U.S. Court of Appeals Docket No. 19-2197
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Joe C. Allen et al.,
Plaintiffs/Appellees,
vs.
Environmental Restoration, LLC,
Defendant/Appellant,
and
GOLD KING MINES CORPORATION et al.,
Defendants.

APPELLEE'S RESPONSE BRIEF
(ORAL ARGUMENT REQUESTED)

On Appeal From
The United States District Court
For The District of New Mexico
The Honorable William P. Johnson, Chief Judge
U.S.D.C. Case No. Case # 1:18-cv-00744-WJ-KK

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I. STATEMENT OF RELATED CASES

In compliance with 10th Cir. R. 28.2(C)(3), Appellees (the "*Allen* Plaintiffs") state that there are no prior or related appeals in this Court. The case proceeding before the district court is encompassed as part of a larger multi-district litigation being managed by the District of New Mexico as *In re: Gold King Mine Release in San Juan County, Colorado, on August 5, 2015*, MDL Case No. 1:18-md-02824-WJ.

II. ISSUE PRESENTED

Does the "point source" rule adopted by the United States Supreme Court in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) preempt the long-standing legal principle that a forum state's own statute of limitations applies?

III. STATEMENT OF THE CASE

On August 5, 2015, mine reclamation activities led by the United States Environmental Protection Agency ("EPA") onsite project team, including Appellant Environmental Restoration, LLC ("ER"), triggered an uncontrolled rapid release of approximately three million gallons of acid mine water from the Gold King Mine located near Silverton, Colorado. Aplt. App. at 61-62.[1] For over fifty years before the release, the mine owners and operators deposited contaminated

[1] Although ER referred to the single-volume "Excerpts of Record" submitted by it with its Opening Brief as "ER," this brief cites to the record as "Aplt. App. at __" as required by 10th Circuit Rule 28.1(A)(1).

wastewater into Bonita Peak Mountain and then installed a series of hydraulic bulkheads that kept the wastewater stored within the mountain and caused it to build up and pressurize. *Id.* at 157, 159-161. As a result, the EPA hired ER and an "onsite team" to reopen the Mine Level 7 Adit high atop Bonita Peak Mountain to begin depressurizing the mountain and cleaning up the wastewater seepage. *Id.* at 159-161. The onsite team incorrectly assumed that the wastewater was below the roof of the adit and that it could therefore slowly drain the wastewater away. *Id.* at 161-62. ER and the onsite team failed to conduct simple hydrostatic testing or bore hole testing that would have alerted them that the adit was heavily pressurized. *Id.* at 162-63. Instead, the onsite team forged ahead blindly and began digging into the adit with heavy machinery causing the uncontrolled release. *Id.*

The nearly three hundred *Allen* Plaintiffs in this action are all members of the Navajo Nation who farm, ranch, and live along the San Juan River. *Id.* at 61-62. The *Allen* Plaintiffs not only rely on the water from the San Juan River to live, work, farm, and graze livestock, they have an enormous cultural and spiritual connection to the land and waters of the rivers. *Id.* Nearly all of the *Allen* Plaintiffs are residents of New Mexico and Utah.[2] *See id.* at 58-171.

[2] Specifically, there are 175 New Mexico Plaintiffs, 104 Utah Plaintiffs, 11 Arizona Plaintiffs, and one Colorado Plaintiff.

This suit was originally separately filed by the State of New Mexico, the Navajo Nation, and the State of Utah against the owners of the mine, the EPA, and the EPA's contractors pursuant to, *inter alia*, the Clean Water Act ("CWA"), 3 U.S.C. §§ 1251-1388 (2006). ER, a defendant in those suits, sought venue in New Mexico by filing a motion with the United States Judicial Panel on Multidistrict Litigation to transfer the Utah case to the District of New Mexico. *See* Aplt. App. at 22 (Doc. 1); ER's Motion to Transfer for Coordinated or Consolidated Pretrial Proceedings, attached hereto as Exhibit 1. All the defendants supported centralization in the District of New Mexico. *Id.* ER's motion was granted on March 4, 2018. *Id.*

On August 3, 2018, the *Allen* Plaintiffs filed their complaint against various defendants, including ER, for negligence, trespass, and nuisance under state law and the Federal Tort Claims Act. *See* Aplt. App. at 58-171. They did not bring claims under the CWA. *See id.* Their complaint was timely filed under New Mexico's three-year statute of limitations. *See* N.M. Stat. Ann. § 37-1-8 (1953). It was consolidated into the Multidistrict Litigation on August 7, 2018. *See* Aplt. App. at 173-74.

After securing venue in New Mexico, ER filed a motion to dismiss on November 1, 2018. It argued that in cases involving a discharge into interstate waters, "'the court must apply the law of the State in which the point source is

located.'" *Id.* at 233 (quoting *Ouellette*, 479 U.S. at 487). As a result, ER asserted, the *Allen* Plaintiffs' claims were untimely under Colorado's two-year statute of limitations. *Id.* at 233-34. In response, the *Allen* Plaintiffs relied on the well-established rule that a federal court sitting in diversity jurisdiction, such as the district court in this case, applies the procedural law of the forum state and, therefore, the *Allen* Plaintiffs' complaint was timely under the New Mexico statute of limitations. *See id.* at 253-55; *see also Dow Chem. Corp. v. Weevil–Cide Co., Inc*., 897 F.2d 481, 483-84 (10th Cir.1990) ("A federal court hearing a diversity action applies the statute of limitations which would be applied by a court of the forum state."); *Nez v. Forney*, 1989-NMSC-074, ¶ 4, 109 N.M. 161, 783 P.2d 471 ("Under New Mexico choice of law principles, a statute of limitations is procedural, and therefore applies even where the applicable substantive law is that of another state.").

The district court ruled in favor of the *Allen* Plaintiffs, rejecting ER's argument that as the "point source" of the blowout, Colorado state procedural law applied. *See* Aplt. App. at 253-55. [3] Instead, the district court held that New Mexico's three-year statute of limitations applied to the New Mexico action. *See id.* The district court correctly applied the long-standing "general" principle that

[3] Pursuant to 10th Circuit Rule 28.2(B), a copy of the May 31, 2019 Memorandum Opinion and Order is attached hereto as Exhibit 2.

"the statute of limitations of the forum state applies to claims in federal court." *Id.* at 254. The district court further ruled that "[w]hile the Clean Water Act preempts the application of New Mexico tort law, the Clean Water Act does not preempt the application of New Mexico's statute of limitations because the application of New Mexico's statute of limitations will not frustrate the goals of the Clean Water Act." *Id.* at 254-55. More specifically, the court agreed with the *Allen* Plaintiffs that the application of New Mexico's statute of limitations would not result in New Mexico regulating the conduct of Colorado or the conduct of a Colorado entity. *Id.*

Upon ER's request, the district court certified the issue for interlocutory appeal. *See id.* at 261-66. This Court granted ER's Petition for Permission to Appeal on November 7, 2019. *Id.* at 267-72.] This Court also denied defendant Sunnyside Gold Corporation's ("SGC") motion to intervene in this appeal but permitted SGC to participate as amicus curiae. *See* Doc. 010110301992, Feb. 10, 2020 Order on SGC's Motion for Leave to Participate as Amicus Curiae.

IV. SUMMARY OF THE ARGUMENT

Nothing in *Ouellette*, or any other authority, supports ER's argument that traditional choice of law principles were completely abrogated in all cases involving interstate water pollution. To the contrary, it is black letter, universally applied law that a federal court sitting in diversity applies the "law of the state where it is located, including the state's statutes of limitations." *Elm Ridge Expl.*

Co., LLC v. Engle, 721 F.3d 1199, 1210 (10th Cir. 2013) (applying New Mexico law) (citing *Burnham v. Humphrey Hospitality Reit Trust, Inc*., 403 F.3d 709, 712 (10th Cir. 2005)); *see, e.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (recognizing that the United States Supreme Court "has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State"); *Dow Chem. Corp.*, 897 F.2d at 483-84 ("A federal court hearing a diversity action applies the statute of limitations which would be applied by a court of the forum state, even when the action is brought under the law of a different state." (citation omitted)); *Anderson Living Tr. v. WPX Energy Prod.*, *LLC*, 27 F. Supp. 3d 1188, 1211 (D.N.M. 2014) ("The Supreme Court has held that a federal court sitting in diversity should apply the same statute of limitations that a state court of the forum state would apply.") (citing *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)). New Mexico courts also require that "the law of the forum governs matters of procedure," *Estate of Gilmore*, 1997-NMCA-103, ¶ 10, 124 N.M. 119, 946 P.2d 1130, and "that under New Mexico law statutes of limitations are procedural." *Sierra Life Ins. Co. v. First Nat'l Life Ins.*, 1973-NMSC-079, ¶ 14, 512 P.2d 1245, 85 N.M. 409.

This is especially true where, as here, Congress was silent as to preemption of state procedural law and where Congress did not write-in a statute of limitations

specific to the CWA. *Sheedy Drayage Co. v. Teamsters Union Local No. 2785*, No. C–12–6204 EMC, 2013 WL 791886, at *4 (N.D. Cal. Mar. 4, 2013) (unpublished) ("When Congress does not provide a statute of limitations for a federal cause of action, we apply the forum state's statute of limitations. . . .").

ER and SGC repeatedly emphasize that *Ouellette* held that "'the court ***must*** apply the law of the State in which the point source is located.'" *E.g.*, Op. Br. at 5, 7 (quoting *Ouellette*, 479 U.S. at 487) (emphasis by ER). They want this Court to believe that "law" means both substantive and procedural law despite the fact that *Ouellette* makes no such rule and despite the fact that courts have for years distinguished between the two. *See* Eugene F. Scoles & Peter Hay, Conflict of Laws 57 (1992) ("The distinction between 'substance' and 'procedure' has medieval origins: a court will apply foreign law only to the extent that it deals with the substance of the case, i.e., affects the outcome of the litigation, but will rely on forum law to deal with the 'procedural' aspects of the litigation.").

The *Ouellette* opinion, as well as the other opinions relied on by ER and SGC interpreting the CWA and the point source rule, are careful to limit preemption to substantive issues only. For example, the "question presented" in *Ouellette* was "whether the Act pre-empts *a common-law nuisance suit* filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York." 479 U.S. at 483 (emphasis added). As explained below, procedural

law, such as application of a forum state's statute of limitations, is not "common law" subject to preemption by the *Ouellette* opinion.

Furthermore, the dilemma addressed by the Court did not concern the preemption of the procedural law of the forum state. The "problem" caused by allowing multiple states' substantive law to apply, as framed by the Court in *Ouellette*, was that downstream states "could do indirectly what they could not do directly -- regulate the conduct of out-of-state sources." *Id.* at 495. This "problem" was at the heart of the split between the Seventh and Second Circuits, which *Ouellette* resolved by holding that preemption of downstream state common law is necessary *only* to prevent the source state from being regulated by the downstream state, thereby protecting state sovereign immunity.

Here, there is no risk that the application of New Mexico's statute of limitations will result in New Mexico regulating Colorado's conduct. A statute of limitations is a merely a statutory procedural device establishing a time limit to sue. *See* Black's Law Dictionary (11th ed. 2019) (defining statute of limitations as "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued"). Furthermore, it is common for federal courts to apply one state's substantive law and the forum state's procedural law in interstate disputes under, among other things, the Full-Faith-and-Credit Clause. *See* U.S. Const. art. 4, § 1.

Next, nothing in *Ouellette* or *Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992), supports ER and SGC's argument that because New Mexico, as the state where the affected individuals reside, occupies a "subordinate position" as it relates to Colorado, its statute of limitations is inapplicable. Those decisions make clear that affected states have a "subordinate position" only as it relates to the issuance of permits and the promulgation of standards. Again, this is necessary only to preserve the source state's sovereign immunity interests to not be regulated by downstream states.

Importantly, there is no case broadening the scope of the point source rule to usurp long-standing choice of law precedent or the forum state's fundamental right to apply its own procedural law—this is why ER and SGC cite none. In contrast, there are cases interpreting *Ouellette* as preempting substantive law only and holding that the forum state's procedural law still applies in interstate disputes. If this Court determines that *Ouellette* preempts *all* downstream law, it should apply the five-year "catch-all" statute of limitations set forth in 28 U.S.C. § 2462 as the CWA does not have a statute of limitations. *See Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987) ("Application of section 2462 to citizen enforcement suits [brought under the CWA] is in keeping with the language of the statute."). Lastly, for reasons explained below, SGC's amicus curiae brief should be stricken and disregarded by this Court.

V. LEGAL ARGUMENT

A. The Circuit Split Leading up to *Ouellette* Shows that the CWA Preemption Question Concerned Only the Application of the Substantive Common Law of Downstream States.

In interpreting the CWA's degree of preemption, the courts have focused on two sections—Section 1365 and Section 1370 (together, "the saving clause"). Section 1365 provides that "nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." 33 U.S.C. § 1365. Section 1370 declares that except as expressly provided, nothing in CWA shall preclude or deny the right of any state to adopt or enforce a standard or limitation respecting discharges of pollutants or any requirement respecting control or abatement of pollution except that any effluent limitations, etc., may not be less stringent than those in effect under CWA. *See* 33 U.S.C. § 1370. What types of state common law remedies the CWA allows depends on the interpretation of the saving clause.

The issue in *Illinois v. Milwaukee*, one of the cases involved in the circuit split on the CWA savings clause, was "whether there is a body of federal law in the area of interstate water pollution which precludes the application of one state's common or statutory law to *determine liability and afford a remedy for discharges*, in particular by a municipality, within another state." 731 F.2d 403, 406 (7th Cir.

