threat of release caused by others.[11] Congress adopted § 9607(d)(1) to shield certain persons from liability when they render non-negligent "care, assistance, or advice in accordance with the National Contingency Plan ('NCP') or at the direction of an onscene coordinator." 42 U.S.C. § 9607(d)(1). Congress included § 9607(d)(1) to encourage qualified persons, such as response teams from industrial companies, to participate in cleanups when they are on or nearby the scene of the release. *See* S. Rep. No. 96-848 at 63 (1980), *reprinted in* 1 Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 at 370 (Comm. Print. 1983). This section does not, however, apply to EPA when EPA is acting *pursuant to its response authority under CERCLA.* EPA does not act "at the direction of" the

[10] Sovereign Plaintiffs comment that no "recent authority" supports EPA's position, Pl. Br. at 28, but the lack of recent authority may be attributed to the fact that the issue was resolved by numerous courts many years ago.

[11] Sovereign Plaintiffs may have alleged that EPA's involvement at Gold King predated the August 2015 release, *see* Pl. Br. at 22 n.16, but those allegations also focus on site assessments and investigations—i.e., EPA actions taken under § 9604 to respond to releases caused by others.

onscene coordinator—instead, EPA directs the action through its on-scene coordinator. In addition, the phrase "care, assistance and advice" does not fit EPA's response actions under § 9604; EPA actions must be consistent with the methods and criteria of the NCP. *See* 40 C.F.R. § 300.400, *et seq.* (describing hazardous substance response actions). Section 9607(d)(1)'s inapplicability to EPA when taking response actions is further illustrated by the fact that Congress used language in this provision that is appropriate to Good Samaritans ("rendering care, assistance, or advice"), in contrast to the language in the separate provision governing state and local government liability, § 9607(d)(2), where it referred to "actions taken in response".

The legislative history also undercuts Sovereign Plaintiffs' § 9607(d) arguments. Congress included § 9607(d)(1) when it passed CERCLA in 1980 (although it then provided for liability in the event of gross negligence). Pub. L. No. 96-510, 94 Stat. 2767, 2783 (1980). Significantly, Congress did not view § 9607(d)(1) as providing State and local governments a shield from liability when responding to releases caused by others. S. Rep. No. 99-11 at 42 (1985), *reprinted in* 2 Legislative History of the Superfund Amendments and Reauthorization Act of 1986 at 634 (Comm. Print 1990) ("SARA Legis. Hist.") (adding § 9607(d)(2) to modify the potential CERCLA liability of State and local governments when responding to releases from a facility owned by another person). Equally significant, Congress considered but rejected including the federal government in § 9607(d)(2), presumably because Congress recognized EPA possessed immunity when it responds to releases caused by others, and thus the federal government did not need the additional protection Congress provided State and local governments.[12] *See* H.R. 2005, 101st Cong. § 107(c)(2) at 37 (1985), *reprinted in* 5 SARA

[12] The discussion of § 9607(d)(1) in *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1444 (E.D. Cal. 1995), does not address whether the operative language applies to EPA's

Legis. Hist. at 4396 (including United States within scope of amendment). In contrast, Sovereign Plaintiffs' argument requires the Court to find that Congress provided federal agencies with less protection from liability than State and local governments.

In sum, Sovereign Plaintiffs fail to meet their burden to demonstrate that CERCLA unequivocally waives federal sovereign immunity when EPA's sole involvement at a site is to respond to releases caused by others—the same result as every reported district court case to squarely address the issue. Their CERCLA claims should be dismissed for lack of jurisdiction.

B. Sovereign Plaintiffs Fail to State a Claim of EPA CERCLA Liability.

Sovereign Plaintiffs' contentions that EPA's conduct in connection with the Gold King Mine release makes it an "operator" are unpersuasive. At their most extreme, Sovereign Plaintiffs assert that EPA is liable as a CERCLA "operator" every time "it makes 'decisions about compliance with environmental regulations.'" Pl. Br. at 33. But, EPA makes decisions about releases consistent with environmental regulations at thousands of sites, including the 1100 Superfund sites on the NPL. *See* 42 U.S.C. § 9621(d(2)(A); 40 C.F.R. §§ 300.415(j), 300.110. If Sovereign Plaintiffs' extreme formulation is correct, EPA could be liable as an operator at each one of these sites *even where the cleanup goes according to plan*. This is not the law.

The Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), makes clear that the term "operator" must be understood according to the "ordinary meaning of the word 'operate' in the *organizational* sense [ ] obviously intended by CERCLA." *Id*. at 66, 71 (emphasis added). That "ordinary or natural meaning" is "[t]o conduct the affairs of; manage; *operate a business*." *Id*. One that "conducts the affairs of a facility . . . having to do with the

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response actions, and its discussion of § 9607(d)(2) fails to recognize that the addition of § 9607(d)(2) would have been unnecessary if the prior version of § 9607(d)(1) sufficiently shielded governmental entities from liability for their response actions.

leakage or disposal of hazardous waste," is thus an operator. *Id*. at 66-67. Under this standard, Sovereign Plaintiffs have not plausibly alleged that EPA was an operator of Gold King Mine. No one would say that EPA is "operating" the Gold King Mine's business when its sole involvement is its response efforts as the regulating agency to safeguard public health and the environment. *See* US Br. at 34-35.[13] Nor is EPA's response action like the conduct at issue in *United States v. Township of Brighton*, where the town operated a dump for the benefit of its residents. 153 F.3d 307, 310 (6th Cir. 1998); *see* Pl. Br. at 32-33.

