IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Multidistrict Litigation Action No. 01:18—md—2824-WJ

***IN RE* GOLD KING MINE RELEASE IN SAN JUAN COUNTY, COLORADO, ON AUGUST 5, 2015.**

(This REPLY IN SUPPORT relates to *State of Utah v. Environmental Restoration, LLC, et al*., No. 02:17—cv—00866-TS.)

REPLY OF DEFENDANT HARRISON WESTERN CONSTRUCTION CORPORATION IN SUPPORT OF MOTION TO DISMISS PLAINTIFF STATE OF UTAH'S FIRST AMENDED COMPLAINT

Defendant Harrison Western Construction Corporation replies now in support of its motion to dismiss plaintiff State of Utah's first amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6)(**FED.R.CIV.P. 12(b)(2)**, **(6)**), stating as follows:

INTRODUCTION

Plaintiff State of Utah ("Utah") opens its first amended complaint, noting that the United Sates Environmental Protection Agency ("EPA") and others -- **not defendant Harrison Western Construction Corporation** ("Harrison Western") -- negligently breached the Gold King Mine near Silverton, Colorado, on August 5, 2015, causing a blowout. [DOC. 93 at ¶¶ 1-2 (***State of Utah v. Environmental Restoration,***

***LLC, et al.*, No. 02:17—cv—00866-TS (D. Utah)**)]. Almost nine months later, Utah's position remains unchanged; that is to say, Utah has repeatedly and unequivocally declared

- that other -- **not Harrison Western** -- "triggered an environmental disaster by tearing open the Level 7 adit of the Gold King Mine with a backhoe" on August 5, 2015;
- that "[t]here is no reasonable dispute that [others -- **not Harrison Western** --] caused the blowout" [DOC. 58 at 1 (***In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015*, No. 01:18—md—02824 (D.N.M.)**)];
- that others excavated into the face of the Gold King Mine adit in the absence of Harrison Western and in substantial deviation from Harrison Western's revised construction plan to safely re-open the Gold King Mine, effectively "abandon[ing] the plan that was designed to prevent [a blowout]" [DOC. 58 at 8, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56

(***In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015***)]; and,

- that others "prevented Harrison Western from doing its job properly, causing an environmental disaster in the process." [DOC. 58 at 35].

Harrison Western agrees. Harrison Western agrees because

- it created a revised construction plan to safely re-open the Gold King Mine;
- that plan was reviewed and approved by the EPA;
- Harrison Western was not present when, nor aware that, others returned to the Gold King Mine in July 2015;
- Harrison Western was scheduled to return to the Gold King Mine during the week of August 17, 2015, at which time it intended to assess the mine and, if appropriate, implement its revised construction plan for re-opening;
- Harrison Western was not aware EPA and others intended to mobilize at the mine on August 4, 2015;

- Harrison Western was not aware EPA and others intended to excavate into the face of the Gold King Mine adit on August 4, 2015;
- Harrison Western was not present at the Gold King Mine on August 4, 2015 when EPA and others did, in fact, excavate into the face of the Gold King Mine adit;
- Harrison Western was prevented from both personally assessing and evaluating the then-current mine conditions as well as successfully implementing its revised construction plan when EPA and others excavated into the face of the Gold King Mine on August 4, 2015;
- Harrison Western was not aware EPA and others intended to continue their excavation at the mine on August 5, 2015;
- Harrison Western was not present at the Gold King Mine on August 5, 2015 when EPA and others continued to excavate into the face of the Gold King

Mine adit;

- Harrison Western was prevented from both personally assessing and evaluating the then-current mine conditions as well as successfully implementing its revised construction plan when EPA and others continued their excavation into the face of the Gold King Mine on August 5, 2015; and,
- Harrison Western was not present when EPA and others caused a blowout of the Gold King Mine. [DOC. 41-4 at ¶¶ 7-27, 30 and DOC. 41-6 at ¶¶ 8-22, 25 (***In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015***)].

Notwithstanding these evidentiary facts and its repeated declarations to the contrary [DOC. 58 at 1, 8, 35, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56], Utah has directed claims against Harrison Western. Harrison Western, of course, has resisted those claims and has moved to dismiss.

ARGUMENT

I. UTAH COURTS LACK PERSONAL JURISDICTION OVER HARRISON WESTERN.

In response to Harrison Western's challenge to personal jurisdiction, Utah

contends that, with regard to its efforts to safely re-open the Gold King Mine -- **all of which occurred in Colorado and all of which ended months prior to the blowout** [DOC. 41-4 at ¶¶ 7-20 and DOC. 41-6 at ¶¶ 8-15] -- Harrison Western "purposefully directed" its efforts at Utah. [DOC. 59 at 8-11 (***In re Gold King Mine Release in San Juan County, Colorado on August 5, 2015***)]. Utah bases that contention upon the fact Harrison Western was aware that some amount of impounded water was in the mine as of September 2014, that the mine could blowout if re-opened improperly and that water flows downhill. [DOC. 59 at 8-10]. In other words, because if done improperly, impounded water could escape and find itself being carried in a waterway to Utah, Harrison Western's efforts -- **in Colorado** -- to safely re-open the Gold King Mine -- **also in Colorado** -- were "expressly aimed" at Utah. [DOC. 59 at 10].