1984) (emphasis added). The Seventh Circuit Court of Appeals concluded that the saving clause "refers to the right of a state with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state." *Id.* at 413. The court interpreted the sections to cover only the right and jurisdiction of a state to regulate water within its boundaries. *See id.* ("[W]e think Congress intended no more than to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters."). That interpretation was based on the premise that states have never had a right to regulate or exercise jurisdiction over extraterritorial waters. *See id.* Accordingly, the Seventh Circuit interpreted the saving clause to apply only to regulation of discharges that occur inside the state. *See id.*

To allow an injured state to regulate the state where the discharge occurred would effectively give that state regulatory power over another state. *See id.* ("[I]t seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II."). The court envisioned chaotic confrontations between states and an end to the uniformity and cooperation made possible by the CWA. *See id.* ("It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water."). When Illinois appealed the Seventh Circuit's ruling on the

application of state common law, the Supreme Court denied certiorari. *See Illinois v. City of Milwaukee*, 451 U.S. 982 (1981).

In the meantime, the Vermont Federal District Court had essentially the same issue before it with the *Ouellette* case, the other case involved in the circuit split—could the Vermont plaintiffs pursue state common-law nuisance remedies against the New York defendant's continuing discharge of effluent? The issue was the "extent to which Congress authorized, either expressly or implicitly, resort to state *common law* in a situation such as this." *Ouellette v. Int'l Paper Co*., 602 F. Supp. 264, 268 (D. Vt. 1985) (emphasis added).[4]

In contrast to the Seventh Circuit, the Vermont federal court ruled that the common law remedies of the injured state were not preempted under the CWA. *See id.* at 274. The court found it "inconceivable that Congress intended to deprive a party injured by water pollution of all compensation for that injury." *Id.* at 269. The Vermont court reasoned that using state common law remedies did not directly impose the full regulatory powers of one state upon the citizens of another state. *See id.* at 271. Rather, its use was merely a means of redress to a specific, injured private party. *See id.* The district court's decision was affirmed per curiam by the Second Circuit Court of Appeals. *See Ouellette*, 776 F.2d at 55-56. The Supreme

[4] *Aff'd*, *Ouellette v. Int'l Paper Co*., 776 F.2d 55 (2d Cir. 1985), *aff'd in part, rev'd in part*, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

Court granted certiorari from the Second Circuit in order to resolve the conflict between the Seventh and Second Circuits. *See Int'l Paper Co. v. Ouellette*, 475 U.S. 1081 (1986).

The above history leading up to *Ouellette* is important as it demonstrates the true tension between the circuit courts: whether an affected, downstream state could impose its common law to regulate the source state's conduct, thereby infringing on the sovereignty of the source state. As emphasized above, the issue in the *Milwaukee* case was whether Illinois law could "determine liability and afford a remedy for discharges" that occurred in Milwaukee. 731 F.2d at 406. Similarly, the issue before the Vermont district court was whether "Congress authorized, either expressly or implicitly, resort to [Vermont] state common law" against a New York discharger. *Ouellette*, 602 F. Supp. at 268. The circuit split did not concern or ever discuss the application of an affected state's procedural law, nor did the split touch on choice of law analysis.

B. *Ouellette* Resolved the Circuit Split by Holding that Preemption Only Applies to Substantive Common Law, Which Prevents Downstream States from Regulating Source States.

Consistent with the above backdrop, the question presented to the United States Supreme Court in *Ouellette* was "whether the [CWA] pre-empts *a common-law nuisance suit* filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York." 479 U.S. at 483 (emphasis added).

Analyzing the saving clause, the Supreme Court considered three possibilities. *See id.* at 485-86. First, "the saving clause could be construed to preserve state law only as it applied to waters not covered by the CWA." *Id.* at 486.

> Second, the saving clause might preserve state nuisance law only as it applies to discharges occurring within the source State; under this view a claim could be filed against IPC under New York common law, but not under Vermont law. This was the position adopted by the Court of Appeals for the Seventh Circuit in *Milwaukee* [].

Id. Third, a state action to redress interstate water pollution could be maintained under the law of the state in which the injury occurred. *See id.*

In adopting the second degree of preemption (i.e., the *Milwaukee* standard), the Court held that the CWA, taken "as a whole, its purposes and its history" preempted an action based on the law of the affected state and that the only state law applicable to an interstate discharge is "the law of the State in which the point source is located." *Id.* at 493, 487. Because application of the Vermont law could "effectively override the *permit requirements and the policy choices made by the source State*," the Court concluded that the Vermont law effectively circumvented and upset the balance of interests contemplated by the CWA. *Id.* at 494-95 (emphasis added). The "problem" caused by allowing multiple states' substantive law to apply, as framed by the Court in *Ouellette*, was that downstream states "could do indirectly what they could not do directly -- regulate the conduct of [source] sources." *Id.* at 495.

The *Ouellette* opinion therefore resolved the circuit split by clarifying that the CWA preempts the common law of an affected state to the extent that that law seeks to impose liability on a point source in another state. *See id.* *Ouellette* at 497 (agreeing with the *Milwaukee* court's concern that it would be impossible to predict discharge standards for downstream states and holding that "[n]othing in the Act gives each affected State this power to regulate discharges"). Critically, the Court carefully held that the "CWA precludes *only those suits* that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act." *Id.* at 497 (emphasis added).

As noted above, the *Ouellette* holding, as well as the circuit court cases the Supreme Court analyzed and resolved, only applied to "common law." *See, e.g.*, *id.* at 483 ("The question presented is whether the Act pre-empts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York."). "Common law" is defined as "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (11th ed. 2019). New Mexico's three-year limitation period is set by statute. *See* N.M. Stat. Ann. § 37-1-8 (1953) ("Action must be brought . . . for an injury to the person or reputation of any person, within three years.").

The *Ouellette* holding therefore clearly limited the scope of preemption to substantive law that is incompatible with the CWA. Had the Supreme Court intended otherwise, it would not have repeatedly used limiting, qualifying terminology throughout the opinion. Under these circumstances, this Court should reject ER and SGS's arguments and affirm the district court's memorandum opinion and order applying New Mexico's statute of limitations. *See* Aplt. App. at 253-260.

C. Applying the New Mexico Statute of Limitations Will Not Infringe Colorado's Sovereign Immunity.

Here, applying New Mexico's statutes of limitations will not result in New Mexico regulating the conduct of Colorado; it would simply establish the time parameters that New Mexico residents could file a CWA action. In addition, New Mexico's statute of limitations would not impose standards of effluent control incompatible with the CWA or Colorado law, which is the "only" type of suit precluded under *Ouellette*. *See id.* In sum, application of New Mexico's statute of limitations application in this New Mexico case would not "interfere with the carefully devised regulatory system established by the CWA," *id.* at 485, nor would it conflict with the "clear and identifiable' discharge standards." *Id.* at 496. The New Mexico district court agreed, concluding: "While the Clean Water Act preempts the application of New Mexico tort law, the Clean Water Act does not preempt the application of New Mexico's statute of limitations because the

application of New Mexico's statute of limitations will not frustrate the goals of the Clean Water Act." Aplt. App. at 254-55. The position of ER and SGC therefore is a dramatic departure from the limited degree of preemption outlined in *Ouellette*.

In addition, nothing in *Ouellette* supports ER's argument that because New Mexico, as the affected state, occupies a "subordinate position" as it relates to Colorado, its statute of limitations is inapplicable. *See* Op. Br. at 6-7. As the *Ouellette* decision makes clear, affected states have a "subordinate position" only as it relates to the issuance of permits and the promulgation of standards. *See Ouellette*, 479 U.S. at 487-496. The Court did not hold that the state's statute of limitations would not apply. In fact, every single mention of preemption of state law in *Ouellette* is in reference to the promulgation of regulation standards or advancement of policy considerations. *See id.* at 487 ("the application of Vermont law against IPC would allow respondents to circumvent the NPDES permit system . . . ."); *id.* at 495 ("it is not surprising that the Act limits the right to administer the permit system to the EPA and the source States."); *id.* at 496 ("'For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.'" (quoting *Milwaukee,* 731 F.2d at 414 (7th Cir. 1984)).

In *Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992), the other case relied on by ER, the Supreme Court interpreted *Ouellette* as standing for the proposition that "the Clean Water Act taken 'as a whole, its purposes and its history' preempted an action based on the law of the affected State and that the only state law applicable to an interstate discharge is 'the law of the State in which the point source is located.'" [cite] The language in *Arkansas* also only references the substantive permitting process:

> Our statement in *Ouellette* concerned only an affected State's input into the permit process; that input is clearly limited by the plain language of § 402(b). Limits on an affected State's direct participation in permitting decisions, however, do not in any way constrain the EPA's authority to require a point source to comply with downstream water quality standards.

Id. at 106. Both *Ouellette* and *Arkansas* establish that the CWA only preempts an affected state's substantive law; nothing whatsoever in either opinion supports the inference that an affected state's procedural law, including the statute of limitations, is preempted.

Lastly, ER repeatedly attempts to portray *Ouellette* as holding that preempting both substantive and procedural law is "categorical," "unqualified," and "without limitation." Op. Br. at 7-9. As established above, the holding is clearly limited to substantive law. In addition, in the thirty-three years since *Ouellette* was decided, the *Allen* Plaintiffs could find no caselaw broadening the

Ouellette and *Arkansas* holdings to preempt an affected state's procedural law as urged by ER and SGC. Tellingly, ER and SGC also do not cite such a case.

There *have* been cases, however, applying *Ouellette* to preempt substantive law only. For example, in *Ashland Oil, Inc. v. Kaufman*, 384 S.E.2d 173 (W. Va. 1989), the West Virginia Supreme Court concluded that *Ouellette*

> requires the application of the statutory or common law of the source state to an interstate pollution dispute when the pollutants in question are regulated by the Clean Air Act. However, the procedural law of West Virginia shall be followed when the issues are being litigated in this State's courts.

Id. at 180. Similarly, in *Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795, (W. Va. 1991), the court held:

> At the start, we note the trial court's ruling that the substantive law of the State of Kentucky governs this case. Applying [*Ouellette*], this Court previously determined . . . that because Kentucky was the 'source state' of the emissions, Kentucky statutory or common law controlled. We further clarified that "the procedural law of West Virginia shall be followed when the issues are being litigated in this State's courts."

Id. at 799-800 (citations omitted). And in *Bocook v. Ashland Oil, Inc.*, 819 F. Supp. 530 (S.D. W. Va. 1993), the court stated:

> This case involves interstate pollution because the alleged source of the pollution is situated in Kentucky while all the plaintiffs are residents of Wayne County, West Virginia. The parties have agreed, and the court concurs, that in cases involving interstate pollution the substantive law of the state in which the source of the pollution is located governs common-law tort claims.

Id. at 532 n.1 (citing *Ouellette*, 479 U.S. at 497-500).

Based on the foregoing, the arguments of ER and SGC are not legally supported. Furthermore, the primary concerns of downstream regulatory interference and infringement on state sovereignty are not present in this case.

i. The Arguments that the Purposes of the CWA Will Be Frustrated by Application of New Mexico Procedural Law Are Unavailing.

It is telling that neither ER nor SGC can articulate a credible reason why the application of New Mexico's statute of limitation would frustrate the CWA's "comprehensive regulatory scheme" designed to create "uniform standards" with "predictable" and "consistent" results. *See* Op. Br. at 7-9; *Amicus Curiae* at 13-15. ER worries that "without the categorical preemption adopted by the Supreme Court, affected states' laws could even be used to impose liability 'even though the source had complied fully with its state and federal permit obligations.'" Op. Br. at 8 (quoting *Ouellette*, 479 U.S. at 495). Also, according to ER, an upstream source state could "theoretically could be subject to the nuisance laws of any of the nine downstream States." *Id.* at 9.

These concerns are without merit. The *Allen* Plaintiffs are not arguing that New Mexico's permitting standards or nuisance laws should apply. There will be no exposure to "a variety common-law rules" established by downstream states by applying the statute of limitations of the forum state. The statute of limitations is

simply a procedural device prescribing the time to sue; it does not create or impose any legal liability.

Similarly, SGC claims that applying New Mexico procedural law "is inconsistent with Congress' objective of a comprehensive regulatory scheme in which regulated discharges like SGC would know where they might be subject to suit, for what, and for how long." *Amicus Curiae* at 15. SGC argues that to "vary the liability based on the differing statutes of limitations in every state through which a permitted discharge might flow would be to destroy the 'predictability the CWA was designed to create.'" *Id.* at 15-16 (quoting *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010) ("*TVA*")).

TVA, however, helps demonstrates the reasons why only the substantive laws of a downstream state are preempted. In *TVA*, the State of North Carolina sued the Tennessee Valley Authority in a North Carolina court under the Clean Air Act ("CCA"). *TVA*, 615 F.3d at 297. North Carolina complained that the Tennessee Valley Authority's many coal-powered plants, all located outside of North Carolina, exceeded North Carolina's clean air standards, which were more stringent than the surrounding states. *Id.* The Western District of North Carolina issued an injunction against four of the Authority's power plants to install emission-reducing features that cost over a billion dollars. *Id.* at 298. Each of the

four plants was in conformity with national regulations and permitting requirements under the CAA. *Id.* at 300.

The Fourth Circuit held that North Carolina's attempt to impose a different set of standards were an "abuse" of the comprehensive framework of the CAA and that it

> ill behoove[d] the judiciary to set aside a congressionally sanctioned scheme of many years' duration—a scheme, moreover, that reflects the extensive application of scientific expertise and that has set in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements. To replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country.

Id. at 301. It relied on *Ouellette* in so holding. *See id.* ("The Supreme Court addressed this precise problem of multiplicity in . . . *Ouellette*. It emphasized that allowing 'a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.'" (quoting *Ouellette*, 479 U.S. at 495).