Instead of grappling with *Bestfoods*, Sovereign Plaintiffs largely rely on pre-*Bestfoods* law to assert that operator liability exists wherever the entity has the "authority to control" or "actual control" over a facility. Pl. Br. at 29 (citing *FMC Corp. v. Aero Indus., Inc.*, 998 F2d 842, 846 (10th Cir. 1993). But, as *Bestfoods* makes clear, these tests did not survive *Bestfoods*; rather, the Court's inquiry is limited to whether the entity "operates the facility, and that operation is evidenced by participation in the activities of the facility." 524 U.S. at 68.[14]

Sovereign Plaintiffs' sole authority holding that a governmental entity may be liable as an operator for its cleanup efforts alone is an unpublished district court decision from California: *Cal. Dep't. of Toxic Substances Control v. Jim Dobbas, Inc.*, No. 14-cv-595, 2014 WL 4627248 (E.D. Cal. Sept. 16, 2014). *See* Pl. Br. at 34, 36. It is true that *Dobbas* held that the plaintiff had

[13] Sovereign Plaintiffs assert that this definition would lead to the "nonsensical rule" that "*no one* can operate a shuttered mine under the meaning of CERCLA, even to dispose of hazardous waste contained therein." Pl. Br. at 34 (emphasis in original). Not so. For example, an entity directing hazardous substance disposal to restore a site to operating condition could have operator liability.

[14] While a "fact-intensive" inquiry necessitating discovery may be required to assess operator liability in many cases, *see* Pl. Br. at 35 n.18, discovery is unnecessary here. Sovereign Plaintiffs do not dispute that EPA's activities here were limited to safeguarding the public by cleaning up contamination created by others. Under *Bestfoods*, these activities simply do not give rise to operator liability. Subjecting EPA to discovery in order to conduct a "fact-intensive" inquiry not required under governing law would needlessly waste taxpayer resources.

plausibly alleged that a state environmental agency was liable as an operator for its cleanup efforts at a facility, but the court failed to analyze the key question from *Bestfoods*: whether the agency had conducted the facility's affairs in the "organizational sense." *See* 2014 WL 4627248, *3. It thus provides no support for Sovereign Plaintiffs here.

Nor does *NuWest Mining, Inc. v. United States*, 768 F. Supp. 2d 1082 (D. Idaho 2011), support Sovereign Plaintiffs' efforts to hold EPA liable. *See* Pl. Br. at 36. There, the government managed the design and location of waste dumps in its role as landowner, at the time that the mines were operational, and benefited from the active mining leases (e.g., through receipt of required royalty fees). Thus, the government's connection to the site in *NuWest Mining* was not limited to its exercise of cleanup authority, as here. 768 F. Supp. 2d at 1085-86.

Sovereign Plaintiffs' arguments on arranger liability are equally flawed. The Supreme Court's decision in *Burlington Northern & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009), requires "intentional steps to dispose of a hazardous substance." *Id.* at 611; *see also* Pl. Br. at 38. Sovereign Plaintiffs appear to concede that the blowout was accidental, and that the incident that allegedly caused it does not, itself, support arranger liability. *See* Pl. Br. at 38-39; U.S. Br. at 38. Instead, Sovereign Plaintiffs assert that EPA's construction of a drainage system and water treatment plant to capture ongoing releases shows an intent to dispose. Pl. Br. at 38-39. Sovereign Plaintiffs' own allegations make clear, however, that EPA's purpose was to *prevent* disposal. *See Burlington N.*, 556 U.S. at 612-13 (safety measures undercut intent). More precisely, Sovereign Plaintiffs have alleged that EPA, in planning to investigate the Gold King Mine site, took precautions to deal with possible releases of hazardous substances. *E.g.*, NM Am. Compl. ¶¶ 77-78. But EPA's knowledge that releases may occur when it investigates environmental hazards pursuant to its statutory authorization to respond to releases of hazardous

substances does not establish that EPA "intended" the disposal of hazardous substances. *See Burlington N.*, 556 U.S. at 612; *see also Team Enters., LLC v. W. Invest. Real Estate Trust*, 647 F.3d 901, 907 (9th Cir. 2011) (cited in Pl. Br. at 38; holding that arranger liability attaches where a transaction's "specific purpose" was hazardous substance disposal).[15]

Finally, alleging that EPA "selected a disposal facility when [it] selected the site for additional water treatment" does not state a "transporter" claim. Pl. Br. at 41. Sovereign Plaintiffs acknowledge that the blowout was *accidental*; thus, transporter liability is absent. *KFD Enters., Inc. v. City of Eureka*, No. C 08-4571 MMC, 2010 WL 4703887, *4 (N.D. Cal. Nov. 12, 2010) (claim not stated where "hazardous substances seeped through [a] well by accident").

IV. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE COURT HAS JURISDICTION OVER THEIR FTCA CLAIMS.

Plaintiffs' responses fail to show that they have met their burden of stating tort claims that are not barred by the FTCA's discretionary function exception. Further, Sovereign Plaintiffs' alleged damages are not cognizable given the FTCA's jurisdictional limitations, federal standing requirements, and CERCLA's comprehensive remedy for natural resource damages.

A. Plaintiffs Have Failed to Satisfy Their Burden of Showing that the FTCA's Discretionary Function Exception Does Not Apply to Their Claims.