This contention is without merit.

It is without merit because it lacks support within the underlying pleading, within the evidentiary facts and within the applicable law.[1]

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[1]It is undisputed Utah has the burden of proving that the exercise of personal jurisdiction over Harrison Western is constitutional. ***Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1065 (10th Cir. 2007)**. That burden is met "'by demonstrating, *via* affidavit or other written materials, facts that if true would support jurisdiction over the defendant.'" ***Melea, Ltd.*, 511 F.3d at 1065, *quoting TH Agriculture & Nutrition, LLC v. Ace European Group Ltd.*, 488 F.3d 1282, 1286 (10th Cir. 2007)**.

Where, as here, Harrison Western has proffered evidentiary facts demonstrating no basis for the exercise of personal jurisdiction, Utah is required to provide counter-evidentiary facts; it cannot rely solely upon allegations or arguments of counsel. It

A. Utah Cannot Establish Personal Jurisdiction Over Harrison Western Based Upon Non-Affirmative And Non-Physical Conduct.

Utah initially contends the exercise of personal jurisdiction is justified because -- at some undefined time prior to the blowout -- Harrison Western conclud[ed]"

- "there were only six feet of toxic wastewater impounded in the mine;"
- "the water was not under pressure and was below the top of the adit;" and that,
- "it was not necessary to test for the level or volume of water behind the blockage."[2] [DOC. 59 at 8].

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cannot because allegations and arguments of counsel "cannot be a basis for personal jurisdiction." ***American Land Program v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1454 (10th Cir. 1983)**.

Utah, of course, has provided no such counter-evidentiary facts. It has, instead, elected to rely upon its (unverified) first amended complaint and underlying arguments of counsel. [DOC. 59]. In this regard, then, Utah has failed to demonstrate a *prima facie* case justifying the exercise of personal jurisdiction over Harrison Western and, therefore, its claims -- and all of them -- must be dismissed. **See *American Land Program*, 710 F.2d at 1454**.

[2]This allegation contradicts the evidentiary fact that Harrison Western never concluded how much water was in the mine in September 2014 other than it likely exceeded the then-existing treatment capacity at the mine. [DOC. 41-4 at ¶ 13]. Because Utah has elected not to respond in opposition with any counter-evidentiary facts, this allegation must be ignored. **See *American Land Program*, 710 F.2d at 1454**.

But, no court can exercise personal jurisdiction over a non-resident defendant premised upon conclusions [DOC. 59 at 8], "assum[ptions]" or belie[fs] [DOC. 93 at ¶¶ 46-48]. A court cannot because conclusions, assumptions and beliefs are neither "purposive efforts" (***Dudnikov v. Chalk & Vermilion Fine Arts*, 514 F.3d 1063, 1078 (10th Cir. 2008)**) nor "actual, physical acts in the real world" (***Schwarzenegger v. Fred Martin Motors Co*., 374 F.3d 797, 806 (9th Cir. 2004)**) required for the exercise of personal jurisdiction. **See *Walker v. THI of New Mexico at Hobbs Center*, 801 F. Supp. 2d 1128, 1158-59 (D.N.M. 2011)**(evidence regarding party's presumption insufficient for exercise of personal jurisdiction over non-resident defendant).

Beyond Harrison Western's conclusions, assumptions and beliefs, Utah also contends the exercise of personal jurisdiction is justified because Harrison Western

- "failed to insert a measuring device behind the blockage to determine the water level, volume, and pressure behind the blockage;"
- "did not design or install sufficient containment measures, or adopt sufficient emergency response procedures, to prevent an accidental release from the mine;" and,

- "did not provide advance warning to other agencies or municipalities so they could be prepared for an accident." [DOC. 59 at 8].

But, no court can exercise personal jurisdiction over a non-resident defendant for a failure to act. A court cannot because non-actions are also neither "purposive efforts" (***Dudnikov*, 514 F.3d at 1078**) nor "actual, physical acts in the real world."[3] (***Schwarzenegger*, 374 F.3d at 806**) required for the exercise of personal jurisdiction. **See *Toytrackerz LLC v. American Plastic Equipment, Inc*., 615 F. Supp. 2d 1242, 1254 (D. Kan. 2009)**(failure to police and restrain licensee from tortious conduct in forum state insufficient for exercise of personal jurisdiction over non-resident defendant); **see also *Pakootas v. Teck Comico Metals, Ltd*., 2012 U.S. Dist. LEXIS 177550 * 33-34 (E.D. Wash.)**(personal jurisdiction over Canadian company premised upon physical act of dumping hazardous substances into Columbia River); ***Welch v. PUC Services, Inc*., 2007 U.S. Dist. LEXIS 70901 * 5**

[3]Utah also alleges that Harrison Western's Health & Safety Plan did not comply with applicable law [DOC. 59 at 8], and that Harrison Western's conduct violated "various [other] mandatory laws, regulations, and polices." [DOC 93 at ¶ 54].