Unlike North Carolina, the *Allen* Plaintiffs in this case are not trying to subvert the congressionally sanctioned scheme of the CWA. Applying the New Mexico statute of limitations in this New Mexico case will not sow uncertainty and chaos within the existing CWA framework. SGC seizes on the following passage from *TVA* to unsuccessfully suggest that dischargers have a right to know how long

they might be subject to suit: "This is because *for an uncertain length of time after the agency issues the permit, the permit-holder would face the very real threat that the inquiry into the validity of its permit might be reopened in an altogether different forum.*" *Amicus Curiae* at 15-16 (emphasis added by SGC).

SGC's policy concerns are inapplicable in this case. It is undisputed that Colorado substantive law applies, and therefore SGC, as well as the other defendants, should be fully aware of how and when its permit might be reposed. Applying New Mexico's statute of limitations is consistent with applicable law and, as shown above, will not disrupt the CWA's regulatory framework. Further, as stated above, the *Allen* Plaintiff found no case interpreting *Ouellette* as ER and SGC suggest. Indeed, the few cases analyzing *Ouellette* and the forum state's procedural law have held that *Ouellette only* preempts the downstream state's substantive law.

Because *Ouellette* only requires application of Colorado substantive law to protect Colorado's sovereign interests, the traditional rule that the statute of limitations of the forum state controls was properly applied by the district court.

D. Under Controlling Precedent, New Mexico's Statute of Limitations Applies.

The Tenth Circuit has long held that "[a] federal court hearing a diversity action applies the statute of limitations which would be applied by a court of the forum state, even when the action is brought under the law of a different state."

Dow Chem. Corp., 897 F.2d at 483-84 (citing *Kitchens v. Bryan Cty. Nat'l Bank*, 825 F.2d 248, 254-55 (10th Cir.1987); *see also Martinez v. Blackburn*, 325 F. App'x 671, 672-73 (10th Cir. 2009) (unpublished) ("In diversity cases, the statute of limitations of the forum state, here New Mexico, governs personal-injury actions."). "The traditional rule is that the law of the state where the case is filed governs the limitation of actions, regardless of where the cause of action arose, whether or not the action would be barred in the state in which it arose." *Vandeventer v. Four Corners Elec. Co.*, 663 F.2d 1016, 1017 (10th Cir. 1981); *see also Lucero v. Mission Chevrolet, Inc*., No. CV 06-0300 LH/ACT, 2007 WL 9734951, at *3 (D.N.M. Jan. 31, 2007) (unpublished) ("The traditional rule is that the law of the state where the case is filed governs the limitations of actions, which is considered a procedural issue, regardless of where the cause of action arose, whether or not the action would be barred in the state in which it arose.[5]").

Likewise, New Mexico courts have held that "the law of the forum governs matters of procedure," *Estate of Gilmore*, 1997-NMCA-103, ¶ 10, and "that under New Mexico law statutes of limitations are procedural." *Sierra Life Ins. Co.*, 1973-NMSC-079, ¶ 14; *see also Anderson Living Tr. v. WPX Energy Prod., LLC*, 27 F. Supp. 3d 1188, 1211 (D.N.M. 2014) ("New Mexico courts have held that 'the law

[5] Citing *Sun Oil Co.*, 486 U.S. 717 (1988) and *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir. 1996).

of the forum governs matters of procedure.'"); *Nez*, 1989-NMSC-074, ¶ 4 (The plaintiff "correctly asserts that we have viewed statutes of limitation as procedural for choice of law purposes."). The district court, which sits in New Mexico, therefore must apply New Mexico procedural law. *See id.*

Not only has the Tenth Circuit held as much, but it has been the law since 1945 when the United States Supreme Court held in a diversity jurisdiction dispute that the "state of the forum is free to apply its own period of limitations, regardless of whether the state originating the right has barred suit upon it." *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 118 (1945). *Ouellette* reiterated this fundamental proposition in holding that

> [s]imply because a cause of action is pre-empted does not mean that judicial jurisdiction over the claim is affected as well; the Act pre-empts laws, not courts. In the absence of statutory authority to the contrary, the rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State.

Ouellette, 479 U.S. at 499-500.

Anderson Living Trust is very instructive. There, the members of a trust brought suit in the district of New Mexico for royalty payments from "wells" in New Mexico and Colorado. 27 F. Supp. 3d 1188 at 1193. The plaintiffs' fourth, eleventh, and twelfth causes of actions arose under Colorado substantive law. *Id.* at 1196. The defendants moved to dismiss the claims as untimely under New Mexico's shorter statute of limitations. *See id.* Like ER and SGC in this appeal,

the plaintiffs argued that the district court should "apply the relevant Colorado statute of limitations . . . to the claims arising under Colorado law." *Id.* at 1207.

The district court began by stating that the:

> Supreme Court has held that a federal court sitting in diversity should apply the same statute of limitations that a state court of the forum state would apply. The district court must, therefore, look to the forum state's choice-of-law rules to determine which state's law to apply—both to control the substance of the dispute and the limitations period in which the suit can be brought.

Id. at 1211 (citation omitted). It then ruled that "New Mexico law supplies the controlling statutes of limitations for all claims, including the eleventh cause of action, which arises under Colorado substantive law, because of the following reasons." *Id.* at 1228. First, according to the district court, "a federal court sitting in diversity jurisdiction must apply the same statutes of limitations that a state court of the forum state would apply to the case." *Id.* "Second, New Mexico uses the First Restatement approach to choice-of-law analyses in most circumstances." *Id.* Third, the First Restatement provides that, in the absence of a "borrowing statute"—a forum-state statute that adopts the statute of limitations of foreign states when applying their substantive law—the statute of limitations of the forum state controls all claims, even when the claims are brought under the substantive law of a foreign state. *Id.* "Last, New Mexico has no borrowing statute." *Id.*

The cases cited here are controlling and clearly hold that in a diversity case such as this one, the district court is obligated apply the statute of limitations of the forum state, in this case New Mexico.

i. The District Court's Decision Rested on a Well-Established and Consistently Applied Legal Principle that the Statute of Limitations of the Forum State Controls.

Here, the district court properly analyzed and applied New Mexico procedural law to find that the New Mexico's statute of limitations applied in this case. For example, in *Nez*, the plaintiff purchased a truck in Texas. 1989-NMSC-074, ¶ 2. The contract contained a provision stating that it would be governed by Texas law. *Id.* After the truck was repossessed from his New Mexico home, the plaintiff filed suit in New Mexico. *Id.* ¶ 3. Similar to ER in this case, the defendant in *Nez* sought summary judgment based on Texas' two-year statute of limitations. *Id.* The defendant argued that the plaintiff could not base his claims on violations of New Mexico law because New Mexico had no connection with the transaction at issue. *Id.* The defendant also contended that Texas law should apply based on the choice of law provision of the purchase contract. *Id.*

The New Mexico Supreme Court began by reaffirming that "under New Mexico law statutes of limitation are procedural and that the law of the forum governs matters of procedure." *Id.* ¶ 4. The *Nez* court also recognized that "our holdings are consistent with a recent Supreme Court opinion, *Sun Oil Co.*," which

"held that traditionally statutes of limitation are procedural; therefore, a Kansas forum did not violate the Due Process and Full Faith and Credit clauses by applying its own longer statute of limitations to a claim governed by the substantive law of other states." *Id.* Accordingly, the New Mexico Supreme Court concluded "that the district court erred as a matter of law in not applying a New Mexico statute of limitations here, because New Mexico courts should apply the forum state's statute of limitations." *Id.* ¶ 8. The same result should be reached here.

In a case particularly concerning New Mexico and Colorado, the District Court for the District of New Mexico firmly held, "[w]hile the Court has concluded that Plaintiff's tort claims are governed by the substantive law of New Mexico, even if the Court were to hold that the claims were governed by the substantive law of Colorado, the Court would nevertheless apply New Mexico's general three year statute of limitations." *Mims v. Davol, Inc.*, No. 2:16-CV-00136-MCA-GBW, 2017 WL 3405559, * 3 (D.N.M. Mar. 28, 2018) (unpublished). This was because "[p]ursuant to New Mexico's choice of law rules, statutes of limitation are procedural, and therefore governed by the law of the forum state . . . In New Mexico, a general three-year statute of limitations applies to tort claims. NMSA 1978 § 37-1-8." *Id*.

Relying on these authorities, among others, the district court correctly found that even if the substantive law of a second state ends up controlling the substance of the action brought, the statute of limitations of the forum state still controls. *See* Aplt. App. at 254-55. Having established that *Ouellette* does not preempt procedural law, there is no reason why Colorado's statute of limitations should apply in the federal District Court of New Mexico. New Mexico is the forum state and its statute of limitations applies.

SGC attempts to undercut this argument by arguing that the "concept of uniform treatment in state or federal court has no application in the instant circumstances." *Amicus Curiae* at 21. This is simply untrue. The very interests highlighted by SGC—that a litigant filing suit in either state or federal court will have his or her claims subject to that state's limitations period—is precisely why the choice of law analysis is so important. Nearly all of the *Allen* Plaintiffs live and work in New Mexico, where this case was filed and where the parties consented to consolidation of this Multi-District Litigation. SGC and ER do not explain why it would be lawful or make practical sense to apply Colorado's statute of limitations.

ii. Applying New Mexico's Statute of Limitations Does Not Promote Forum-Shopping or Raise Other Policy Concerns.

A law is substantive if it would "significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an

action upon the same claim by the same parties in a State court." *Hanna v. Plumer*, 380 U.S. 460, 466 (1965). This outcome-determinative test must be read with "reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468. These concerns are not present in this case.

As stated above, a large majority of the *Allen* Plaintiffs are residents of New Mexico. Aplt. App. at 58-171. In addition, ER is the party that originally sought venue in New Mexico when it filed a motion with the United States Judicial Panel on Multidistrict Litigation to transfer the Utah case to the District of New Mexico for coordinated pretrial proceedings, "or such other District Court as this Panel deems appropriate." Exhibit 1 at 1.

This situation not uncommon. Federal courts frequently apply the statute of limitations of the injured state in interstate disputes under full-faith-and-credit clause of the Constitution. *See* U.S. Const. art. 4, § 1. In *Sun Oil Co.*, for instance, a case decided after *Ouellette*, the Supreme Court held that a state court may choose to apply its own statute of limitations to claims governed by the substantive laws of another state without violating either the full faith and credit clause or the due process clause. 486 U.S. at 719-720. The Court's opinion stated that statutes of limitations are procedural, and the forum is entitled to apply its own procedural laws. *See id.* at 729. Specifically, the Court held that

> If current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect, or it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause. It is not the function of this Court, however, to make departures from established choice-of-law precedent and practice constitutionally mandatory.

Id. (citations omitted). The Court also explicitly rejected the suggestion that statutes of limitations should be treated substantively for conflict of law purposes to be consistent with their treatment for *Erie* doctrine purposes. *See id.* at 726-27.

E. ER's Argument that the Partial Dissent in *Ouellette* Is Unsupported and Irrelevant Does Not Change the Analysis.

ER makes a puzzling argument that the partial dissent of Justice Brennan somehow proves that the district court's decision in this case is contrary to the *Ouellette* majority. *See* Op. Br. at 11-12. To get there, ER claims that in order to "draw a contrast with the majority opinion," Justice Brennan "disagree[d] with the majority's conclusion that the" CWA preempts the usual two-step conflict of law analysis undertaken by federal district courts. *Id.* at 11. ER's argument conflates conflict of law and choice of law principles.

Justice Brennan's partial dissent merely argued that parties should be allowed to bring a state nuisance action in either the upstream or downstream state, using existing conflict of law rules to determine which state's law should apply. *See Ouellette*, 479 U.S. at 500-01 (Brennan, J., concurring in part and dissenting in part). As pointed out by Justice Brennan, "[a]s far as the parties and

the Court know, Vermont law and New York law are identical on the question of private nuisance." *Id.* at 501 (internal quotation marks and citations omitted). Justice Brennan would have applied "well-settled conflict-of-law principles" to protect the affected state's interests in applying its "own tort laws in suits against the source State's polluters." *Id.* at 502. Justice Brennan disagreed with the majority that the savings clause unambiguously preempted this important right. *See id.* ("The State's interest in applying its own tort laws cannot be superseded by a federal act unless that was the clear and manifest purpose of Congress.").

As stated above, there is no issue before this Court as to whether Colorado's substantive law applies, including Colorado nuisance law. As a result, there is no conflict of law issue advanced by the *Allen* Plaintiffs or implicated in the district court's memorandum opinion and order. The issue before this Court is whether the district court correctly held that New Mexico's statute of limitations, not Colorado's, applies to this diversity case pending in New Mexico.

Although similar, conflict of law and choice of law rules are unique depending on the setting. Under conflict of law rules, the first step in employing the most significant relationship approach is to decide whether the laws of the various jurisdictions conflict; if the laws do not conflict, there is no need to resolve the choice of law problem. *See* Restatement (Second) of Conflict of Laws

§§ 6, 145. That is what Justice Brennan sought in his partial dissent. Choice of law is a set of rules used to select which jurisdiction's laws to apply in a lawsuit.

In contrast, choice of law questions most frequently arise in lawsuits in the federal courts that are based on diversity jurisdiction, such as this case, where the plaintiff and defendant are from different states. In these lawsuits, the courts are often confronted with the question of which jurisdiction's laws should apply, regardless of whether they conflict. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497-97 (1941) (holding that federal courts sitting in diversity must apply the choice-of-law rules of the state in which they are located); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 681 (7th Cir.1986) (holding that the choice of law rules of the forum state must be applied to determine the appropriate law to be applied to state law claims, whether they are premised on diversity of citizenship or are pendent to federal claims.); *see also In re Bridgestone/Firestone, Inc. Tires Products Liab. Litig.*, 155 F. Supp. 2d 1069, 1078 (S.D. Ind. 2001) ("In MDL proceedings, the forum state generally is the state in which the transferor court of each individual action sits; in other words, the transferee court must make an independent choice of law determination for each state from which a case was transferred into the MDL proceeding.").