The FTCA's discretionary function exception "poses a jurisdictional prerequisite to suit," and, consequently, a plaintiff must show that the exception does not apply "as part of his overall burden to establish subject matter jurisdiction." *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) (quotations omitted). Indeed, the Tenth Circuit recently stated that to survive a motion

[15] Nor is EPA liable because it "controlled and directed waste disposal" generally. Pl. Br. at 41 (citing *United States v. Wash. State Dep't of Transp.*, 665 F. Supp. 2d 1233 (W.D. Wash. 2009)). This case relied on an "actual control" test rejected by *Burlington Northern*. *See* 665 F. Supp. 2d at 1242; 556 U.S. at 607, 611. *Matthews v. Dow Chem. Co.*, 947 F. Supp. 1517 (D. Colo. 1996), likewise applied a pre-*Burlington Northern* test from outside the Tenth Circuit. *Id.* at 1525.

to dismiss under the FTCA's discretionary function exception, a plaintiff has the burden to allege facts "showing that the actions were *actually not* policy-oriented." *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1222 (10th Cir. 2016) (emphasis added). Plaintiffs' responses to the United States' motion reveal that they have not met their burden. Plaintiffs fail to point to any particular allegations in their complaints that could establish, if true, that their claims are outside the bar of the FTCA's discretionary function exception.

1. Plaintiffs have not identified a specific and mandatory provision that removed EPA's discretion.

Plaintiffs abandon many of the provisions that they alleged in their complaints removed the EPA's discretion. Instead, Plaintiffs focus on: (1) the Task Order and Work Plan for the GKM work, which they claim created "contractual obligations" that bound EPA to the description of work in those documents, and (2) regulatory provisions, including those under the Occupational Safety and Health Act ("OSHA") and the Mine Safety and Health Act ("MSHA"), which they argue removed EPA's discretion.

Plaintiffs' arguments are flawed. First, the Task Order and Work Plan did not impose any obligations on government employees; instead, they applied to the contractor. Second, the regulatory provisions that Plaintiffs have identified are not sufficiently specific to remove the discretion of any government employees at the site.

a. The Task Order and Work Plan did not impose any specific and mandatory obligations on the EPA.

The Task Order and the Work Plan did not and could not impose any obligations on EPA employees. Plaintiffs' own allegations show that the EPA issued the Task Order to its contractors to solicit the *contractor's plan* for the work, and the EPA's contractor, Environmental Restoration, prepared the Work Plan to describe the work *it anticipated doing* at the site.

Crucially, Plaintiffs have not alleged that the Task Order or Work Plan established any specific requirements for any particular EPA employee. The Plaintiffs' own allegations show that the focus was on what the contractors, not EPA, would do. The Navajo Nation alleged "USEPA issued a Task Order," and "[t]he Task Order sought a work plan from Environmental Restoration aimed at disposing of acid mine drainage." NN Am. Compl. ¶ 67. Further, the Navajo Nation alleged that the Task Order "required Environmental Restoration to '[p]rovide for appropriate removal of contamination…,'" *id*. ¶ 71, and that under "the Task Order, Weston was 'responsible for overseeing [and managing] the water treatment operations.'" *Id.* ¶ 78. Similarly, New Mexico alleged that EPA "issued a 'Task Order Statement of Work'" and "requested a work plan for the Gold King Mine investigation from Environmental Restoration." NM Am. Comp. ¶ 78. New Mexico even included quotations from the Task Order that show that it was aimed at the contractors, including that "[Environmental Restoration] will conduct operations in management of surface and underground work activities to include construction & maintenance of repository, retention pond & water treatment, access road maintenance…," and "[t]he work will be conducted by qualified contractors with assistance and cooperation of the landowner, San Juan Corp." *Id.* New Mexico further alleged that "Environmental Restoration submitted a draft work plan for the Gold King Mine operation, which included sub-contracting with Harrison Western to complete the project." *Id.* at 89.[16]

The complaints do not allege that any EPA employee had any specific and mandatory responsibilities under these documents. For instance, there is no allegation that any EPA employee was contractually obliged to perform any of the work described in the work plan.

[16] The Utah and McDaniel Complaints are largely silent on the provisions of the Task Order and Work Plan.

Further, Plaintiffs' complaints fail to allege that EPA's On Scene Coordinators ("OSCs") had any specific retained responsibility in how they directed or coordinated work at the site. Finally, there is no allegation that the EPA OSCs lacked the authority and discretion to request modifications in how the contractors performed work at the site based on changing conditions. To the contrary, at hazardous waste remediation sites like the Gold King Mine, the EPA's OSCs must have discretion to make on-the-spot decisions regarding how the work should proceed and cannot be restricted by contractor-prepared work plans submitted months, if not years, earlier.[17]

Furthermore, Plaintiffs have failed to cite any authority showing that documents such as a task order to a contractor or a contractor-authored work plan can impose contractual obligations on the government. Cases holding that contract provisions can create mandatory obligations removing government discretion, including *Bell v. United States*, 127 F.3d 1226 (10th Cir. 1997), involve obligations that government employees *specifically retained* through a contract, rather than work to be performed by the contractor. *See id.* at 1227-28 (Bureau of Reclamation *contractually retained responsibility* to administer third-party contract to ensure compliance with the Bureau's *own specifications* for the work); *see also Kiehn v. United States*, 984 F.2d 1100, 1106 (10th Cir. 1993) (National Park Service contractually required to provide emergency service through government operating permit); *Routh v. United States*, 941 F.2d 853, 855-56 (9th Cir. 1991) (United States Forest Service contractually obligated to notify the contractor that corrective action needed when aware of non-compliance with a safety provision). As opposed to these cases, Plaintiffs have not and cannot allege that any EPA employee had a specific

[17] Plaintiffs' complaints show that conditions allow an OSC to exercise discretion to deviate from a timeline and modify the work set forth in a Work Plan. Plaintiffs allege that the work at the mine was postponed to 2015 after initial excavation on September 11, 2014, suggested that larger settling ponds and additional water treatment works would be necessary. *See* NM Am. Compl. ¶ 82; NN Am. Compl. ¶¶ 79-80; Utah Am. Compl. ¶¶ 39-41.

contractual obligation under the work plan.