These allegations, however, are pure conclusions and cannot provide a basis for the exercise of personal jurisdiction over Harrison Western. **See *Shrader v. Biddinger*, 633 F.3d 1235, 1239 (10th Cir. 2011)**; ***Silver v. Quora, Inc*., 2016 U.S. Dist. LEXIS 186761 * 6 (N.M.)**.

(W.D. Mich.)(personal jurisdiction over Canadian wastewater treatment plant operator premised upon physical act of releasing untreated wastewater into St. Mary's River).

Utah also contends the exercise of personal jurisdiction is justified because Harrison Western was involved in undefined and unspecified miscommunications prior to the blowout. [DOC. 59 at 8].

But, the allegation supporting this contention is a conclusion and cannot be considered. **See *Shrader*, 633 F.3d at 1239**; ***Silver*, 2016 U.S. Dist. LEXIS 186761 * 6**.

This allegation must also be ignored because it directly contradicts evidentiary facts. **See *American Land Program*, 710 F.2d at 1454**; **see also *UniCredit Bank AG v. RKC Financial Corp.*, 2014 U.S. Dist. LEXIS 86762 * 46 (Kan.)**(even allegations "made upon 'information and belief' must rise above mere suspicions, implausibly sweeping conclusions and speculation"). Indeed, Harrison Western prepared a revised construction plan for safely re-opening the Gold King Mine, provided that plan to defendant Environmental Restoration, LLC ("ER") and, thereafter, was advised to mobilize at the mine on the week of August 17, 2015. [DOC. 41-4 at ¶¶ 17-19 and DOC. 41-6 at ¶¶ 12-14]. Harrison Western was never advised that others would undertake the excavation of the mine or that they would

do so prior to Harrison Western's scheduled return. [DOC. 41-4 at ¶¶ 18-23 and DOC. 41-6 at ¶¶ 13-18]. These evidentiary facts directly contradict the "on[-]information[-]and[-]belief" allegation that Harrison Western miscommunicated with others.

Moreover, even if that allegation were not conclusory and contradictory, it concerns nothing more than a "passive act," which acts are also insufficient for the exercise of personal jurisdiction.[4] **See *Touchstone Group, LLC v. Rick*, 913 F. Supp. 2d 1063, 1075 (D. Colo. 2012)**(non-resident defendant's receipt of funds from forum "passive act" insufficient for exercise of personal jurisdiction); ***Toytrackerz LLC*, 615 F. Supp. 2d at 1254** (failure to police and restrain licensee from tortious conduct in forum state "passive act" insufficient for exercise of personal jurisdiction over non-resident defendant).

B. Utah Cannot Exercise Personal Jurisdiction Over Harrison Western Based Upon Conduct "Expressly Aimed" At Colorado.

Separately, Utah contends the exercise of personal jurisdiction is justified because Harrison Western:

[4]Utah also contends that Harrison Western "intentionally" concluded, assumed, believed and failed to act. [DOC. 59 at 8]. But, the pleading allegations it relies upon do not mention any intentional conduct or intentional non-conduct by Harrison Western. [DOC. 93 at ¶¶ 40, 46-53, 56, 58].

- visited the Gold King Mine in late July 2014;
- discussed the mine's re-opening;
- prepared a construction plan to safely re-open the mine;
- visited the mine in September 2014 to evaluate and assess the conditions;
- communicated its observations and conclusions about the mine conditions to ER;
- prepared a revised construction plan to safely re-open the mine; and,
- shared that plan with ER. [DOC. 59 at 9].

While these may be examples of "purposive conduct" or "actual, physical acts in the real world," **none were "expressly aimed" at Utah because it is also true that each occurred in Colorado to address the safe re-opening of a Colorado mine**. [DOC. 41-4 at ¶¶ 5-20 and DOC. 41-6 at ¶¶ 4-15]. Utah, however, suggests that, because Harrison Western was aware of the risks involved as well as the laws of gravity and hydrology, Utah was the "focal point" of its efforts to safely re-open the Gold King Mine because "the downstream communities stood to benefit from

[Harrison Western]'s intentional acts if they were performed without negligence." [DOC. 59 at 10].

But, this contention finds no support in the allegations by Utah. Indeed, there is no allegation that any wastewater from the Gold King Mine ever entered any Utah waterway prior to the decision by CDRMS to re-open that Colorado mine nor is there any allegation that CDRMS was otherwise animated by any prior contamination of a Utah waterway.

This contention also finds no support in the evidentiary facts. Indeed, all the work performed by Harrison Western in connection with safely re-opening the Gold King Mine was undertaken in Colorado or was intended to be undertaken in Colorado at the mine itself. [DOC. 41-4 at ¶¶ 2-14, 17-20 and DOC. 41-6 at ¶¶ 2-15]. More specifically, Harrison Western subcontracted with ER -- in Colorado -- to safely re-open the Gold King Mine, also in Colorado.[5] [DOC. 41-4 at ¶ 7 and DOC. 41-6 at ¶ 8]. Toward that end, Harrison Western mobilized at the mine the following month [DOC. 41-4 at ¶¶ 9-10 and DOC. 41-16 at ¶¶ 10-11], at which time it observed others excavating near the mine's adit. [DOC. 41-4 at ¶ 10]. Harrison Western noticed

[5]In this regard, Harrison Western's subcontract was Colorado-centric. **See *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1077, 1080 (10th Cir. 1995)**; ***H.A. Folsom & Associates, Inc. v. Capel*, 2016 U.S. Dist. LEXIS 111040 * 21-22 (Utah)**; ***All American Securities Corp. v. Borealis Mining Co., LLC*, 2015 U.S. Dist. LEXIS 173103 * 9-11**.

seepage in the face of the excavation in a quantity that it believed could not be safely handled under the existing circumstances. [DOC. 41-4 at ¶¶ 11-13 and DOC. 41-6 at ¶ 11]. Harrison Western recommended that the excavation cease, and it did. [DOC. 41-4 at ¶ 14 and DOC. 41-6 at ¶ 11].