In essence, the choice of law rules establish a method by which the courts can select the appropriate law. ER's argument that the Justice Brennan's dissent is dispositive is therefore unfounded.

F. If New Mexico's Statute of Limitations Is Preempted, Then the Five-Year Federal Statute of Limitations Should Apply, Not Colorado's.

If the Court determines that the CWA prevents application of New Mexico's statute of limitations, it should apply the federal statute of limitations rather than Colorado's. After all, as highlighted by SGC, in CWA cases, the

> "Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."

Amicus Curiae at 21 (quoting *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission*, 432 U.S. 355, 367 (1977)).

Under this logic, neither New Mexico nor Colorado created their statute of limitations with national interests in mind. Accordingly, because the CWA contains no statute of limitations, courts should apply the "catch-all" statute of limitations set forth in 28 U.S.C. § 2462. *See Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.,* 913 F.2d 64, 74-75 (3d Cir. 1990); *United States v. Hobbs,* 736 F. Supp. 1406, 1408-09 (E.D. Va. 1990); *United States v. Material Serv. Corp*., No. 95 C 3550, 1996 WL 563462, at *2 (N.D. Ill. Sept. 30, 1996)

(unpublished). Under Section 2462, a five-year statute of limitations is imposed on claims for relief. Several courts have held that Section 2462 applies to suits brought under the CWA. *See Pub. Interest Research Grp. of N.J., Inc.*, 913 F.2d at 73-77; S*ierra Club v.*, 834 F.2d at 1521 ("Application of section 2462 to citizen enforcement suits [brought under the CWA] is in keeping with the language of the statute; a citizen enforcement suit is also an 'action ... for the enforcement of [a] civil fine.'"); *Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 287 (N.D.N.Y. 1986). If the Court finds that application of New Mexico's statute of limitations is preempted by the CWA, it should apply Section 2462's statute of limitations.

G. SGC's *Amicus Curiae* Should Be Stricken or Disregarded By This Court.

SGC originally sought to join this appeal as an intervenor even though it did not participate in the interlocutory process. That motion was denied by this Court. *See* Doc. 010110272420. SGC then moved to participate as an intervenor, which the *Allen* Plaintiffs opposed, because SGC clearly is not an impartial party and because SGC provided no unique perspective for the benefit of the Court (i.e., SGC and ER are both named defendants seeking dismissal). This Court allowed SGC to conditionally participate as *amicus curiae* "with the final determination to be made" by this panel. Doc. 010110301992.

The *Allen* Plaintiffs respectfully renew the arguments made in their Response in Opposition to SGC's request to participate as amicus curiae because, among other things, SGC participation does not fulfill the spirit or purpose behind amicus curiae, which is to advise "the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another." *WildEarth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 10028647, at *2 (D.N.M. June 20, 2012) (unpublished). "Rather than seeking to come as a 'friend of the court' and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that [SGC] has come as an advocate for one side." *United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991). "In doing so, it does the court, itself and fundamental notions of fairness a disservice." *Id.* Any named party, much less a miner-defendant similarly aligned with ER, cannot be considered disinterested and cannot provide unique information or law.

VI. CONCLUSION

ER and SGC's blanket argument that under *Ouellette* the CWA preempts all law ignores decades of carefully created precedent distinguishing between substantive and procedural law. *Ouellette* did not abrogate traditional choice of law principles for a court sitting in diversity jurisdiction. Furthermore, as shown above, the concerns identified in *Ouellette* are not present here. New Mexico is

not, and will not be able to, regulate the conduct of Colorado permit holders. This Court should affirm the district court's well-reasoned opinion that the forum state's statute of limitations applies to this New Mexico action.

Dated this 23rd day of April 2020

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FEDERAL RULE OF APPELLATE PROCEDURE 32(g)]

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9283 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and 10th Cir. R. 32(A) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Office 365 Edition with the Times New Roman font at 14 points.

Dated April 24, 2020

EGOLF + FERLIC +
MARTINEZ + HARWOOD

/s/ Kate Ferlic
Kate Ferlic

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020 the foregoing document was filed via the Court's CM/ECF system and a copy thereof was served electronically upon all counsel of record, as reflected by the Court's CM/ECF system.

/s/ Kate Ferlic
Kate Ferlic

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;
(2) Pursuant to the Court's General Order Filed March 16, 2020, Appellees will not submit paper copies at this time. If Appellees are required to submit paper copies at a later date, as indicated by the General Order Filed March 16, 2020, the ECF submission will be an exact copy of those documents;
(3) The digital submissions have been scanned and confirmed secure by Web Root, and according to the program are free of viruses.

/s/ Kate Ferlic
Kate Ferlic

Exhibit 1

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re: Gold King Mine Release in San Juan County, Colorado, on August 5, 2015.	MDL NO.: _____

DEFENDANT ENVIRONMENTAL RESTORATION, LLC'S MOTION TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. § 1407

Defendant Environmental Restoration, LLC ("ER"), by and through its counsel, Glaser Weil Fink Howard Avchen & Shapiro LLP, respectfully moves this Panel for an Order pursuant to 28 U.S.C. § 1407 transferring *State of Utah v. Environmental Restoration, LLC, et al.*, case no. 17-cv-00866, filed in the United States District Court for the District of Utah, Central Division (the "Utah Action") to the United States District Court for the District of New Mexico for coordinated or consolidated pretrial proceedings before Chief United States District Judge M. Christina Armijo, or such other District Court as this Panel deems appropriate. Chief Judge Armijo is currently presiding over the consolidated actions, *State of New Mexico, on behalf of the New Mexico Environment Department v. United States Environmental Protection Agency, et al.*, case no. 16-cv-00465 (the "New Mexico Action"), and *Navajo Nation v. United States of America, et al.*, case no. 16-cv-00931, in the United States District Court for the District of New Mexico (the "Navajo Nation Action," collectively with the New Mexico Action, the "Consolidated Actions"). Another action, *McDaniel, et al. v. United States*, case no. 17-cv-00710 (the "McDaniel Action"), has also been filed in the United States District Court for the District

Exhibit 1

of New Mexico.[1] The Utah Action, the Consolidated Actions, and the McDaniel Action are referred to herein as the "Pending Actions."

Pursuant to 28 U.S.C. § 1407, ER also moves for an Order transferring all subsequently filed actions involving common questions of fact with the Pending Actions (collectively, the "Gold King Actions") to the District of New Mexico for coordinated or consolidated pretrial proceedings before Chief Judge Armijo, or such other District Court as this Panel deems appropriate.

In support of this Motion, ER states as follows:

1. The Gold King Actions all arise out of the release of allegedly hazardous substances from the Gold King Mine in San Juan County, Colorado ("Gold King"), on August 5, 2015 (the "Release"). The resulting plume of allegedly hazardous substances traveled along the Animas and San Juan Rivers through three states (Colorado, New Mexico and Utah) until it reached Lake Powell, covering approximately 300 miles. Residents of a fourth state (Arizona) may also have been impacted. The same factual allegations underlie the Gold King Actions:[2]

a. Gold King is one of several hundred abandoned mines located in the San Juan Mountains of Colorado. (Utah Compl.[3] ¶ 15; NN Compl.[4] ¶¶ 5, 36; SNM

[1] The McDaniel Action has not been consolidated with the Consolidated Actions yet, but satisfies the prerequisites for consolidation under Fed. R. Civ. P. 42.

[2] The allegations are relied on here to show the similarity of the operative alleged facts and claims for relief. By citing to them, ER does not admit, expressly or tacitly, any of the allegations, and reserves its right to contest such allegations.

[3] "Utah Compl." refers to Plaintiff State of Utah's Complaint filed in the Utah Action (Dkt. 2). A true and correct copy of the Utah Complaint is attached as **Exhibit F** to the Declaration of Peter Sheridan ("Sheridan Declaration"), filed contemporaneously herewith.

[4] "NN Compl." refers to Plaintiff Navajo Nation's Complaint filed in the Navajo Nation Action (Dkt. 1). A true and correct copy of the Navajo Nation Complaint is attached as **Exhibit G** to the Sheridan Declaration.

Compl.[5] ¶ 19.)

b. Gold King began leaking acid mine drainage ("AMD") in the 1990s after Defendant Sunnyside Gold Corporation ("Sunnyside Gold"), with the approval of the State of Colorado, installed two bulkheads in a nearby exploratory tunnel known as the "American Tunnel." (Utah Compl. ¶ 18; NN Compl. ¶¶ 45–47; SNM Compl. ¶¶ 36, 38.) As a result of Sunnyside Gold plugging the American Tunnel, groundwater migrated through natural fractures in the mountainside and backed up inside the Gold King adit, causing the once-dry Gold King to become filled with AMD that leaked out of the mine's collapsed portal. (Utah Compl. ¶ 19; NN Compl. ¶¶ 6, 56; SNM Compl. ¶¶ 50, 60.)

c. The plugging of the American Tunnel and resulting build-up of AMD in Gold King and the nearby Red & Bonita Mine created an environmental risk that both Defendant U.S. Environmental Protection Agency ("EPA") and the Colorado Division of Reclamation, Mining and Safety ("DRMS") sought to address. After its own reclamation projects at Gold King resulted in further collapses, DRMS, in 2014, requested that EPA re-open Gold King's collapsed portal and investigate the AMD. (Utah Compl. ¶¶ 29–31; NN Compl. ¶¶ 66–67; SNM Compl. ¶¶ 64–66, 75.)

d. EPA retained ER as its "Emergency and Rapid Response Services" ("ERRS") contractor and Weston Solutions, Inc. ("Weston") as its "Superfund Technical

[5] "SNM Compl." refers to Plaintiff State of New Mexico's Complaint filed in the New Mexico Action (Dkt. 1). A true and correct copy of the State of New Mexico Complaint is attached as **Exhibit H** to the Sheridan Declaration.

Assessment and Response Team" ("START") contractor to assist with EPA's reclamation activities at Gold King. (Utah Compl. ¶¶ 32–33; NN Compl. ¶ 67; NN FAC[6] ¶¶ 21, 78; SNM Compl. ¶¶ 15, 107; SNM FAC[7] ¶ 17.)

e. EPA commenced reclamation activities at Gold King in 2014, but temporarily suspended work after seepage appeared. (Utah Compl. ¶¶ 32, 36, 38; NN Compl. ¶ 70; SNM Compl. ¶ 76.)

f. EPA, DRMS, ER and Weston returned to Gold King and resumed reclamation activities in July 2015. (Utah Compl. ¶¶ 38–39; NN Compl. ¶¶ 73–74; SNM Compl. ¶ 81; McDaniel SAC[8] ¶ 36.)

g. While reclamation activities were being performed on August 5, 2015, an accidental release of approximately three (3) million gallons of allegedly contaminated water from Gold King occurred. (Utah Compl. ¶¶ 51, 55–56; NN Compl. ¶¶ 1, 80, 83; SNM Compl. ¶¶ 85–87; McDaniel SAC ¶¶ 31, 43, 47.)

h. The water that was released from Gold King flowed into Cement Creek, which is located at the base of the mountainside. The water formed a yellow plume that traveled downstream to the Animas River, which flowed along its length (while still in Colorado) until it flowed into the San Juan River near

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[6] "NN FAC" refers to Plaintiff Navajo Nation's proposed First Amended Complaint filed in the Navajo Nation Action (Dkt. 141-1). A true and correct copy of the Navajo Nation's proposed First Amended Complaint is attached as **Exhibit I** to the Sheridan Declaration.

[7] "SNM FAC" refers to Plaintiff State of New Mexico's proposed first Amended Complaint filed in the New Mexico Action (Dkt. 86-1). A true and correct copy of the State of New Mexico's proposed First Amended Complaint is attached as **Exhibit J** to the Sheridan Declaration.

[8] "McDaniel SAC" refers to the Second Amended Complaint filed by Plaintiffs Joanna McDaniel, *et al.*, in the McDaniel Action (Dkt. 6). A true and correct copy of the McDaniel Second Amended Complaint is attached as **Exhibit K** to the Sheridan Declaration.

Farmington, New Mexico. The yellow plume continued to travel downstream for hundreds of miles along the San Juan River through New Mexico, the Navajo Nation, and into Utah, where it flowed into Lake Powell. (Utah Compl. ¶ 57; NN Compl. ¶¶ 83–84; SNM Compl. ¶¶ 1, 87; McDaniel SAC ¶ 31.)

2. At this time, four (4) civil actions in total arising from the Release have been filed by seventeen (17) plaintiffs in two United States District Courts—three (3) civil actions in the District of New Mexico and one (1) civil action in the District of Utah. Three of the seventeen (17) plaintiffs are governmental entities (State of New Mexico, Navajo Nation and State of Utah). Fourteen (14) of the plaintiffs are individuals, who all reside in New Mexico. The State of New Mexico has its seat of government located within the District of New Mexico. And the borders of the Navajo Nation reach into areas within the District of New Mexico. The State of Utah is the only plaintiff that lacks a geographical connection to the District of New Mexico.