Accepting Plaintiffs' argument would mean that a government contractor could circumscribe the government's discretion through a document that it authored describing its own anticipated work. Plaintiffs have failed to cite a single case supporting this. For instance, in *Bell*, the Bureau of Reclamation *contractually retained responsibility* to ensure that a reservoir pipeline would be buried and the ground leveled. 127 F.3d at 1227-30. Thus, *Bell* involved specific obligations that the government had contractually retained and was obliged to enforce.

b. The OSHA and the MSHA provisions that Plaintiffs cite did not remove the discretion of any EPA employees at the GKM site.

Plaintiffs' reliance on certain OSHA and the MSHA provisions is unavailing because those provisions did not remove the discretion of any EPA employee at the GKM site. To remove government discretion under the first part of the discretionary function exception test, a regulation must be both mandatory and specific in its application to the challenged conduct of a government employee. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (regulation must "specifically prescribe[] a course of action for an employee to follow"); *United States v. Gaubert*, 499 U.S. 315, 329 (1991) (agency must be "bound to act in a particular way"). The Tenth Circuit has repeatedly emphasized that in order to find that a provision is non-discretionary, the provision must set a "fixed or readily ascertainable standard" for the government employee to follow. *Kiehn*, 984 F.2d at 1106-07; *Flynn v. United States*, 902 F.2d 1524, 1530 (10th Cir. 1990); *Barton v. United States*, 609 F.2d 977, 979 (10th Cir. 1979).

The provisions of OSHA and the MSHA that Plaintiffs cite fail this test because they do not prescribe a specific course of conduct, through a fixed or readily ascertainable standard, for any EPA employee at the site. The EPA OSCs at the site were acting in accordance with EPA's regulations which establish "general responsibilities." *See* 40 C.F.R. § 300.120. Among the

OSC's general responsibilities were "addressing worker health and safety concerns… in accordance with § 300.150," which states that EPA response actions are to comply with the provisions of OSHA. *See id.* §§ 300.135(l), 300.150. The EPA regulations, however, do not provide a fixed or readily ascertainable standard specifying *how the OSC is to address* worker health or safety concerns or ensure compliance with OSHA or the MSHA. Indeed, allegations in the complaints confirm that the EPA fulfilled its general safety responsibilities by requiring, through the Task Order to Environmental Restoration, that site contractors perform the work in "compliance with applicable OSHA standards" and "appropriate [MSHA] regulations inclusive of establishing a safe underground working environment." NM Am. Compl. ¶ 78; NN Am. Compl. ¶ 72. Tellingly, Plaintiffs fail to cite any regulatory provisions providing a fixed and readily ascertainable standard for *an EPA OSC to follow in policing contractor compliance* with OSHA or the MSHA. Plaintiffs cannot simply allege that EPA had supervisory authority to overcome the discretionary function exception. Plaintiffs must allege that EPA was required to exercise that authority in a specific way. *See Garcia v. U.S. Air Force*, 533 F.3d 1170, 1177-78, 1180-81 (10th Cir. 2008) (supervisory authority under guidelines and a contract was not sufficient to overcome the discretionary function exception without specific procedures controlling the exercise of that authority).[18] Plaintiffs fail to do this.

For example, Plaintiffs claim that OSHA required a site Health and Safety Plan (HASP) that contained an Emergency Response Plan. However, the responsibility to develop the HASP was clearly delegated to the contractor through the Task Order as Plaintiffs' own complaints

[18] By contrast, in *Bell v. United States*, Bureau of Reclamation employees were contractually required to ensure "strict accordance" with Bureau specifications that were directly applicable to the site. 127 F.3d at 1227.

allege.[19] NM Am. Compl. ¶ 78; NN Am. Compl. ¶ 72. Plaintiffs cite 40 C.F.R. § 300.120 and argue that the EPA had to "'assure compliance' with relevant regulations," Pl. Br. 51, but they fail to quote any language establishing a fixed or readily ascertainable standard, such as a checklist, requiring the EPA to take any particular action to confirm that the contractor's HASP contained an Emergency Response Plan. *See McMichael v. United States*, 856 F.2d 1026, 1033 (8th Cir. 1988) (government required to follow checklist for contractor safety compliance).

The other cited OSHA regulations do not provide an applicable fixed or readily ascertainable standard of conduct, even if the EPA, rather than the contractor, had been responsible for implementation. For example, Plaintiffs cite 29 C.F.R. § 1926.651(i)(1) & (2), regarding "Stability of adjacent structures." Pl. Br. at 47. However, these provisions are inapplicable to the GKM work, which did not involve "adjacent structures." Subsection (1) states "Where the stability of *adjoining buildings, walls, or other structures* is endangered by excavation operations, support systems such as shoring, bracing, or underpinning shall be provided to ensure the stability of such structures for the protection of employees." *Id.* (emphasis added). Likewise, subsection (2) refers to work below "the base or footing of any foundation or retaining wall," referring to the stability of an adjacent structure. *Id.* Plaintiffs do not allege that any "adjacent structure" was involved in the Gold King Mine work.