With the mine re-opening "suspended" [DOC. 41-4 at ¶ 14 and DOC. 41-6 at ¶ 11], Harrison Western returned to suburban Denver and prepared a revised construction plan to safely re-open the Gold King Mine. [DOC. 41-4 at ¶ 17 and DECLARATION EXHIBIT 3, and DOC. 41-6 at ¶ 12 and DECLARATION EXHIBIT 3]. Harrison Western planned to return to the Gold King Mine during the week of August 17, 2015.[6] [DOC. 41-4 at ¶ 19 and DOC. 41-6 at ¶ 14].

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[6]Utah similarly contends it has established a basis for personal jurisdiction over Harrison Western because its "conduct was aimed at remediating mine waste pollution affecting downstream communities" and, therefore, Harrison Western "knew that the brunt of any harm caused by its negligence or wrongful conduct would be felt in those same downstream communities." [DOC. 59 at 10-11].

Nowhere, of course, has Utah alleged any facts regarding Harrison Western's knowledge as to where the brunt of the harm would be felt due to its "passive conduct." [DOC. 93]. And, nowhere has Utah alleged any prior downstream pollution in Utah from the Gold King Mine or any interest on the part of CDRMS to address any prior contamination of a Utah waterway.

Additionally, the evidentiary facts establish that others -- not Harrison Western -- caused the blowout on August 5, 2015. [DOC. 41-4 at ¶¶ 21-26, 30 and DOC. 41-6 at ¶¶ 16-21, 25]. Utah does not disagree with those facts. Rather, it concedes others "prevented Harrison Western from doing its job properly" by substantially deviating from and "abandon[ing]" Harrison Western's revised construction plan to safely re-open the Gold King Mine. [DOC. 58 at 1, 8, 35, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56]. Simply contending, as Utah does, that

Utah simply has not established that any of the efforts undertaken by Harrison Western in Colorado to safely re-open a Colorado mine were "expressly aimed' at Utah.

C. Utah Cannot Exercise Personal Jurisdiction Over Harrison Western Based Upon Conduct That Arose Solely Out Of Its Contact With Colorado.

Utah contends the exercise of personal jurisdiction over Harrison Western is justified because the damages it suffered as a result of the Gold King Mine blowout arise out of Harrison Western's conclusions, assumptions, beliefs and failures to act. [DOC. 59 at 11].

But, that contention ignores Utah's prior declarations [DOC. DOC. 58 at 1, 8, 35, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56] as well as the evidentiary facts. [DOC. 41-4 at ¶¶ 7-26 and DOC. 41-6 at ¶¶ 8-21]. Those declarations and evidentiary

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Harrison Western knew the brunt of any harm caused by its work solely in Colorado would be felt in Utah because of the laws of gravity and hydrology evades those facts. **See *Nationwide Telecom v. Dollar Phone Corp.*, 2018 U.S. Dist. LEXIS 58215 * 6-7 (Colo.)**(refusing exercise of personal jurisdiction over non-resident defendant where no evidence defendant knew calls would be routed through Colorado).

This contention, then, unwinds into a repackaged version of the roundly-rejected proposition that personal jurisdiction over a non-resident defendant can be exercised simply because some harm was felt in the forum state. **See *Walden v. Fiore*, 134 S.Ct. 1115, 1125 (2014)**.

facts establish that, to the extent there was any "purposive conduct" or "actual, physical acts in the real world" "expressly aimed" at Utah, they were undertaken by others and, therefore, cannot serve as a basis for the exercise of personal jurisdiction over Harrison Western.[7] ***Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868, 1873 (1984)**("[the] unilateral activity of another party or third party is not an appropriate consideration when determining whether a defendant" has minimum contacts with forum state); **see *Calder v. Jones*, 104 S.Ct. 1482, 1487 (1984)**; ***Bell Helicopter Textron, Inc. v. Heliqwest International*, 385 F.3d 1291, 1296 (10th Cir. 2004)**("specific jurisdiction must be based on actions by the defendant and not on events that are the result of unilateral actions taken by someone else"); ***Dudnikov*, 514 F.3d at 1074**; ***Ramos v. Foam America, Inc.*, 2018 U.S. Dist. LEXIS 26465 * 22 (N.M.)**(refusing exercise of personal jurisdiction over non-resident defendant where tar lugger designed, manufactured, marketed and sold by defendant brought into New Mexico by third-party with whom defendant had no relationship).