3. Given the distance that Plaintiffs allege the plume purportedly traveled (approximately 300 miles) (Utah Compl. ¶ 57; NN Compl. ¶¶ 83–84; SNM Compl. ¶¶ 1, 87; McDaniel SAC ¶ 31), and the national media coverage that the Release has and continues to receive, ER anticipates that additional lawsuits may well be filed relating to the Release. EPA has announced that 144 administrative claims have been filed with the agency by farmers, ranchers, homeowners, businesses, employees, state and local governments, and other individuals seeking damages as a result of the Release. The prospect of additional lawsuits further supports centralization of the Gold King Actions in a single United States District Court for coordinated or consolidated pretrial proceedings. *See In re Air Crash at Georgetown, Guyana, on July 30, 2011*, 895 F. Supp. 2d 1355, 1356–57 (J.P.M.L. 2012) (ordering the transfer

of three (3) actions pending in two (2) U.S. District Courts arising from an airplane crash because, "[a]lthough only three actions are pending, centralization under Section 1407 is more suitable than informal coordination given that these actions arise from the same accident, and the parties' representation that over 100 passengers have retained counsel to pursue unresolved claims"); *In re Industrial Wine Contracts Securities Litig.*, 386 F. Supp. 909, 912 (J.P.M.L. 1975) (ordering the transfer of a single action alleging securities fraud to another U.S. District Court where five (5) related actions were pending because "several tag-along actions" were anticipated and "the institution of Section 1407 proceedings at this time will have the salutary effect of providing a ready forum for the most just and expeditious judicial treatment of any future actions along with the present ones").

4. Plaintiffs have and will continue to assert virtually identical claims against defendants in the Gold King Actions. Plaintiffs allege that the defendants in the Gold King Actions are liable because defendants contributed to the conditions that created a threat of a release from Gold King and/or triggered the Release while working on the EPA-led reclamation project. All plaintiffs in the Gold King Actions allege that they incurred property and economic damages as a result of the alleged contamination of the San Juan River. Three of the Gold King Actions have been brought by government entities (State of New Mexico, Navajo Nation and State of Utah) and, in addition to compensatory damages under state tort law, the government entities are seeking clean-up costs and natural resource damages under CERCLA.

5. Defendants will be relying on largely the same sets of facts to establish their defenses in each of the Gold King Actions. In every Gold King Action, ER will rely on substantially the same sets of facts, regardless of where the plaintiffs reside or bring suit. By way of example only, ER will offer evidence to establish that it is, *inter alia*: (i) immune from state

law liability based on the federal "Government Contractor Defense"; (ii) protected from state law liability under the well-established common law contractor defense; (iii) not jointly and severally liable with any other defendant because Gold King (the point source) is located in Colorado and, therefore, Colorado state law should apply, which bars joint and several liability; (iv) not liable under CERCLA because it was neither an "owner," "operator," "arranger" nor "transporter" under the statute; (v) not liable under CERCLA because it acted "at the direction of an on-scene coordinator" and did not act negligently, *see* 42 U.S.C. § 9607(d)(1); and (vi) not liable under CERCLA because it was a "response action contractor" under CERCLA and did not act negligently, *see* 42 U.S.C. § 9619(a)(1).

6. Transferring all Gold King Actions to a single U.S. District Court would be convenient for parties and witnesses, and would promote just and efficient conduct of all actions, because it would avoid duplicative discovery, prevent inconsistent pretrial rulings and conserve judicial resources. The same witnesses with knowledge of the events that occurred prior to, at the time of, and after the Release will need to be deposed in the Gold King Actions, including but not limited to, (i) the EPA on-scene coordinators who directed reclamation activities at Gold King, (ii) other EPA employees who were involved in EPA's reclamation activities at Gold King and post-Release response, (iii) the DRMS employees who routinely visited Gold King and consulted EPA about the ongoing reclamation activities, (iv) the DRMS employees who worked on the agency's prior reclamation efforts in 2008 and 2009 and/or have knowledge about the conditions inside the Gold King adit, and (v) the government contractor employees who worked at Gold King. Plaintiffs in the Gold King Actions will likely request identical documents from defendants relating to, *inter alia*, the work that was performed at Gold King and the conditions inside the Gold King adit, and any resulting discovery disputes likely would involve identical

issues. The discovery in the Gold King Actions will not only overlap, but also will involve complex factual questions. Extensive expert discovery will need to be conducted in each of the Gold King Actions to address, among other issues: (i) the propriety of the alleged activities at Gold King; (ii) the hydrology of the area into which the release from Gold King occurred; (iii) the geochemistry of the plume that migrated through the Animas and San Juan Rivers; (iv) whether the Release had any impact on the water quality of the Animas and San Juan Rivers and, if so, the degree of such impact; (v) alternative causes of any contamination of the Animas and San Juan Rivers; and (vi) if any of the defendants are found liable and if any contamination exists, what remediation steps to take beyond what EPA already has underway.

7. There would be an untenable risk of inconsistent pretrial rulings if the Gold King Actions are not transferred to a single U.S. District Court. An MDL would also conserve judicial resources because multiple District Judges would not have to hear and decide these same legal issues in multiple actions. The Gold King Actions will involve the same legal issues in advance of trial and will involve the same discovery, and it would be preferable to have a single District Judge deciding such legal issues and resolving any discovery disputes. Defendants have and will continue to raise arguments that apply equally to all Gold King Actions, and different U.S. District Courts might reach different conclusions about these common issues. Many of these common issues implicate the parties' legal rights and the scope of defendants' potential liability, while other common issues could be dispositive of plaintiffs' claims. By way of example only, the District of New Mexico and District of Utah might reach different conclusions about: (i) the "Government Contractor Defense"; (ii) certain defendants' status as a potentially responsible party under CERCLA; (iii) whether EPA's initiation of removal work at areas potentially affected by the Release has stripped federal courts of jurisdiction under 42 U.S.C. § 9613(h);

(iv) whether CERCLA preempts the government plaintiffs' claims for unrestricted monetary damages under state law; (v) which state's laws govern plaintiffs' common law tort claims; and (vi) whether defendants could be held jointly and severally liable. Indeed, ER initially raised these issues in the Consolidated Actions over a year ago when ER moved to dismiss and to strike portions of the State of New Mexico's complaint. ER raised identical issues in its motion to dismiss and to strike portions of Navajo Nation's complaint, and in its oppositions to State of New Mexico and Navajo Nation's motions for leave to amend their complaints. These motions remain pending in the Consolidated Actions, and ER intends to raise the same issues in an anticipated motion to dismiss and motion to strike portions of the State of Utah's complaint. Accordingly, if these issues are decided by different courts in different jurisdictions, then there is a real and imminent danger of conflicting rulings on these critical legal issues that are involved in all of the Gold King Actions.

8. The Judicial Panel has routinely transferred actions arising from the same accident to a single United States District Court for coordinated or consolidated pretrial proceedings before a single District Judge because, perforce, the actions arising from each accident involved overlapping factual issues much like those that will overlap here. *See, e.g.*, *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 731 F. Supp. 2d 1352, 1354 (J.P.M.L. 2010) (ordering actions arising from the Deepwater Horizon explosion to be transferred to a single U.S. District Court because the actions "indisputably share factual issues concerning the cause (or causes) of the Deepwater Horizon explosion/fire and the role, if any, that each defendant played in it"); *In re Air Crash over the Southern Indian Ocean, on March 8, 2014*, 190 F. Supp. 3d 1358, 1359 (J.P.M.L. 2016) (ordering actions arising from the disappearance and presumed loss of Malaysia Airlines Flight MH370 to be transferred to a

single U.S. District Court because "[a]ll of the actions will involve similar, if not identical, factual inquiries regarding the cause or causes of the loss of Flight MH370"); *In re Amtrak Train Derailment in Philadelphia, Pennsylvania, on May 12, 2015*, 140 F. Supp. 3d 1347, 1348 (J.P.M.L. 2015) (ordering actions arising from a train derailment to be transferred to a single U.S. District Court because "[c]entralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary"); *In re Air Crash at San Francisco, California, on July 6, 2013*, 987 F. Supp. 2d 1378, 1379 (J.P.M.L. 2013) (ordering actions arising from an airplane crash because "[a]ll actions share factual questions regarding the cause or causes of the crash").

9. The Judicial Panel should order that the Utah Action and all future Gold King Actions be transferred to the District of New Mexico. In selecting a particular transferee court under § 1407, the Judicial Panel considers several factors, including "where the largest number of cases is pending, where discovery has occurred, where cases have progressed furthest, the site of the occurrence of common facts, where the cost and inconvenience will be minimized, and the experience, skill, and caseloads of available judges." MANUAL FOR COMPLEX LITIGATION § 20.131 (4th ed. 2004). These factors favor transferring the Utah Action and all future Gold King Actions to the District of New Mexico.

a. Three of the four cases arising from the Release are currently pending in the District of New Mexico.

b. The Consolidated Actions have progressed further than the Utah Action. All of the defendants in the Consolidated Actions in the District of New Mexico have filed motions to dismiss that have been fully briefed by the parties and are awaiting decision by the District Court. In addition, limited discovery has

already been conducted in the Consolidated Actions. The District Court in the Consolidated Actions ordered further discovery and briefing on defendants' arguments that the Court lacks jurisdiction over certain claims under 42 U.S.C. § 9613(h).

c. The Release (and the work leading up to the Release) occurred in San Juan County, Colorado, which is closer to Albuquerque, New Mexico, than Salt Lake City, Utah. Among the cities and towns affected by the Release, the city with the highest population is Farmington, New Mexico, which has a population of 45,000. In addition to Farmington, the plume from the Release also traveled near Aztec, Kirtland, Waterflow and Shiprock, New Mexico.

d. The District of New Mexico has the capacity to manage an MDL relating to the Release. That District Court has seven active district judges, two senior district judges, six visiting district judges, and ten magistrate judges. Further, there is already an MDL pending in the District of New Mexico (*In re Santa Fe Natural Tobacco Company Marketing and Sales Practices Litigation*, MDL No. 2695), thus the District of New Mexico has proven that it possesses the resources and expertise to host an MDL. *See* MDL Statistics Report, dated November 15, 2017 (attached to the Sheridan Declaration as **Exhibit L**).

10. As for the individual District Judge to whom the MDL should be assigned, the Judicial Panel should consider assigning the Gold King Actions to Chief Judge M. Christina Armijo. Chief Judge Armijo has already been assigned two cases relating to the Release that have been filed in the District of New Mexico. It is anticipated that additional cases relating to the Release may be filed in the District of New Mexico. These future Gold King Actions will

likely satisfy the prerequisites under Fed. R. Civ. 42 for consolidation with the Consolidated Actions that are currently before Chief Judge Armijo. In addition, Chief Judge Armijo is a well-respected District Judge who has experience handling complex cases involving allegedly hazardous substances, including *Chevron Mining, Inc. v. United States*, case no. 13-cv-00328. Chief Judge Armijo is an appropriate choice for supervising the MDL process for these and other cases as and when they are filed.

11. ER has met and conferred with the defendants in the Utah Action and with the U.S. Environmental Protection Agency, and such parties do not oppose transferring the Utah Action to the United States District Court for the District of New Mexico for coordinated or consolidated pretrial proceedings with the Consolidated Actions.

12. In support of this Motion, ER has filed contemporaneously herewith the Sheridan Declaration, which attaches (i) as **Exhibit A**, a numbered schedule providing the complete name of each action involved in the Motion, the district court and division where each action is pending, the civil action number of each action, and the name of the judge assigned to each action (the "Schedule"), (ii) as **Exhibits B–E**, a copy of all docket sheets for all actions listed on the Schedule, and (ii) as **Exhibits F–K**, a copy of all complaints for all actions listed on the Schedule.

13. ER incorporates by reference the arguments and authorities set forth in its accompanying brief, which is being filed contemporaneously herewith.

WHEREFORE, ER respectfully requests that the Judicial Panel issue an Order under 28 U.S.C. § 1407 ordering the transfer of all current and future actions related to the Gold King Release on August 5, 2015, to the District of New Mexico, to be assigned to Chief Judge M. Christina Armijo, or such other District Court, for coordinated and consolidated pretrial proceedings.

Respectfully submitted,

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Attorneys for Defendant Environmental Restoration, LLC

DATED: December 11, 2017

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re: Gold King Mine Release in San Juan County, Colorado, on August 5, 2015.	MDL NO.: _____

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ENVIRONMENTAL RESTORATION, LLC'S MOTION TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. § 1407

I. INTRODUCTION

Defendant Environmental Restoration, LLC ("ER") respectfully submits this memorandum of law in support of its Motion for an Order pursuant to 28 U.S.C. § 1407 transferring *State of Utah v. Environmental Restoration, LLC, et al.*, case no. 17-cv-00866, filed in the United States District Court for the District of Utah, Central Division (the "Utah Action") to the United States District Court for the District of New Mexico for coordinated or consolidated pretrial proceedings before Chief United States District Judge M. Christina Armijo, or such other District Court as this Panel deems appropriate. Chief Judge Armijo is currently presiding over the consolidated actions, *State of New Mexico, on behalf of the New Mexico Environment Department v. United States Environmental Protection Agency, et al.*, case no. 16-cv-00465 (the "New Mexico Action"), and *Navajo Nation v. United States of America, et al.*, case no. 16-cv-00931, in the United States District Court for the District of New Mexico (the "Navajo Nation Action," collectively with the New Mexico Action, the "Consolidated Actions"). Another action, *McDaniel, et al. v. United States*, case no. 17-cv-00710 (the "McDaniel

Action"), has also been filed in the United States District Court for the District of New Mexico.[1] The Utah Action, the Consolidated Actions, and the McDaniel Action are referred to herein as the "Pending Actions."

Pursuant to 28 U.S.C. § 1407, ER also moves for an Order transferring all subsequently filed actions involving common questions of fact with the Pending Actions (collectively, the "Gold King Actions") to the District of New Mexico for coordinated or consolidated pretrial proceedings before Chief Judge Armijo, or such other District Court as this Panel deems appropriate.