Other OSHA provisions contain discretionary language rather than any fixed or readily ascertainable standard. The provision that Plaintiffs cite regarding "Protection from hazards associated with water accumulation," acknowledges that "[*t*]*he precautions necessary to protect employees adequately vary with each situation,* but could include special support or shield

[19] Plaintiffs incorrectly state that "EPA and the contractor jointly developed the HASP without an Emergency Response Plan." Pl. Br. at 51, n. 26. The cited allegations do not claim that the EPA was involved in developing the HASP.

systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline." 29 C.F.R. § 1926.651(h)(1) (emphasis added). Another provision states site excavations "shall be shored or sloped *as appropriate* to prevent accidental collapse…" *Id.* § 1910.120(b)(1)(iii) (emphasis added). With respect to the OSHA inspection provision that Plaintiffs cite, 29 C.F.R. § 1926.651(k), Plaintiffs concede that the competent person responsible for inspection was a contractor, not an EPA, employee. Pl. Br. at 49. Further, Plaintiffs fail to quote the discretion-conferring final sentence of the provision which states, "These inspections are only required when employee exposure can be reasonably anticipated." 29 C.F.R. § 1926.651(k)(1). Likewise, the OSHA training provision that Plaintiffs cite, 29 C.F.R. § 1910.120(e)(7), confers discretion in determining what constitutes "hazardous emergency situations" that necessitate employee training for such "suspected emergencies." *Id.*[20]

Finally, Plaintiffs claim that the MSHA regulations governing underground coal mines are applicable because they are referenced in the Task Order. However, Plaintiffs ignore key language in their own allegations regarding the MSHA which state that the EPA's Task Order required the contractors to perform work in compliance with "*appropriate* [MSHA] regulations

[20] Contrary to Plaintiffs' assertion, the United States did not argue "that OSHA regulations can *never* be specific enough to remove the government's discretion," *see* Pl. Br. at 46, n.23; rather, the United States argued that OSHA regulations, "by their very nature," do not specifically "dictate particular courses of conduct because the regulations apply across many different work places, sites, and situations." U.S. Br. at 50. The cases that Plaintiffs cite do not involve any of the OSHA regulations that Plaintiffs rely upon here. In fact, the only case actually holding that an OSHA provision removed discretion illustrates the type of provision establishing a fixed or readily ascertainable standard. In *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130, 1152-54 (N.D. Ala. 2013), the court found that the Tennessee Valley Authority violated specific OSHA directives to establish a worksite asbestos exposure limit of 2 fibers per cubic centimeter (because it established a higher level of 5 fibers per cubic centimeter at a facility), and to monitor exposure by a particular method at particular times. Unlike the OSHA regulations that Plaintiffs cite here, the exposure limit of 2 fibers per cubic centimeter and the particular monitoring requirements established a "fixed or readily ascertainable standard." *See Gotha v. United States*, 115 F.3d 176, 181 (3d Cir. 1997) (OSHA regulations inapplicable to the work).

inclusive of establishing a safe underground working environment." NM Am. Compl. ¶ 78; NN Am. Compl. ¶ 72 (emphasis added). Importantly, there is no fixed or readily ascertainable standard identified regarding the EPA's oversight of any determination of what MSHA regulations were appropriate for the site.

2. Plaintiffs have failed to demonstrate that EPA's conduct was not policy-oriented.

Under the second part of the discretionary function exception test, Plaintiffs have failed to allege "facts showing that the actions were actually not policy-oriented," for any of their claims. *See Hardscrabble Ranch*, 840 F.3d at 1222. Plaintiffs, in fact, do not even acknowledge the binding Supreme Court precedent establishing a presumption that discretionary conduct pursuant to a regulatory statute such as CERCLA is based in protected policy considerations. Nor do Plaintiffs cite a single case in which the EPA's remedial conduct pursuant to CERCLA was subject to scrutiny through an FTCA action. Despite the consistent case law protecting the government's discretionary conduct pursuant to CERCLA from tort challenges, Plaintiffs argue that this Court should break new legal ground here because EPA "*abandoned* its work plan and negligently bore into the mine without necessary safety protocols." Pl. Br. at 53 (emphasis in original). This fundamentally misunderstands the relevant inquiry.

The FTCA expressly states that the discretionary function exception applies "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Thus, "[t]he discretionary function applies even when the discretionary acts themselves constitute negligence," *Flynn*, 902 F.2d at 1530, and the standard for application of the second part of the discretionary function exception test is simply whether the challenged conduct "implicate[s] public policy concerns or [is] 'susceptible to policy analysis.'" *Lopez v. United States*, 376 F.3d 1055, 1060-61 (10th Cir. 2004) (quoting *Gaubert*, 499 U.S. at 325). Where, as here, the EPA's conduct was discretionary

and pursuant to CERCLA, "it must be presumed" that the conduct was "grounded in policy," *Gaubert*, 499 U.S. at 324, and the plaintiff has the burden to "allege facts showing that the actions were actually not policy-oriented." *Hardscrabble Ranch*, 840 F.3d at 1222.[21]

a. Plaintiffs have not even attempted to allege facts showing that the claimed negligent conduct was not policy-oriented for any particular claims.