II. UTAH HAS FAILED TO STATE A CLAIM FOR RELIEF AGAINST HARRISON WESTERN.

Utah's factual allegations are linear and chronological. Utah begins in 1959

[7]It is worth noting that Utah has not challenged or disputed Harrison Western's belief that the Gold King Mine would have been successfully re-opened had EPA and others not prevented Harrison Western from implementing its revised construction plan.

and recounts the history of the Gold King Mine thereafter. [DOC. 93 at ¶¶ 18-63]. Utah further alleges that, during excavation work by others at the Gold King Mine in September 2014, Harrison Western observed seepage and determined that some amount of water was impounded within the mine. [DOC. 93 at ¶ 39]. The excavation work by others was stopped and, as Utah alleges, suspended until 2015. [DOC. 93 at ¶ 41].

Thereafter, Utah's recounting of the Gold King Mine's history jumps to July 23, 2015 and certain communications between others -- **not Harrison Western** -- regarding a "site visit" and "an outside independent review of the EPA/DRMS plans" scheduled for August 14, 2015 [DOC. 93 at ¶ 42], prior to Harrison Western's planned re-mobilization. [DOC. 41-4 at ¶ 19 and DOC. 41-6 at ¶ 14]. Utah then alleges that others -- **not Harrison Western** -- gathered at the mine on August 4, 2015 "and created a plan to conduct excavation activities at the [mine]" [DOC. 93 at ¶ 44], excavated and, while doing so, noticed "contaminated water seeping out at an elevation about five to six feet above the floor of the adit." [DOC. 93 at ¶ 45]. In its very next breath, though, Utah states that Harrison Western -- **who was not present at the mine nor expected to be** -- assumed "this" meant

- "that the contaminated water level was below the top of the adit;"

- that, "because the mine was draining, it was not under pressure from the contaminated water behind it;" and,
- that "it was not necessary to directly test for the level or volume of contaminated water behind the blockage." [DOC. 93 at ¶¶ 46-48].

These allegations do not make sense. Harrison Western cannot be alleged to have made an assumption about an event on August 4, 2015 -- water seepage at the Gold King Mine -- that it did not witness and did not even know was occurring. [DOC. 41-4 at ¶¶ 21-23 and DOC. 41-6 at ¶¶ 16-18].

Utah's response to this obvious problem is to blame Harrison Western. [DOC. 59 at 13]. According to Utah -- and notwithstanding its prior, linear and chronological recitations of events -- Harrison Western should not have assumed the aforementioned allegations [DOC. 93 at ¶¶ 46-48] concerned the acts of Harrison Western on August 4, 2015. Rather, Harrison Western should have deduced that those allegations concerned its acts almost a year prior in September 2014. [DOC. 59 at 14]. In other words, those allegations should be read to concern the acts of Harrison Western "on August 5, 2015 *or at some time beforehand*." (Emphasis in original). [DOC. 59 at 14].

But, that explanation is equally problematic because it simply ignores what Utah alleged. For instance, Utah alleged that, on August 4, 2015, others -- **not Harrison Western** -- "observed contaminated water seeping out at an elevation about five to six feet above the floor of the adit." [DOC. 93 at ¶ 45]. Within its very next allegation, Utah states that "[Harrison Western] assumed *this* meant that the contaminated water level was below the top of the adit." (Emphasis added). [DOC. 93 at ¶ 46]. The unambiguous meaning of the pronoun "this" plainly refers to what others -- **not Harrison Western** -- did and saw at the Gold King Mine on August 4, 2015. **See** https://webapps.towson.edu/ows/proref.htm (pronoun refers to noun preceding pronoun); **Webster's New Collegiate Dictionary 1208 (1980)**(defining "this" as "being the person, thing, or idea that is present or near in place or time, or thought *or that has just been mentioned*")(emphasis added). Accordingly, all the allegations regarding what Harrison Western assumed, believed or failed to do at the Gold King Mine on August 4-5, 2015 [DOC. 93 at ¶¶ 46-58] are internally inconsistent and must be disregarded.[8] ***Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965-66 (2007)**.

[8]It bears repeating that the current allegations against Harrison Western are not specific to Harrison Western. They are addressed to a larger group of "Contractor Defendants," including ER and defendant Weston Solutions, Inc. [DOC. 93 at ¶ 17]. Previously -- within Utah's initial complaint -- those same allegations were only directed to "EPA's On Site Team" [DOC. 2 at ¶¶ 41-54 (***State***

A. CERCLA "Operator" Liability.[9]

Utah contends that it has stated a claim for CERCLA "operator" liability against Harrison Western because inferences may be drawn

- that it "had control over and/or provided critical input to the plan created on August 4[-5], 2015;" and,

of Utah)], which did not include Harrison Western. Those allegations changed, however, in response to Harrison Western's initial motion to dismiss. More specifically, instead of addressing the contentions raised within that motion [DOC. 71], Utah filed its first amended complaint. [DOC. 93]. Within that amended pleading, Utah simply substituted "Contractor Defendants" for "EPA's On Site Team" throughout. [Compare DOC. 93 at ¶¶ 46-52, 56, 58 and DOC. 2 at ¶¶ 41-49, 52, 54].