II. FACTUAL BACKGROUND

The Gold King Actions all arise out of the release of allegedly hazardous substances from the Gold King Mine in San Juan County, Colorado ("Gold King"), on August 5, 2015 (the "Release"). The resulting plume of allegedly hazardous substances traveled along the Animas and San Juan Rivers through three states (Colorado, New Mexico and Utah) until it reached Lake Powell, covering approximately 300 miles. Residents of a fourth state (Arizona) may also have been impacted. The same factual allegations underlie the Gold King Actions:[2]

(i) Gold King is one of several hundred abandoned mines located in the San Juan Mountains of Colorado. (Utah Compl.[3] ¶ 15; NN Compl.[4] ¶¶ 5, 36; SNM Compl.[5] ¶ 19.)

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[1] The McDaniel Action has not been consolidated with the Consolidated Actions yet, but satisfies the prerequisites for consolidation under Fed. R. Civ. P. 42.

[2] The allegations are relied on here to show the similarity of the operative alleged facts and claims for relief. By citing to them, ER does not admit, expressly or tacitly, any of the allegations, and reserves its right to contest such allegations.

[3] "Utah Compl." refers to Plaintiff State of Utah's Complaint filed in the Utah Action (Dkt. 2). A true and correct copy of the Utah Complaint is attached as **Exhibit F** to the Declaration of Peter Sheridan ("Sheridan Declaration"), filed contemporaneously herewith.

(ii) Gold King began leaking acid mine drainage ("AMD") in the 1990s after Defendant Sunnyside Gold Corporation ("Sunnyside Gold"), with the approval of the State of Colorado, installed two bulkheads in a nearby exploratory tunnel known as the "American Tunnel." (Utah Compl. ¶ 18; NN Compl. ¶¶ 45–47; SNM Compl. ¶¶ 36, 38.) As a result of Sunnyside Gold plugging the American Tunnel, groundwater migrated through natural fractures in the mountainside and backed up inside the Gold King adit, causing the once-dry Gold King to become filled with AMD that leaked out of the mine's collapsed portal. (Utah Compl. ¶ 19; NN Compl. ¶¶ 6, 56; SNM Compl. ¶¶ 50, 60.)

(iii) The plugging of the American Tunnel and resulting build-up of AMD in Gold King and the nearby Red & Bonita Mine created an environmental risk that both Defendant U.S. Environmental Protection Agency ("EPA") and the Colorado Division of Reclamation, Mining and Safety ("DRMS") sought to address. After its own reclamation projects at Gold King resulted in further collapses, DRMS, in 2014, requested that EPA re-open Gold King's collapsed portal and investigate the AMD. (Utah Compl. ¶¶ 29–31; NN Compl. ¶¶ 66–67; SNM Compl. ¶¶ 64–66, 75.)

(iv) EPA retained ER as its "Emergency and Rapid Response Services" ("ERRS") contractor and Weston Solutions, Inc. ("Weston") as its "Superfund Technical

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[4] "NN Compl." refers to Plaintiff Navajo Nation's Complaint filed in the Navajo Nation Action (Dkt. 1). A true and correct copy of the Navajo Nation Complaint is attached as **Exhibit G** to the Sheridan Declaration.

[5] "SNM Compl." refers to Plaintiff State of New Mexico's Complaint filed in the New Mexico Action (Dkt. 1). A true and correct copy of the State of New Mexico Complaint is attached as **Exhibit H** to the Sheridan Declaration.

Assessment and Response Team" ("START") contractor to assist with EPA's reclamation activities at Gold King. (Utah Compl. ¶¶ 32–33; NN Compl. ¶ 67; NN FAC[6] ¶¶ 21, 78; SNM Compl. ¶¶ 15, 107; SNM FAC[7] ¶ 17.)

(v) EPA commenced reclamation activities at Gold King in 2014, but temporarily suspended work after seepage appeared. (Utah Compl. ¶¶ 32, 36, 38; NN Compl. ¶ 70; SNM Compl. ¶ 76.)

(vi) EPA, DRMS, ER and Weston returned to Gold King and resumed reclamation activities in July 2015. (Utah Compl. ¶¶ 38–39; NN Compl. ¶¶ 73–74; SNM Compl. ¶ 81; McDaniel SAC[8] ¶ 36.)

(vii) While reclamation activities were being performed on August 5, 2015, an accidental release of approximately three (3) million gallons of allegedly contaminated water from Gold King occurred. (Utah Compl. ¶¶ 51, 55–56; NN Compl. ¶¶ 1, 80, 83; SNM Compl. ¶¶ 85–87; McDaniel SAC ¶¶ 31, 43, 47.)

(viii) The water that was released from Gold King flowed into Cement Creek, which is located at the base of the mountainside. The water formed a yellow plume that traveled downstream to the Animas River, which flowed along its length (while still in Colorado) until it flowed into the San Juan River near Farmington, New

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[6] "NN FAC" refers to Plaintiff Navajo Nation's proposed First Amended Complaint filed in the Navajo Nation Action (Dkt. 141-1). A true and correct copy of the Navajo Nation's proposed First Amended Complaint is attached as **Exhibit I** to the Sheridan Declaration.

[7] "SNM FAC" refers to Plaintiff State of New Mexico's proposed first Amended Complaint filed in the New Mexico Action (Dkt. 86-1). A true and correct copy of the State of New Mexico's proposed First Amended Complaint is attached as **Exhibit J** to the Sheridan Declaration.

[8] "McDaniel SAC" refers to the Second Amended Complaint filed by Plaintiffs Joanna McDaniel, *et al.*, in the McDaniel Action (Dkt. 6). A true and correct copy of the McDaniel Second Amended Complaint is attached as **Exhibit K** to the Sheridan Declaration.

Mexico. The yellow plume continued to travel downstream for hundreds of miles along the San Juan River through New Mexico, the Navajo Nation, and into Utah, where it flowed into Lake Powell. (Utah Compl. ¶ 57; NN Compl. ¶¶ 83–84; SNM Compl. ¶¶ 1, 87; McDaniel SAC ¶ 31.)

Plaintiffs allege that the defendants in the Gold King Actions are liable because defendants contributed to the conditions that created a threat of a release from Gold King and/or triggered the Release while working on the EPA-led reclamation project. All plaintiffs in the Gold King Actions allege that they incurred property and economic damages as a result of the alleged contamination of the San Juan River. Three of the Gold King Actions have been brought by government entities (State of New Mexico, Navajo Nation and State of Utah) and, in addition to compensatory damages under state tort law, the government entities are seeking clean-up costs and natural resource damages under CERCLA.

At this time, four (4) civil actions in total arising from the Release have been filed by seventeen (17) plaintiffs in two United States District Courts—three (3) civil actions in the District of New Mexico and one (1) civil action in the District of Utah. Except for the State of Utah, all of the plaintiffs who have filed suit so far have a geographical connection to the District of New Mexico. Three of the seventeen (17) plaintiffs are governmental entities (State of New Mexico, Navajo Nation and State of Utah). Fourteen (14) of the plaintiffs are individuals, who all reside in New Mexico. The State of New Mexico has its seat of government located within the District of New Mexico. And the borders of the Navajo Nation reach into areas within the District of New Mexico. ER anticipates that additional actions arising from the Release may be initiated. EPA has announced that 144 administrative claims have been filed with the agency by

farmers, ranchers, homeowners, businesses, employees, state and local governments, and other individuals seeking damages as a result of the Release.

III. ARGUMENT

A. The Well-Known Standard for Transferring an Action under § 1407(a) Supports Centralization of the Gold King Actions.

"When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The United State Judicial Panel on Multidistrict Litigation (the "Judicial Panel") may order such transfers "upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id.*

The Judicial Panel has routinely transferred actions arising from the same accident to a single United States District Court for coordinated or consolidated pretrial proceedings before a single District Judge because, perforce, the actions arising from each accident involved overlapping factual issues much like those that will overlap here. *See, e.g.*, *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 731 F. Supp. 2d 1352, 1354 (J.P.M.L. 2010) (ordering actions arising from the Deepwater Horizon explosion to be transferred to a single U.S. District Court because the actions "indisputably share factual issues concerning the cause (or causes) of the Deepwater Horizon explosion/fire and the role, if any, that each defendant played in it"); *In re Air Crash over the Southern Indian Ocean, on March 8, 2014*, 190 F. Supp. 3d 1358, 1359 (J.P.M.L. 2016) (ordering actions arising from the disappearance and presumed loss of Malaysia Airlines Flight MH370 to be transferred to a single U.S. District Court because "[a]ll of the actions will involve similar, if not identical, factual

inquiries regarding the cause or causes of the loss of Flight MH370"); *In re Amtrak Train Derailment in Philadelphia, Pennsylvania, on May 12, 2015*, 140 F. Supp. 3d 1347, 1348 (J.P.M.L. 2015) (ordering actions arising from a train derailment to be transferred to a single U.S. District Court because "[c]entralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary"); *In re Air Crash at San Francisco, California, on July 6, 2013*, 987 F. Supp. 2d 1378, 1379 (J.P.M.L. 2013) (ordering actions arising from an airplane crash because "[a]ll actions share factual questions regarding the cause or causes of the crash"). In such cases, the Judicial Panel has ordered transfers under § 1407 even though some of the transferred "actions may involve different defendants or different threshold jurisdictional or successor liability inquiries." *In re Air Crash over the Southern Indian Ocean*, 190 F. Supp. 3d at 1359. As the Judicial Panel has explained, "Section 1407 does not require a complete identity or even a majority of common questions of fact to justify transfer, and the presence of additional or differing legal theories is not significant when, as here, the actions arise from a common factual core." *Id.*

The Judicial Panel has also transferred actions under § 1407 where additional actions will likely be filed and "there has been sufficient development so that an informed decision on the propriety of transfer and the appropriate transferee court can be made." *In re Air Crash Disaster near Saigon, South Vietnam, on April 4, 1975*, 404 F. Supp. 478, 479 n.2 (J.P.M.L. 1975) (ordering the transfer of five (5) actions arising from an overseas airplane crash to a single U.S. District Court). *See also In re Air Crash at Georgetown, Guyana, on July 30, 2011*, 895 F. Supp. 2d 1355, 1356–57 (J.P.M.L. 2012) (ordering the transfer of three (3) actions pending in two (2) U.S. District Courts arising from an airplane crash because, "[a]lthough only three actions are pending, centralization under Section 1407 is more suitable than informal coordination given that

these actions arise from the same accident, and the parties' representation that over 100 passengers have retained counsel to pursue unresolved claims"); *In re Air Crash at Tegucigalpa, Honduras, on May 30, 2008*, 598 F. Supp. 2d 1368, 1369 (J.P.M.L. 2009) (ordering centralization under § 1407 of two (2) actions because, "[a]lthough only two actions are pending, centralization under Section 1407 is more suitable than informal coordination given that both actions have been pending for nearly the same length of time and arise from the same accident"). The Judicial Panel's decision in *In re Industrial Wine Contracts Securities Litig.*, 386 F. Supp. 909 (J.P.M.L. 1975), is instructive. There, the Judicial Panel transferred a single action alleging securities fraud to another U.S. District Court where five (5) related actions were pending. The Judicial Panel explained that "several tag-along actions" were anticipated and "the institution of Section 1407 proceedings at this time will have the salutary effect of providing a ready forum for the most just and expeditious judicial treatment of any future actions along with the present ones." *Id.* at 912. These same considerations apply here. The Judicial Panel should centralize the Gold King Actions in one U.S. District Court in order to provide a ready forum for additional actions arising from the Release that will likely be filed in the future.

B. <u>Centralization of the Gold King Actions Is Proper.</u>

1. Common Questions of Fact Predominate in the Gold King Actions.

As set forth above, the Gold King Actions arise out of the Gold King Release on August 5, 2015. The key factual issues in the Gold King Actions will be the same, namely, whether any one or more of the defendants contributed to the conditions inside Gold King that created the risk of a release and/or caused the Release as a result of their alleged activities at Gold King, and what, if any, damages were caused by the Release. In addition, defendants will be relying on largely the same sets of facts to establish their defenses in each of the Gold King

Actions. In every Gold King Action, ER will rely on substantially the same sets of facts, regardless of where the plaintiffs reside or bring suit. By way of example only, ER will offer evidence to establish that it is, *inter alia*: (i) immune from state law liability based on the federal "Government Contractor Defense"; (ii) protected from state law liability under the well-established common law contractor defense; (iii) not jointly and severally liable with any other defendant because Gold King (the point source) is located in Colorado and, therefore, Colorado state law should apply, which bars joint and several liability; (iv) not liable under CERCLA because it was neither an "owner," "operator," "arranger" nor "transporter" under the statute; (v) not liable under CERCLA because it acted "at the direction of an on-scene coordinator" and did not act negligently, *see* 42 U.S.C. § 9607(d)(1); and (vi) not liable under CERCLA because it was a "response action contractor" under CERCLA and did not act negligently, *see* 42 U.S.C. § 9619(a)(1).

Although plaintiffs in the Gold King Actions allegedly incurred distinct damages, that is undoubtedly true of plaintiffs in every multidistrict litigation arising from the same accident. Despite that fact, the Judicial Panel has routinely granted transfers under § 1407 in cases involving singular accidents with multiple claimed damaged parties. In *In re Air Crash over the Southern Indian Ocean, on March 8, 2014*, 190 F. Supp. 3d 1358 (J.P.M.L. 2016), plaintiffs argued that actions arising from the disappearance and loss of an airline should not be centralized because "the only truly disputed merits issue in this litigation will be plaintiffs' damages." *Id.* at 1359. The Judicial Panel rejected this argument because it impermissibly required "the Panel to pre-judge the merits of these actions—something we are neither authorized nor inclined to do." *Id.* at 1360. In addition, the Judicial Panel recognized that the litigation, as in the Gold King

Actions, would involve the circumstances of the underlying accident, "not just plaintiffs' damages." *Id.*

2. Centralization of the Gold King Actions Would Be Convenient and Would Promote Just and Efficient Conduct of All Actions.