In the opening brief, the United States listed all of the claims of alleged negligent conduct across the four complaints in the multidistrict litigation. U.S. Br. at 39-40. In response, Plaintiffs do not argue that any of this claimed negligent conduct was not pursuant to CERCLA and its regulations. Consequently, Plaintiffs must demonstrate that their complaints have adequately alleged facts that the conduct was not policy-oriented to overcome the "strong presumption" that the conduct was based in the policies underlying CERCLA. *See Gaubert*, 499 U.S. at 324; *Hardscrabble Ranch*, 840 F.3d at 1222.

Plaintiffs' responses repeatedly show that they fail to appreciate their burden. Plaintiffs argue that EPA "cannot explain why actions the Sovereign Plaintiffs challenge" were susceptible to policy choices "related to safety, feasibility, resource allocation, and environmental protection," Pl. Br. at 53, and "EPA does not attempt to explain how its failure to have an adequate emergency plan in place, or failure to warn downstream communities, involved policy

[21] Contrary to Plaintiffs' assertion, the United States has never argued that "*any* action the government takes related to CERCLA is exempt from claims under the FTCA." Pl. Br. at 58. Indeed, the United States offered an example in the opening brief where a plaintiff could show that alleged negligent conduct of an employee involved in a CERCLA remedial action was not policy-oriented: an employee negligently causing a traffic accident on the way to the job site. U.S. Br. at 62, n.23. In a separate filing (Dkt. 62)—not allowed under the case management order—Utah acknowledged this example, but claimed that the example "swallows the argument" because "the same rule applies when the EPA employee/contractor negligently drives or operates a backhoe at work, to breach a mine adit." Utah, however, does not point to any allegations in any complaint that: (1) an EPA employee was operating a backhoe or (2) the operation of the backhoe was not part of the policy-oriented remedial process at the site. Indeed, Plaintiffs have ignored their burden of pointing to alleged facts to show that claims were not policy-oriented.

considerations." Pl. Br. at 59. But, given the strong presumption applicable under *Gaubert* to discretionary conduct pursuant to a policy-based statute like CERCLA, the United States does not have to articulate the potential policy implications. Instead, Plaintiffs have the burden, which they have failed to meet, of alleging facts showing that each particular claim is *not* policy-oriented. Indeed, Plaintiffs have not even tried to show that their complaints allege facts that negligent conduct was not policy-oriented for *any* particular claims of negligence.

Even without the policy presumption, Plaintiffs' claims obviously challenge conduct that is susceptible to policy analysis. For example, all of the plaintiffs have claimed that EPA was negligent for "failing to investigate or test the hydraulic pressure with the Gold King Mine Level 7 adit before digging out the earthen plug . . ." *See* U.S. Br. at 39. As noted in the opening brief, determining the hydraulic pressure behind the collapsed adit is undoubtedly susceptible to the following considerations: safety (whether it is worth the risk in placing equipment and personnel on a steep slope that may be prone to cave-ins); environmental protection (whether the fragile natural environment around the mine should be disturbed in order to install the drill rig); feasibility (whether a drill rig can be put in place in the short time period during which weather allows work to take place at the mine adit); and resource allocation (whether EPA has enough money, equipment, and expertise to accomplish the complicated and expensive task given its other priorities).

Likewise, failure to warn claims involving environmental hazards arising from a CERCLA site are consistently barred by the discretionary function exception because decisions regarding how and when to warn of such hazards inherently involve policy balancing related to CERCLA. *See, e.g., Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1542-43 (10th Cir. 1992) (discretionary function exception barred failure to warn claim regarding hazards at a CERCLA

site because the claim implicated policy concerns underlying the CERCLA response actions); *W. Greenhouses v. United States*, 878 F. Supp. 917, 928 (N.D. Tex. 1995) (discretionary function exception barred failure to warn claim because plaintiffs failed to produce evidence to overcome the presumption that CERCLA remediation conduct, including public notification, was grounded in policy); *see also A.O. Smith Corp. v. United States*, 774 F.3d 359, 369-71 (6th Cir. 2014) (discretionary function exception barred failure to warn claim for downstream residents of flooding from dam discharges because plaintiffs failed to show "how this decision is not susceptible to policy analysis"). Plaintiffs have not cited any contrary cases.

b. Characterizing EPA's conduct as "implementation" is insufficient to overcome the discretionary function exception.

Rather than properly trying to satisfy their burden by pointing to facts alleged in their complaints showing that particular claims are not policy-oriented, Plaintiffs engage in impermissible and arbitrary line-drawing by broadly arguing that none of their claims are barred because the claims challenge "implementation" of a policy. The Plaintiffs do not cite any cases showing that this argument can overcome a presumption that conduct pursuant to a statute such as CERCLA is policy-oriented. But, even if this argument were germane, it is unpersuasive.