That wholesale substitution also occurred over a year after Utah was provided with the declarations from Harrison Western, explaining its role and involvement in connection with the Gold King Mine.

[9]Utah suggests that Harrison Western has "ignored" the decision in ***New Mexico v. United States Environmental Protection Agency*, 310 F. Supp. 3d 1230 (D.N.M. 2018**) insofar as it concerns the underlying CERCLA claims against it. [DOC. 59 at 16].

Utah, however, neglects to mention that Harrison Western was not a party to that prior consolidated action at that time. Utah also neglects to mention that its specific allegations against Harrison Western were not addressed in ***New Mexico***; that decision only addressed the allegations of New Mexico and Navajo Nation against ER which -- unlike Harrison Western -- was aware of, and participated in, the excavation of the Gold King Mine on August 4-5, 2015.

- that it "approved or directed [the August 4[-5], 2015 excavation at the Gold King Mine] by phone, email, or otherwise." [DOC. 59 at 17-18].

This contention is disingenuous. It is disingenuous because Utah has contemporaneously declared

- that others -- **not Harrison Western** -- "triggered an environmental disaster by tearing open the Level 7 adit of the Gold King Mine with a backhoe" on August 5, 2015;
- that "[t]here is no reasonable dispute that [others -- **not Harrison Western** --] caused the blowout" [DOC. 58 at 1];
- that others excavated into the face of the Gold King Mine adit in the absence of Harrison Western and in substantial deviation from Harrison Western's revised construction plan to safely re-open the Gold King Mine, effectively "abandon[ing] the plan that was designed to prevent [a blowout]" [DOC. 58 at 8, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56];

and,

- that others "prevented Harrison Western from doing its job properly, causing an environmental disaster in the process." [DOC. 58 at 35].

The inferences Utah desires to be drawn and the affirmative declarations Utah has made do not jive. Those inferences, therefore, are unreasonable; that is, they are speculative, conjectural and ignore Utah's repeated declarations to the contrary. **See, *e.g.*, *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1184 (10th Cir. 2013)**(refusing inference as unreasonable where it ignored evidence)); ***In re R.D.S.*, 183 Colo. 89, 95 (1973)**(inferences "may not be based on mere speculation or conjecture").

Without those unreasonable inferences, Utah has simply alleged that "EPA's On Site Team" "created a plan to conduct excavation activities at the Level 7 Adit" on August 4-5, 2015 in the absence of Harrison Western. [DOC. 93 at ¶ 44]. Those allegations are insufficient to state a claim against Harrison Western for CERCLA "operator" liability. **See *K.C. 1986 Limited Partnership v. Reade Manufacturing*, 472 F.3d 1009, 1020 (8th Cir. 2007)**; ***United States v. Town of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998)(**"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."); ***Jacksonville Electric Authority v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993)**(CERCLA "operator" liability requires person to "actually supervise[] the activities of" facility or "play an active role in the actual management of the enterprise"); ***Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1138, 1341-42 (9th Cir. 1992)** (CERCLA "operator" liability requires control over the contaminating activity and "only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment"); ***Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157-58 (7th Cir. 1988**) (independent construction contractor not subject to CERCLA "operator" liability where it did not actually operate finished wood processing plant); ***United States v. Dart Industries, Inc.*, 847 F.2d 144, 146 (4th Cir. 1988)** (no CERCLA "operator" liability for defendant where no evidence of "'hands on'" activities contributing to release); ***NuWest Mining Inc. v. United States*, 768 F. Supp. 2d 1082, 1089 (D. Idaho 2011)**; ***Veolia Es Special Services, Inc. v. Techsol Chemical Co.*, No. 01:07-0153-RCC (S.D.W.V.) March 14, 2008 Memorandum Opinion and Order at 4-5** (unpublished)(no CERCLA "operator" liability where no allegations defendant had authority to prevent spill at time spill occurred)[DOC. 41-10 (***In re Gold King Mine***

Release in San Juan County, Colorado on August 5, 2015)]; ***Ryland Group, Inc. v. Payne Firm, Inc.*, 492 F. Supp. 2d 790, 794 (S.D. Ohio 2005)**(no CERCLA "operator" liability where no allegation defendant "exercised any discretion over the activities at the site"); ***Lentz v. Mason*, 961 F. Supp. 709, 716 (D.C.N.J. 1997) (**no CERCLA "operator" liability where no allegations defendants aware of disposal at property or that defendants "had the power to control the disposal activities undertaken by [another]"); ***Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1284, 1288-89 (N.D. Iowa 1994)** (no CERCLA "operator" liability for contractor that "did not have any 'authority to control' the cause of contamination at time the hazardous substances were released into the environment"); **see also *CPC International, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989)** ("The most commonly adopted yardstick for determining whether a party is owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution.").

B. CERCLA "Arranger" Liability.

Utah also contends that it stated a claim for CERCLA "arranger" liability against Harrison Western because ER subcontracted with Harrison Western to "de-water" the Gold King Mine. [DOC. 59 at 19].