As the Judicial Panel has routinely held in cases that arise from an accident and involve overlapping questions of fact, transferring all Gold King Actions to a single U.S. District Court would be convenient for parties and witnesses, and would promote just and efficient conduct of all actions, because it would avoid duplicative discovery, prevent inconsistent pretrial rulings and conserve judicial resources. *See, e.g.*, *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 731 F. Supp. 2d 1352, 1354 (J.P.M.L. 2010); *In re Air Crash Over Southern Indian Ocean on March 8, 2014*, 190 F. Supp. 3d 1358, 1359 (J.P.M.L 2016); *In re Amtrak Train Derailment in Philadelphia, Pennsylvania, on May 12, 2015*, 140 F. Supp. 3d 1347, 1348 (J.P.M.L. 2015); *In re Air Crash at San Francisco, California, on July 6, 2013*, 987 F. Supp. 2d 1378, 1379 (J.P.M.L. 2013). The same witnesses with knowledge of the events that occurred prior to, at the time of, and after the Release will need to be deposed in the Gold King Actions, including but not limited to, (i) the EPA on-scene coordinators who directed reclamation activities at Gold King, (ii) other EPA employees who were involved in EPA's reclamation activities at Gold King and post-Release response, (iii) the DRMS employees who routinely visited Gold King and consulted EPA about the ongoing reclamation activities, (iv) the DRMS employees who worked on the agency's prior reclamation efforts in 2008 and 2009 and/or have knowledge about the conditions inside the Gold King adit, and (v) the government contractor employees who worked at Gold King. Plaintiffs in the Gold King Actions will likely request identical documents from defendants relating to, *inter alia*, the work that was performed

at Gold King and the conditions inside the Gold King adit, and any resulting discovery disputes likely would involve identical issues. Thus, discovery sought will overlap between and around the Gold King Actions.

Discovery in the Gold King Actions will not only overlap, but also will involve complex factual questions. Extensive expert discovery will need to be conducted in each of the Gold King Actions to address, among other issues: (i) the propriety of the alleged activities at Gold King; (ii) the hydrology of the area into which the release from Gold King occurred; (iii) the geochemistry of the plume that migrated through the Animas and San Juan Rivers; (iv) whether the Release had any impact on the water quality of the Animas and San Juan Rivers and, if so, the degree of such impact; (v) alternative causes of any contamination of the Animas and San Juan Rivers; and (vi) if any of the defendants are found liable and if any contamination exists, what remediation steps to take beyond what EPA already has underway.

In light of the predominance of common questions of fact and the overlapping discovery in the Gold King Actions, the interests of convenience and judicial economy weigh in favor of transferring the Gold King Actions to a single U.S. District Court that can shepherd the actions through discovery and other pre-trial proceedings.

3. The Risk of Inconsistent Pretrial Rulings Compels Centralization of the Gold King Actions.

There would be an untenable risk of inconsistent pretrial rulings if the Gold King Actions are not transferred to a single U.S. District Court. An MDL would also conserve judicial resources because multiple District Judges would not have to hear and decide the same legal issues in multiple actions. The Gold King Actions will involve the same legal issues in advance of trial and will involve the same discovery, and it would be preferable to have a single District

Judge deciding such legal issues and resolving any discovery disputes. Defendants have and will continue to raise arguments that apply equally to all Gold King Actions, and different U.S. District Courts might reach different conclusions about these common issues. Many of these common issues implicate the parties' legal rights and the scope of defendants' potential liability, while other common issues could be dispositive of plaintiffs' claims. By way of example only, the District of New Mexico and District of Utah might reach different conclusions about: (i) the "Government Contractor Defense"; (ii) certain defendants' status as a potentially responsible party under CERCLA; (iii) whether EPA's initiation of removal work at areas potentially affected by the Release has stripped federal courts of jurisdiction under 42 U.S.C. § 9613(h); (iv) whether CERCLA preempts the government plaintiffs' claims for unrestricted monetary damages under state law; (v) which state's laws govern plaintiffs' common law tort claims; and (vi) whether defendants could be held jointly and severally liable. Indeed, ER initially raised these issues in the Consolidated Actions over a year ago when ER moved to dismiss and to strike portions of the State of New Mexico's complaint. ER raised identical issues in its motion to dismiss and to strike portions of Navajo Nation's complaint, and in its oppositions to State of New Mexico and Navajo Nation's motions for leave to amend their complaints. These motions remain pending in the Consolidated Actions, and ER intends to raise the same issues in an anticipated motion to dismiss and motion to strike portions of the State of Utah's complaint. Accordingly, if these issues are decided by different courts in different jurisdictions, then there is a real and imminent danger of conflicting rulings on these critical legal issues that are involved in all of the Gold King Actions.

Centralization under § 1407 is proper in this case even though certain plaintiffs, such as the State of Utah, have asserted claims under different state laws. As the Judicial Panel has

repeatedly held, the presence of state law claims does not bar transferring an action to another district for coordinated or consolidated pretrial proceedings. *In re Sugar Industry Antitrust Litig.*, 471 F. Supp. 1089, 1094 (JPML 1979); *In re Helicopter Crash in Germany on September 26, 1975*, 443 F. Supp. 447, 449 (JPML 1978). District Courts routinely decide issues governed by the laws of states outside of the district in which the court lies. Further, as ER has argued in pending motions to strike in the Consolidated Actions, the state law of Colorado should govern all common law claims that arise from the Release because Gold King, the "point source" of the alleged harm, is located in Colorado. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487, 497–98 (1987) (holding that New York state law applied to a release from a New York mill that moved toward Vermont across Lake Champlain because the "point source" of the harm was located in New York); *Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992) ("[T]he only state law applicable to an interstate discharge is the law of the State in which the point source is located."). Thus, the state law of Utah does not apply to the State of Utah's state law claims.

C. <u>The Panel Should Transfer All Gold King Actions to the District of New Mexico Because Doing So Would Achieve All or Nearly All of the Beneficial Results Contemplated by Enactment of the MDL Statute.</u>

The Judicial Panel should order that the Utah Action and all future Gold King Actions be transferred to the District of New Mexico. In selecting a particular transferee court under § 1407, the Judicial Panel considers several factors, including "where the largest number of cases is pending, where discovery has occurred, where cases have progressed furthest, the site of the occurrence of common facts, where the cost and inconvenience will be minimized, and the experience, skill, and caseloads of available judges." MANUAL FOR COMPLEX LITIGATION

§ 20.131 (4th ed. 2004). These factors favor transferring the Utah Action and all future Gold King Actions to the District of New Mexico.

First, three of the four cases arising from the Release are currently pending in the District of New Mexico.

Second, the Consolidated Actions have progressed further than the Utah Action. All of the defendants in the Consolidated Actions in the District of New Mexico have filed motions to dismiss that have been fully briefed by the parties and are awaiting decision by the District Court. In addition, limited discovery has already been conducted in the Consolidated Actions. The District Court in the Consolidated Actions ordered further discovery and briefing on defendants' arguments that the Court lacks jurisdiction over certain claims under 42 U.S.C. § 9613(h).

Third, the Release (and the work leading up to the Release) occurred in San Juan County, Colorado, which is closer to Albuquerque, New Mexico, than Salt Lake City, Utah. Among the cities and towns affected by the Release, the city with the highest population is Farmington, New Mexico, which has a population of 45,000. In addition to Farmington, the plume from the Release also traveled near Aztec, Kirtland, Waterflow and Shiprock, New Mexico.

Fourth, the District of New Mexico has the capacity to manage an MDL relating to the Release. That District Court has seven active district judges, two senior district judges, six visiting district judges, and ten magistrate judges. Further, there is already an MDL pending in the District of New Mexico (*In re Santa Fe Natural Tobacco Company Marketing and Sales Practices Litigation*, MDL No. 2695), thus the District of New Mexico has proven that it possesses the resources and expertise to host an MDL. *See* MDL Statistics Report, dated November 15, 2017 (Sheridan Decl. Ex. L).

As for the individual District Judge to whom the MDL should be assigned, the Judicial Panel should consider assigning the Gold King Actions to Chief Judge M. Christina Armijo. Chief Judge Armijo has already been assigned two cases relating to the Release that have been filed in the District of New Mexico. It is anticipated that additional cases relating to the Release may be filed in the District of New Mexico. These future Gold King Actions will likely satisfy the prerequisites under Fed. R. Civ. 42 for consolidation with the Consolidated Actions that are currently before Chief Judge Armijo. In addition, Chief Judge Armijo is a well-respected District Judge who has experience handling complex cases involving allegedly hazardous substances, including *Chevron Mining, Inc. v. United States*, case no. 13-cv-00328. Chief Judge Armijo is an appropriate choice for supervising the MDL process for these and other cases as and when they are filed.

Fifth, centralization of the Gold King Actions in the District of New Mexico is proper regardless of whether certain defendants would be subject to personal jurisdiction in the District of New Mexico. "'Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue. . . . Following a transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer.'" *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 163 (2d Cir. 1987) (quoting *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976)). *See also In re Telectronics Pacing Sys., Inc.*, 953 F. Supp. 909, 913 (S.D. Ohio 1997) ("In the context of cases consolidated for pretrial purposes under 28 U.S.C. § 1407, the court can exercise personal jurisdiction to the same extent as the transferor court could. Thus, if the transferor court in an individual case has jurisdiction over a defendant in the transferor court's forum, this Court also has jurisdiction in that action regardless

of the defendant's contacts with this forum."); *In re Sugar Indus. Antitrust Litig.*, 399 F. Supp. 1397, 1400 (J.P.M.L. 1975) (rejecting argument that an order transferring an action in the Eastern District of Pennsylvania to the Northern District of California would deprive defendants of due process on the grounds that they lacked "the requisite minimal contacts with California to give the California court in personam jurisdiction over them").

Finally given the distance that Plaintiffs allege the plume purportedly traveled (approximately 300 miles), and the national media coverage that the Release has and continues to receive, ER anticipates that additional lawsuits may well be filed relating to the Release. EPA has announced that 144 administrative claims have been filed with the agency by farmers, ranchers, homeowners, businesses, employees, state and local governments, and other individuals seeking damages as a result of the Release. The prospect of additional lawsuits further supports an Order transferring all related cases to the District of New Mexico for coordinated or consolidated pretrial proceedings under Chief Judge Armijo's supervision. *See In re Air Crash at Georgetown, Guyana, on July 30, 2011*, 895 F. Supp. 2d 1355, 1356–57 (J.P.M.L. 2012) (ordering the transfer of three (3) actions pending in two (2) U.S. District Courts arising from an airplane crash because, "[a]lthough only three actions are pending, centralization under Section 1407 is more suitable than informal coordination given that these actions arise from the same accident, and the parties' representation that over 100 passengers have retained counsel to pursue unresolved claims"); *In re Industrial Wine Contracts Securities Litig.*, 386 F. Supp. 909, 912 (J.P.M.L. 1975) (ordering the transfer of a single action alleging securities fraud to another U.S. District Court where five (5) related actions were pending because "several tag-along actions" were anticipated and "the institution of Section 1407 proceedings at this time will

have the salutary effect of providing a ready forum for the most just and expeditious judicial treatment of any future actions along with the present ones").

IV. CONCLUSION

For the reasons set forth above, ER respectfully requests that the Judicial Panel issue an Order under 28 U.S.C. § 1407 ordering the transfer of all current and future actions related to the Gold King Release on August 5, 2015, to the District of New Mexico, to be assigned to Chief Judge M. Christina Armijo or such other District Court for coordinated and consolidated pretrial proceedings.

DATED: December 11, 2017

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BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

MDL-_____ - In re: Gold king Mine Release in San Juan County, Colorado, on August 5, 2015

SCHEDULE OF ACTIONS

	Case Captions	Court	Civil Action No.	Judge(s)
1.	**Plaintiffs:** The State of New Mexico on behalf of the New Mexico Environment Department, **Defendants:** United States Environmental Protection Agency; Gina McCarthy, in her official capacity as Administrator, United States Environmental Protection Agency; Environmental Restoration, LLC; Kinross Gold Corporation; Kinross Gold USA, Inc.; and Sunnyside Gold Corporation	District of New Mexico	1:16-cv-00465	Hon. M. Christina Armijo, U.S.M.J. (presiding) Hon. Laura Fashing, U.S.D.J. (referral)
2.	**Plaintiffs:** Navajo Nation, a federally recognized Indian Tribe, on its own behalf, and as *parens patriae* on behalf of the Navajo people **Defendants:** United States of America, Environmental Protection Agency; Environmental Restoration, LLC; Harrison Western Corporation; Gold King Mines Corporation; Sunnyside Gold Corporation; Kinross Gold Corporation; Kinross Gold USA, Inc.; and Does 1-10	District of New Mexico	1:16-cv-00931* *Consolidated with 1:16-cv-00465	Hon. M. Christina Armijo, U.S.M.J. (presiding) Hon. Laura Fashing, U.S.D.J. (referral)

	Case Captions	Court	Civil Action No.	Judge(s)
3.	**Plaintiffs:** The State of Utah **Defendants:** Environmental Restoration, LLC; Harrison Western Corporation; Kinross Gold Corporation; Kinross Gold U.S.A., Inc.; Sunnyside Gold Corporation; and Gold King Mines Corporation	District of Utah, Central Division	2:17-cv-00866	Hon. Brooke C. Wells, U.S.D.J.
4.	**Plaintiffs:** Joanna McDaniel and Ronnie McDaniel; Joe Ann Duncan; Carolyn Emerson and Joseph Emerson; Frank White and Walter White; Michael Pratt and Deborah Pratt; Jeremiah Booher and Danny Booher; Deloris Davis; Rosemary Hart; and Georgia Wilson **Defendants:** United State of America; United States Environmental Protection Agency; Environmental Restoration, LLC; Gold King Mines Corporation; Weston Solutions Inc.; Harrison Western Construction Corporation; Salem Minerals, Inc.; and San Juan Corp.	District of New Mexico	1:17-cv-00710	Hon. William P. Johnson, U.S.D.J. (presiding) Hon. Lourdes A. Martinez, U.S.D.J. (referral)

Exhibit 2

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

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

No. 1:18-md-02824-WJ

This Document Relates to: No. 1:18-cv-00744-WJ-KK

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the EPA Contractor Defendants' Motion to Dismiss the *Allen* Plaintiffs' Complaint and Motion to Strike, Doc. 117, filed November 1, 2018. For the reasons stated below, the Motion is **GRANTED in part** and **DENIED in part.**

Shortly after the EPA Contractor Defendants filed a motion to dismiss the claims of New Mexico, the Navajo Nation and Utah ("Sovereign Plaintiffs"), the Allen Plaintiffs filed a Complaint in *Allen v. United States*, No. 1:18-cv-00744-WJ-KK, asserting claims against the EPA Contractor Defendants and others arising from the August 5, 2015, release from the Gold King Mine. The EPA Contractor Defendants' motion now before the Court seeks dismissal of the Allen Complaint.