Plaintiffs claim that the discretionary function exception does not apply because the EPA actions involved "implementation of *a predetermined course*"—namely, the course which had already been determined through the Work Plan. Pl. Br. at 55. As described above, however, the Work Plan was the contractor's description of the proposed work. Plaintiffs have made no allegations in their complaints that EPA's OSC lacked the discretion and the authority to modify the Work Plan in implementation of a CECRLA removal site evaluation. In *Lopez*, the Tenth Circuit explicitly recognized that when a "relevant law," like CERCLA, "leaves room for officials to exercise policy-oriented discretion in a particular area, that discretion will be

protected even with regard to what may seem to be details of implementation." 376 F.3d at 1060-61. Further, in *Zumwalt v. United States*, 928 F.2d 951, 954-55 (10th Cir. 1991), the Tenth Circuit rejected a plaintiff's argument that implementation of policies is not protected by the discretionary function exception, stating "[a] decision that is a component of an overall policy decision protected by the discretionary function exception also is protected by this exception." Finally, contrary to Plaintiffs' argument, the Tenth Circuit's decision in *Daigle*, did not involve just "broad-based challenges" to an environmental project, Pl. Br. at 55, but also the "translation" of CERCLA's provisions into "concrete plans." 972 F.2d at 1541.

Plaintiffs try to circumvent this Tenth Circuit precedent; they argue that implementation is actionable here because this case is like *Indian Towing v. United States*, 350 U.S. 61 (1955), in which the government was found liable because the Coast Guard failed to keep a lighthouse operational. Pl. Br. at 56. As the Supreme Court has since explained, once the Coast Guard decided to operate the lighthouse, the failure to keep the light operational cannot be considered a discretionary policy choice. *See Gaubert*, 499 U.S. at 326. Plaintiffs, however, do not argue that the EPA failed to perform the very essence of the task it had undertaken, a removal site evaluation; instead, Plaintiffs improperly insert a negligence analysis, arguing that EPA performed excavation "without due care." Pl. Br. at 56. Moreover, *Indian Towing* did not apply the two-part discretionary function exception test, and the Tenth Circuit has stated, after *Gaubert*, that *Indian Towing* is "not persuasive authority in the context of the discretionary function exception." *Harrell v. United States*, 443 F.3d 1231, 1237 (10th Cir. 2006) (citing four other circuit courts agreeing that *Indian Towing* has no bearing on discretionary function cases).

Here, any EPA decisions about how to evaluate the site, including when to excavate, where to excavate, and what equipment to use, simply cannot be divorced from the larger

statutory context of CERCLA, and therefore implicated the policy considerations that underlie the statute's purpose. Plaintiffs have failed to point to any particular allegations to show that this, or any other conduct, is not policy-oriented.[22]

Because Plaintiffs have failed to meet their burden to demonstrate either: (1) that a fixed or readily ascertainable standard constrained the discretion of an EPA employee with respect to one of their claims, or (2) that alleged facts would establish that one of their claims challenges conduct that is not policy-oriented to overcome the *Gaubert* presumption, Plaintiffs' FTCA claims must be dismissed for lack of jurisdiction.

B. The Sovereign Plaintiffs Continue to Claim Damages that are Not Jurisdictionally Cognizable under the FTCA.

Sovereign Plaintiffs argue that they merely need to allege some cognizable damages. Yet they have not alleged any cognizable damages under the FTCA, and they are therefore missing an essential element of any tort claim. The Court can and should dismiss Sovereign Plaintiffs' tort claims for which they cannot state jurisdictionally-cognizable damages. *See Allen v. Toshiba Corp.*, 599 F. Supp. 381, 385 (D.N.M. 1984) (dismissing non-cognizable tort claims seeking economic losses). Here, Sovereign Plaintiffs have failed to show that any of their jurisdictionally-flawed tort claims against the United States can survive.

1. The Court lacks jurisdiction over tort claims that seek remote damages.

Sovereign Plaintiffs have only identified damages that are derived from injury to private parties. Those remote damages, including damages for lost tax revenue, are jurisdictionally

[22] Plaintiffs do not argue that the discretionary function exception does not apply because EPA's conduct involved scientific or technical considerations. In fact, Plaintiffs concede that the discretionary function exception can apply when conduct is grounded in both policy considerations *and* technical or scientific considerations. Pl. Br. at 56. Plaintiffs also acknowledge that the Tenth Circuit's decision in *Ayala v. United States*, 877 F.2d 846 (10th Cir. 1989) involved only application of technical safety considerations, apart from other policy considerations. Pl. Br. at 56-57.

barred on two separate grounds: first, there is no analogous private liability because state tort law prohibits claims for economic loss that derive from injury to someone else; and second, generalized grievances do not give rise to an injury-in-fact for Article III standing. *See* U.S. Br. at 63-66. In their response, Sovereign Plaintiffs chose to address only Article III standing. They did not—and cannot—address the argument that there is no waiver of sovereign immunity for this unique and completely unprecedented form of tort damages.

Under the FTCA, the United States waives sovereign immunity for negligence claims *only* to the same extent "a private person" would be held liable under the state law "where the act or omission occurred." *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994), 28 U.S.C. § 1346(b). Thus, unless state law recognizes a claim allowing a state to sue a private person for lost tax revenue resulting from injuries to third parties, the FTCA has not waived immunity. *See Ayala v. United States*, 49 F.3d 607, 610-11 (10th Cir. 1995). Plaintiffs have not cited a case from Colorado, or any other state, recognizing such a claim. For this reason alone, the Court should decline the invitation to create novel state law, simultaneously expanding the FTCA waiver of sovereign immunity. *See Amparan v. Lake Powell Car Rental Cos.*, 882 F.3d 943, 947-48 (10th Cir. 2018) (federal courts should not expand state law without clear guidance from state's highest court). Moreover, there are well-grounded policy reasons that state law prohibits recovery derived from someone else's injury. The problem is not proximate cause, as Sovereign Plaintiffs argue, but rather, the concern that permitting recovery for derivative injuries would create a limitless proliferation of lawsuits. *Compare* Pl. Br. 62-64 with *Nat'l Roofing Inc. v. Alstate Steel Inc.*, 366 P.3d 276, 278-79 (N.M. Ct. App. 2015) (liability for derivative claims would be "foreseeable" but limitless) and *Int'l Bhd. of Teamsters v. Phillip Morris*, 34 F. Supp. 2d 656, 661 (N.D. Ill. 1998) (remoteness is a problem "completely unrelated to factual or proximate causation").

Article III standing arises from similar policy concerns, and separately bars Sovereign Plaintiffs' claims. Sovereign Plaintiffs again rely heavily on their own repetition of the word "direct," but behind that, they still cannot identify damage to any specific revenue stream that would be a recognizable injury-in-fact. Instead, Sovereign Plaintiffs insist—wrongly—that they can stand on generalized economic harm and "concomitant reduction in GDP." Pl. Br. at 62. Sovereign Plaintiffs cannot reconcile that position with binding precedent that courts must refrain from adjudicating states' generalized grievances, *see, e.g.*, *Wyoming v. Dept. of Interior*, 674 F.3d 1220, 1230-31 (10th Cir. 2012), and indeed, several of the cases Sovereign Plaintiffs cite actually prohibit their claims. *See, e.g.*, Pl. Br. at 63, *citing Pennsylvania v. Kleppe*, 533 F.2d 668, 672-73 (D.C. Cir. 1976) (holding that reductions in state tax revenue are "the sort of generalized grievance… so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing."). By relying on generalized economic harm, plaintiffs have failed to identify a specific injury-in-fact. In sum, the burden is on plaintiffs to identify a specific injury-in-fact, not just a generalized grievance, and Sovereign Plaintiffs cannot meet that burden.

2. The Court lacks jurisdiction over tort claims for interference with contract rights and lost business.

Sovereign Plaintiffs acknowledge the remoteness of their claims in arguing that they are not barred by 28 U.S.C. § 2680(h), which prohibits FTCA claims for the interference with contract rights and business expectations. Sovereign Plaintiffs contend "that Plaintiffs do not allege that the EPA interfered with *their* contractual relationships or *their* 'business expectations.'" Pl. Br. at 65 (emphasis added). But, this argument fails to recognize that Sovereign Plaintiffs' generalized economic harm derives from interference with contractual relationships and business expectations among their citizens. It would be "illogical and contrary to the words and reason of the exception" to allow such derivative claims, when the underlying

claims among the private parties with actual contracts—who may claim interference with farming and recreational businesses—are barred. *See Art-Metal USA v. United States*, 753 F.2d 1151, 1155 (D.C. Cir. 1985) (internal quotations omitted).

3. The Court lacks jurisdiction over tort claims for injunctive relief.

In arguing to save their novel FTCA claims seeking monetary awards for specific remedies, Plaintiffs do not address well-established Tenth Circuit precedent holding that when a federal statute waives sovereign immunity only for a specific form of relief such as "money damages," the court must apply the "essential purpose" test to determine jurisdiction. *See Eagle - Picher Indus. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990). Sovereign Plaintiffs' tort claims cannot survive this test. Rather than acknowledge this, Sovereign Plaintiffs analogize their novel claims to traditional torts, in which restoration costs are *one measure of money damages* under state law for injury to real property. *See, e.g.*, Pl. Br. at 67 (citing *Marina Bay Realty Trust v. United States*, 407 F.3d 418 (1st Cir. 2005)). But Sovereign Plaintiffs are not aggrieved real property owners, and they have no damages to real estate to measure. *See, e.g.*, Pl. Br. at 66 (describing their claims as "tort claims for investigation, cleanup and remedial costs," not claims for real property damage). Rather, Sovereign Plaintiffs seek money to fund specific, forward-looking actions to improve the environment in their states and territories. That is injunctive relief barred by the FTCA and by CERCLA § 9613(h), whether or not it is assigned monetary value.

4. The Court lacks jurisdiction over tort claims for natural resource damages.

Sovereign Plaintiffs acknowledge that the Tenth Circuit has held, in a remarkably similar case, that "permitting New Mexico's state law tort claim for [natural resource damages] to survive 'in its original form' would run afoul of CERCLA," and therefore precluded the tort

claim and "restrict[ed] New Mexico's ability to use [natural resource damages] as contemplated by section 9607(f)(1)." Pl. Br. at 68, citing *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006). That is exactly the point. Natural resource damages claims cannot proceed in tort because that would conflict with CERCLA's comprehensive remedy.

Sovereign Plaintiffs further confuse the issue arguing that consequential damages, such as reduced tourism, fishing and land uses are "beyond" natural resource damages. Pl. Br. at 69. Yet, natural resource damages specifically include consequential damages from lost resource use, such as reduced tourism, fishing and land use. *See* 43 C.F.R. §§ 11.10-11.93 (procedures for natural resource damages assessments). Indeed, this argument merely underscores how well Sovereign Plaintiffs' claimed damages fit into CERCLA's comprehensive regulatory scheme. Thus, the Court must dismiss tort claims for natural resource damage.

CONCLUSION

For the above reasons, the Court should dismiss all claims against Federal Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2018, I electronically filed the foregoing Federal Defendants' Reply In Support of Their Motion to Dismiss using the Electronic Case Filing ("ECF") system of this Court. The ECF system will send a "Notice of Electronic Filing" to the attorneys of record.

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