But, this contention misunderstands such liability. Harrison Western did not arrange for the "de-watering" of the Gold King Mine; ER did. Utah, of course, acknowledges that fact when it notes that the subcontract with Harrison Western was intended to partially discharge ER's obligations to EPA. [DOC. 59 at 19]. In short, Harrison Western and ER cannot both be CERCLA "arrangers" based upon the same subcontract.[10] **See *City of North Miami v. Berger*, 828 F. Supp. 401, 414 (E.D. Va. 1993)**(no CERCLA "arranger" liability where "[n]o evidence ... to suggest that contractor 'arranged' with a transporter for the delivery of hazardous wastes" to site).

Additionally, Harrison Western can have no CERCLA "arranger" liability where it was not present at the Gold King Mine when others triggered the blowout. **See *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004)**; **see also *Interstate Power Co.*, 909 F. Supp. at 1288** (no CERCLA "arranger" liability for contractor that "had no 'authority to control'" disposal of hazardous substances at time of release).

[10]There is no allegation that Harrison Western arranged for the "de-watering" of the Gold King Mine through a sub-subcontractor or third-party. [DOC. 93].

Moreover, there is no allegation that Harrison Western, "owned" or "possessed" the toxic wastewater prior to the August 5, 2015 blowout. **See *Chevron Mining Ltd. v. United States*, 863 F.3d 1261, 1279 (10th Cir. 2017)**.

Under the circumstances, then, there can also be no CERCLA "arranger" liability for Harrison Western.

C. CERCLA "Transporter" Liability.

Utah separately contends that it has stated a claim for CERCLA "transporter" liability against Harrison Western because an inference can be drawn that "[Harrison Western] actively and substantially participated in planning for how to perform that work including selecting the location outside the mine to which the wastewater would be transported." [DOC. 59 at 21].

But, that inference is unreasonable given Utah's contemporaneous declarations to the contrary. [DOC. 58 at 1, 8, 35, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56]. Moreover, there is no specific, non-conclusory allegation establishing Harrison Western's substantial participation in the selection of a disposal site for the wastewater within the Gold King Mine.

Under the circumstances, then, there can be no CERCLA "transporter" liability for Harrison Western either. ***Interstate Power Co.*, 909 F. Supp. at 1289** (no CERCLA "transporter" liability for contractor that "had no authority or

opportunity to control or exercise any discretion" at the time hazardous substances were moved and where contractor did not select any site for disposal); **see *United States v. Hardage*, 985 F.2d 1427, 1435 (10th Cir. 1993)**(CERCLA "transporter" liability "predicated on site selection by the transporter").

D. CERCLA "Response Action Contractor" Liability And Negligence/Gross Negligence.

Utah contends it has stated a claim for CERCLA "response action contractor" liability and negligence/gross negligence under Colorado law[11] against Harrison Western because it is entitled to an inference that "[Harrison Western] was aware of, provided input to, and/or approved the August 4[-5, 2015] plan." [DOC. 59 at 24].

Inferences, however, must be reasonable (***e.g., Llewellyn*, 711 F.3d at 1184**), and cannot be based upon speculation or conjecture. ***E.g., In re R.D.S.*, 183 Colo. at 95**.

Here, of course, Utah has contemporaneously declared that others "prevented Harrison Western from doing its job properly" and effectively "abandoned the plan that was designed [by Harrison Western] to prevent [a blowout]" by excavating into

[11]Colorado law governs Utah's common law tort claims against Harrison Western because the spill occurred in Colorado -- at the Gold King Mine -- making Colorado the "point source" of Utah's damages. **See *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 809 (1987)**; **see also *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 306 (4th Cir. 2010)**.

the face of the Gold King Mine on August 4-5, 2015 in Harrison Western's absence and in substantial deviation from that aforementioned plan. [DOC. 58 at 1, 8, 35, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56]. Accordingly, an inference that "[Harrison Western] was aware of, provided input to and/or approved the August 4[-5, 2015] plan" [DOC. 59 at 24] is patently unreasonable.

Under the circumstances, then, Utah has failed to state a claim for CERCLA "response action contractor" liability or negligence/gross negligence against Harrison Western.

E. Public Nuisance.

Utah relies upon the same unreasonable inference in support of its public nuisance claim against Harrison Western. [DOC. 59 at 26 (contending inference may be drawn that "[Harrison Western] was involved in and to a substantial degree responsible for the August [4-]5, 2015 plan")]. In other words, while Utah concedes Harrison Western did not carry on the excavation at the Gold King Mine, it may nevertheless be inferred to have substantially participated in that excavation. [DOC. 59 at 26].

But, again, such an inference is patently unreasonable given what Utah has already declared. [DOC. 58 at 8, 35, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56].

Under the circumstances, then, Utah has failed to state a claim for public nuisance against Harrison Western.

F. Utah State Environmental Statutes.

Utah contends that its state environmental statutes apply and may be enforced against Harrison Western because they are not preempted. [DOC. 59 at 26-27].

This contention, however, was wholly rejected by the United States District Court for the District of New Mexico some seven months ago (***New Mexico v. United States Environmental Protection Agency*, 310 F. Supp. 3d 1230, 1266-70 (D.N.M. 2018)**), and Utah has offered no challenge to that rejection. It has simply regurgitated what others had previously and unsuccessfully argued. **See, *e.g.*, *International Paper Co.*, 107 S.Ct. at 809**; ***Illinois v. Milwaukee*, 731 F.2d 403, 407, 414 (7th Cir. 1984)**(Clean Water Act preempted Illinois statutory and common law claims).

III. ALL UTAH'S COMMON LAW TORT CLAIMS ARE BARRED TO THE EXTENT THEY SEEK TO IMPOSE JOINT-AND-SEVERAL LIABILITY.

Utah does not challenge this contention. [DOC. 59 at 29].

IV. ALL UTAH'S COMMON LAW TORT CLAIMS ARE BARRED TO THE EXTENT THEY SEEK PUNITIVE DAMAGES.

Utah argues that the district court has already addressed and rejected the contention that punitive damage claims are premature, and that it is not only permitted to request punitive damages, but required to. [DOC. 59 at 30].

This argument is confused.

First, the district court did not previously reject this contention on the merits. ***New Mexico*, 310 F. Supp. 3d at 1266-70**.

Second, the underlying Colorado statute precluding a request for punitive damages within an initial complaint -- **C.R.S. § 13-21-102(1.5)(a)** -- is substantive Colorado law.[12] ***E.g., American Economy Insurance Co.*, 2007 U.S. Dist. LEXIS 3261 * 4-7**; ***Mrs. Colorado-America, Inc. v. Mrs. Colorado United States Pageant*, 2007 U.S. Dist. LEXIS 10199 * 10-12 (Colo.)**; ***Witt v. Condominiums at the Boulders Ass'n*, 2006 U.S. Dist. LEXIS 7180 * 23-24 (Colo.)**; **see *Jones v. Krautheim*, 208 F. Supp. 2d 1173, 1174-80 (D. Colo.)**.

[12]In ***Hamilton v. Matrix Logistics, Inc.*, 2006 U.S. Dist. LEXIS 17231**, the United States District Court for the District of Colorado concluded, without analysis, that Colorado's punitive damages statute was procedural in nature and not applicable in a diversity jurisdiction action. **2006 U.S. Dist. LEXIS 17231 * 8-9**. However, that very same district court reversed course almost a year later and applied that statute in a diversity jurisdiction action, concluding that the "reasoning and analysis of ***Jones***" was "persuasive and relevant." ***American Economy Insurance Co. v. William Schoolcraft, M.D., P.C.*, 2007 U.S. Dist. LEXIS 3261 * 7 (Colo.)**.

Third, "[a] claim for exemplary damages in an action" is not a separate cause of action (**C.R.S. § 13-20-102(1.5)(a)**), as Utah argues [DOC. 59 at 30]; it is "only a form of the relief prayed for as part of the claim." **See *Jones*, 208 F. Supp. 2d at 1178**.

Lastly and by its own declarations, Utah has wholly failed to alleged facts sufficient to justify a request for punitive damages against Harrison Western. [DOC. 58 at 8, 35, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56].

Utah's request for punitive damages must, therefore, be dismissed. ***Mrs. Colorado-America, Inc.*, 2007 U.S. Dist. LEXIS 10199 * 12** (striking premature request for punitive damages).

CONCLUSION

Both Harrison Western and Utah agree

- that others -- **not Harrison Western** -- "triggered an environmental disaster by tearing open the Level 7 adit of the Gold King Mine with a backhoe" on August 5, 2015;
- that "[t]here is no reasonable dispute that [others -- **not Harrison Western** --] caused the blowout" [DOC. 58 at 1];

- that others excavated into the face of the Gold King Mine adit in the absence of Harrison Western and in substantial deviation from Harrison Western's revised plan to safely re-open the Gold King Mine, effectively "abandon[ing] the plan that was designed to prevent [a blowout]" [DOC. 58 at 8, 39-40, 48, 53, 56 and DOC. 61 at 44-45, 49, 56]; and,
- that others "prevented Harrison Western from doing its job properly, causing an environmental disaster in the process." [DOC. 58 at 35].

That agreement as well as the unchallenged evidentiary facts [DOC. 41-4 and DOC. 41-6] serve to establish that the exercise of personal jurisdiction over Harrison Western would be unconstitutional under the circumstances, and that Utah has otherwise failed to state a claim for relief.

For the aforementioned reasons, defendant Harrison Western Construction Corporation replies now in support of its motion to dismiss the first amended complaint of plaintiff State of Utah pursuant to Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6)(**FED.R.CIV.P. 12(b)(2)** and **12(b)(6)**).

DATED THIS 21ST DAY OF SEPTEMBER, 2018.

Respectfully Submitted,

HALL & EVANS, LLC

By:[*s/ Brian Molzahn*]

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CERTIFICATE OF SERVICE

Pursuant to **D.N.M.LR-Civ. 7.1(b)**, I hereby certify that on this 21st day of September 2018, a true and correct copy of the foregoing **REPLY OF DEFENDANT HARRISON WESTERN CONSTRUCTION CORPORATION IN SUPPORT OF MOTION TO DISMISS PLAINTIFF STATE OF UTAH'S FIRST AMENDED COMPLAINT** was, unless otherwise noted, served on the following *via* CM/ECF system:

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