Statute of Limitations

The EPA Contractor Defendants assert that the Allen Plaintiffs' claims are barred by Colorado's two-year statute of limitations. *See* Doc. 117 at 5. The EPA Contractor Defendants rely on two United States Supreme Court cases that held "when a court considers a state-law claim concerning interstate water pollution that is subject to the [Clean Water Act], the court must apply the law of the State in which the point source is located." *International Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987) (Vermont landowners brought suit against operator of New York pulp and paper mill under Vermont common law of nuisance); *Arkansas v. Oklahoma*, 503 U.S. 91, 100

Exhibit 2

(1992) (restating the holding in *Ouellette* as "the Clean Water Act taken 'as a whole, its purposes and its history' pre-empted an action based on the law of the affected State and that the only state law applicable to an interstate discharge is 'the law of the State in which the point source is located'"). The Court has concluded that Colorado substantive law applies in this case, *see* Doc. 166 at 18, filed March 20, 2019 (citing *International Paper Co. v. Ouellette*).

The Allen Plaintiffs are asserting tort claims against Defendants and assert that they "filed their complaint within the New Mexico statute of limitations and are not barred." Doc. 128 at 6. Generally, the statute of limitations of the forum state applies to claims in federal court. *See* Restatement (Second) Conflict of Laws § 142 ("In general, unless the exceptional circumstances of the case make such a result unreasonable . . . The forum will apply its own statute of limitations unless: (1) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence"); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (stating the United States Supreme Court "has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State"); *Myers v. Koopman*, 738 F.3d 1190, 1194 n.2 (10th Cir. 2013) ("Claims under § 1983 are governed by the forum state's statute of limitations", citing *Wallace v. Kato*, 549 U.S. 384, 387 (2007)); *Elm Ridge Exploration Co., LLC v. Engle*, 721 F.3d 1199, 1210 (10th Cir. 2013) ("A federal court sitting in diversity applies the substantive law of the state where it is located, including the state's statutes of limitations"). While the Clean Water Act preempts the application of New Mexico tort law, the Clean Water Act does not preempt the application of New Mexico's statute of limitations because the application of New Mexico's statute of limitations will not frustrate the goals of the Clean Water Act. *See*

International Paper Co. v. Ouellette, 479 U.S. 481, 497-499 n.20 (1987) ("we note that the preemptive scope of the CWA necessarily includes *all* laws that are inconsistent with the 'full purposes and objectives of Congress' . . . the application of affected-state law would frustrate the carefully prescribed CWA regulatory system"). The Court therefore denies the EPA Contractor Defendants' motion to dismiss the Allen Plaintiffs' claims as barred by Colorado's statute of limitations.

Whether Allen Plaintiffs Seek to Recover Same Damages as the Navajo Nation

The EPA Contractor Defendants move to dismiss the Allen Complaint "because the Allen Plaintiffs seek to recover the same damages as the Navajo Nation," stating the "interests of the Allen Plaintiffs are already being protected by the Navajo Nation, *parens patriae*, and the 'compensatory and consequential damages' . . . sought by the Allen [P]laintiffs, are duplicative of the 'compensatory, consequential, and punitive damages,' . . . sought by the Navajo Nation." Doc. 117 at 11-12.

The Court denies the EPA Contractor Defendants' motion to dismiss the Allen Complaint based on potential duplicative claims by the Allen Plaintiffs. "The Supreme Court has recognized the right of a State to sue as *parens patriae* to prevent or repair harm to its quasi-sovereign interest." *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993). "It is equally clear, however, that a state may not sue to assert the rights of private individuals." *Satsky v. Paramount Communications, Inc.*, 7 F.3d at 1469. The Allen Plaintiffs have asserted claims of "personal injury and property damages arising out of the release." Complaint, Doc. 1, filed August 3, 2018, in *Allen v. United States*, No. 1:18-cv-00744-WJ-KK (D.N.M.). Because Rule 8 only requires "a short and plain statement of the claim showing that the pleader is entitled to relief," and

because there has been no discovery, the Court cannot at this time determine the extent, if any, that the claims of the Allen Plaintiffs and the Navajo Nation are duplicative.

CERCLA Section 113(h)

EPA Contractor Defendants move the Court to dismiss the Allen Plaintiffs' state law claims because CERCLA Section 113(h), 42 U.S.C. 9613(h), bars any interference with a CERCLA response action and the Allen Plaintiffs' "claims for monetary damages would interfere with EPA's ongoing remedial efforts at the BPMD site." *See* Doc. 117 at 19-20; *see also* 42 U.S.C. § 9613(h) ("No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action selected under section 9604 of this title . . . except" in certain actions).

The Court denies EPA Contractor Defendants' motion to dismiss pursuant to CERCLA Section 113(h) because the Court has previously denied the Federal Defendants' and the Mining Defendants' motions to dismiss claims pursuant to CERCLA Section 113(h) to allow for jurisdictional discovery regarding the issue of whether abatement in New Mexico and/or Utah would interfere with EPA's remedial action. *See* Mem. Op. and Order at 10-15, Doc. 164, filed February 28, 2019; Mem. Op. and Order at 9-11, Doc. 168, filed March 26, 2019.

Government Contractor Defense

The EPA Contractor Defendants assert that they "are shielded from state tort law liability under the government contractor defense" and incorporate by reference their arguments in their earlier motion to dismiss the claims brought by the State of New Mexico, the Navajo Nation, the State of Utah and the McDaniels Plaintiffs. Doc. 117 at 22. The Court denied the EPA Contractor Defendants' earlier motion to dismiss based on the government contractor defense "because the

defense does not appear plainly on the face of the Amended Complaints." Mem. Op. and Order at 9-11, Doc. 166, filed March 20, 2019.

To establish the government contractor defense, a contractor must show: (i) the case involves "uniquely federal interests;" (ii) a "significant conflict exists between an identifiable federal policy or interest and the operation of state law;" and (iii) the contractor's actions fall within the "scope of displacement." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504, 507, 512 (1988). A contractor's actions fall within the scope of displacement if: (i) "the United States approved reasonably precise specifications;" (ii) the contractor "conformed to those specifications;" and (iii) the contractor "warned the United States about the dangers" known to the contractor but not to the United States." *Boyle v. United Technologies Corp.*, 487 U.S. at 512.

The Court denies the EPA Contractor Defendants motion to dismiss the Allen Plaintiffs' claims based on the government contractor defense because the government contractor defense does not appear plainly on the face of the Allen Plaintiffs' Complaint. While the Allen Complaint alleges that there was "a plan to conduct excavation activities," it does not allege that EPA approved reasonably precise specifications, the EPA Contractor Defendants conformed to those specifications, or that the EPA Contractor Defendants warned EPA about the dangers known to the EPA Contractor Defendants but not to EPA.

Failure to State a Claim

The EPA Contractor Defendants assert that the Allen Plaintiffs have failed to state a claim for negligence, negligence per se, and gross negligence, and:

> EPA Contractor Defendants incorporate by reference their legal argument that [the Sovereign and McDaniel] Plaintiffs have failed to state any state law or common law causes of action, as set forth in the Motion to Dismiss, Doc. 46, at 54-60, and Reply in Support of the Motion to Dismiss, Doc. 80 at 30-34, in which EPA Contractor Defendants argue that the McDaniel and Sovereign Plaintiffs have failed to plead prima facie claims for the negligence-based claims. These legal grounds

> apply equally to the Allen Plaintiff's negligence, negligence per se, and gross negligence claims that are based on the same predicate facts. The Allen Complaint makes claims for negligence, negligence per se, and gross negligence. These common law claims are the same claims brought by the McDaniel Plaintiffs in their Second Amended Complaint.

Doc. 117 at 22-23. The Court subsequently found that the McDaniels Plaintiffs' allegations were sufficient to state plausible claims for relief under Colorado law and denied the EPA Contractor Defendants' motion to dismiss the McDaniels Plaintiffs' negligence-based claims. *See* Mem. Op. and Order at 19, Doc. 166, filed March 20, 2019. Because the Allen Plaintiffs' negligence, negligence per se, and gross negligence claims "are the same claims brought by the McDaniel Plaintiffs" and "are based on the same predicate facts," the Court denies the EPA Contractor Defendants' motion to dismiss the Allen Plaintiffs' negligence, negligence per se, and gross negligence claims.

Joint and Several Liability

The EPA Contractor Defendants assert that the Allen Plaintiffs' joint and several liability requests should be stricken because "Colorado law governs Plaintiffs' state law claims and Colorado has abolished joint and several liability by statute in favor of pro-rata liability." Doc. 117 at 19; *see also* Colo. Rev. Stat. Ann. § 13-21-111.5(1) ("In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claim injury, death, damage, or loss, except as provided in subsection (4) of this section [imposing joint liability on persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act]").

The Allen Plaintiffs argue that the issue of whether their joint and several liability requests should be stricken "is ultimately a question of whether New Mexico or Colorado law applies."

Doc. 128 at 20. The Court has since concluded that Colorado law applies. *See* Doc. 166 at 18, filed March 20, 2019 (stating "The Court concludes that Colorado law governs [the McDaniel] Plaintiffs' tort claims," citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 499 n.20 (1987)); Doc. 168 at 3-4, filed March 26, 2019 ("grant[ing] the Mining Defendants' motion to dismiss the Sovereign Plaintiffs' tort claims as preempted by the [Clean Water Act] to the extent the Sovereign Plaintiffs seek to assert those claims under the law of any state other than Colorado"). The Court strikes the Allen Plaintiffs' joint and several liability requests.

Emotional Distress Claims

The Allen Plaintiffs state: "As members of the Navajo Nation, Plaintiffs have an enormous cultural and spiritual connection to the land and waters of the Animas River and San Juan Rivers. As a result of the spill, Plaintiffs have experienced great spiritual and emotional distress." Allen Plaintiffs' Complaint ¶ 8. The EPA Contractor Defendants assert that the Allen Plaintiffs' emotional distress claims should be stricken because the Allen Plaintiffs "are not entitled to recover damages for 'emotional distress' based on negligence." Doc. 117 at 25. The EPA Contractor Defendants also assert that:

> The Allen Plaintiffs do not (and cannot) allege any physical injury to or interference with their real property. That fact distinguishes all of the cases that the Allen Plaintiffs rely on to argue that their emotional distress claims should not be stricken. As the Colorado Court of Appeals explained in *Hendricks*, the allegation of "injury to real property" is critical, because Colorado courts only allow recovery of "discomfort and annoyance" damages for "harm to land." Without any allegation of "harm to land," the Allen Plaintiffs are not entitled to any "emotional distress" or "annoyance and discomfort" damages.

Doc. 135 at 22-23 (citations ommitted).

Under Colorado law, "victims of physical damage to real property cannot be compensated for purely emotional distress," but may recover "for annoyance and discomfort damages" in cases

involving damages for injury to real property. *Hendricks v. Allied Waste Transp., Inc.*, 282 P.3d 520, 524-525 (Colo.App. 2012).

The Allen Plaintiffs argue that the Court "should not dismiss their claims for emotional distress damages" because their "claims for emotional distress damages are equivalent to the type of injuries for 'discomfort and annoyance.'" Doc. 128 at 24.

The Court strikes the Allen Plaintiffs claims for emotional distress damages because Colorado law distinguishes emotional distress damages from damages for discomfort and annoyance. *See Hendricks v. Allied Waste Transp., Inc.*, 282 P.3d at 524 (agreeing that "damages for loss of enjoyment, annoyance, discomfort, and inconvenience are not emotional distress damages").

The Court defers ruling on the EPA Contractor Defendants' assertion that the Allen Plaintiffs' are not entitled to "annoyance and discomfort" damages because the Allen Plaintiffs have not alleged "harm to land." The Allen Plaintiffs allege that they submitted claims to EPA for "property damage," but it is not clear whether those claims include real property.

THEREFORE, IT IS ORDERED that the EPA Contractor Defendants' Motion to Dismiss the Allen Plaintiffs' Complaint and Motion to Strike, Doc. 117, filed November 1, 2018, is **GRANTED in part** and **DENIED in part.** The Court grants the EPA Contractor Defendants' motion to strike the joint and several liability requests in the Allen Plaintiffs' Complaint. The Court grants the EPA Contractor Defendants' motion to strike the Allen Plaintiffs' claims for emotional distress damages. The Court denies the remainder of the EPA Contractor Defendants' motion to dismiss.

WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE