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.

APPELLANT'S OPENING 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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CORPORATE DISCLOSURE STATEMENT

[FEDERAL RULE OF APPELLATE PROCEDURE 26.1]

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner Environmental Restoration, LLC hereby certifies that it has no parent corporation and that there are no publicly held corporations that own 10% or more of its membership interests.

Pursuant to 10th Circuit Rule 26.1, Environmental Restoration hereby identifies the following members and their state(s) of citizenship:

- Dennis L. Greaney Revocable Trust dated September 18, 2007, Missouri
- Mark A. Ruck, Missouri
- Steven R. Wilhelm Revocable Trust dated 1991, Missouri
- Russell D. Gulledge Revocable Trust dated September 28,2006, Illinois
- James K. Davis, Missouri
- Jack Bolozky Revocable Trust dated November 13, 1992, Missouri
- Robert H. McManis Revocable Trust, Florida
- Charles A. Lowenhaupt 1998 Trust, Missouri
- Miriam G. Wilhelm 1998 Trust, Missouri
- Richard C. Witzel, Missouri

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STATEMENT OF RELATED CASES

There are no pending related appeals.

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.

INTRODUCTORY STATEMENT

This appeal raises a single and discrete legal issue: whether the Clean Water Act, codified at 33 U.S.C. § 1251 *et seq.*, preempts common law conflict of law rules. Under the Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), it does. In that decision, the Supreme Court announced the "point source" rule, which compels the application of the law of state in which water pollution arises to tort claims, regardless of the venue of the litigation.

The reach of the "point source" rule is a determinative matter in the case below. If the statute of limitations of Colorado, the source state, governs, then all of the Appellees' claims are time-barred. If, however, the point source rule does ***not*** extend to statutes of limitations, and the law of New Mexico, a downstream affected state and the venue for this action, applies, then the Appellees' claims were timely by two days.

In the ruling below, the District Court erred when it disregarded the categorical language used by the Supreme Court in *International Paper*. Instead, the District Court improperly created a conflict-of-laws exception to the Supreme Court's point source rule. This exception created by the District Court finds no support in Clean Water Act precedent and should be reversed.

JURISDICTIONAL STATEMENT

Pursuant to Federal Rule of Appellate Procedure 28(a)(4), Appellant Environmental Restoration submits the following statement of jurisdiction:

(a) The United States District Court for the District of New Mexico had subject matter jurisdiction over this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b), as the plaintiffs were seeking monetary damages for alleged personal injury and property damages. The District Court had supplemental jurisdiction over the claims against Environmental Restoration pursuant to 28 U.S.C. § 1367, as all of the alleged injuries arise from the same mining incident.

(b) This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(b), which authorizes discretionary interlocutory relief from an order which the district court has certified as a controlling and debatable question for which an immediate appeal would advance the termination of the case. The District Court certified this issue for immediate appeal on September 25, 2019. (ER 261-266)[1] This Court granted Environmental Restoration's petition for leave to file an interlocutory appeal on November 7, 2019. (ER 267-272)

(c) The order granting leave to bring an interlocutory appeal set a deadline of fourteen (14) days from its order for Environmental Restoration to pay the filing fee, and did not require a separate notice of appeal. (ER 271) Environmental Restoration paid the required fee on November 8, 2019. (ER 20)

(d) Although the underlying case remains pending, the order at issue in this appeal is final as of May 31, 2019, and this Court has granted permission to present this appeal on an interlocutory basis. (ER 267-272)

ISSUE PRESENTED

Does the United States Supreme Court's ruling in *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), that courts must apply the law of the state in which water pollution arose (the "point source rule"), preempt the application of a

[1] "ER" references are to the single-volume Excerpts of Record submitted concurrently with this opening brief.

different state's statute of limitations to such claims?

STATEMENT OF THE CASE

The instant appeal arises from one of a number of lawsuits based on the inadvertent release of contaminated water from the Gold King Mine on August 5, 2015. (ER 61)[2] Gold King Mine is one of nearly 50 inactive or abandoned mines located in the "Bonita Peak Mining District" of the San Juan Mountains in southwestern Colorado. (ER 157) This region has been the site of mining activities, and the associated environmental contamination, for over a century.

Although Gold King Mine was once a "virtually dry" mine that did not meaningfully contribute to the contamination discharged into the nearby Animas and San Juan rivers, that changed following the installation of a bulkhead in the mine in 1996. *Id.* By 2005, Gold King Mine was one of the worst polluting mines in Colorado.

After a number of prior efforts by, among others, the Colorado Division of Reclamation, Mining and Safety failed to contain the contamination from Gold King Mine, the United States Environmental Protection Agency intervened and began a "removal site evaluation," which is the first step of a removal action under the Comprehensive Environmental Response, Compensation, and Liability Act. Defendant and Appellant Environmental Restoration was one of the EPA's contractors involved in this cleanup effort. (ER 159-161)

On August 5, 2015, during EPA activities at Gold King Mine, portions of the mine wall collapsed and released approximately three million gallons of acid

[2] Citations in this statement of facts are to the allegations made in plaintiffs' complaint in this matter. Although unnecessary to the resolution of the purely legal question presented in this appeal, such allegations are assumed to be true in the context of a motion to dismiss, such as here. *Byrson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

mine drainage into a creek that flows into the Animas and San Juan rivers. (ER 163-64)

The underlying lawsuit was filed on August 3, 2018 by nearly three hundred members of the Navajo Nation who farm or ranch along the Animas and San Juan rivers (ER 1), and asserts state law negligence claims against the EPA, the EPA's contractors including Environmental Restoration, and the owners of Gold King Mine and other nearby mining sites. (ER 165-170)

On November 1, 2018, Environmental Restoration filed a Rule 12(b)(6) motion to dismiss Appellees' complaint asserting, among other grounds, that the dispute was governed by Colorado law, which imposes a two-year statute of limitations for tort actions. (ER 184-185) Appellees opposed on the grounds that, since the case was before the New Mexico District Court, New Mexico's more lenient three-year statute of limitations for personal injuries should apply. (ER 203-207)

On May 31, 2019, the District Court ruled on the motions to dismiss, and sided with the Appellees on the statute of limitations issue. (ER 253-255) The District Court did so despite agreeing that, under Supreme Court precedent, the law of Colorado governed Appellees' claims. (ER 254)

Following a request by Environmental Restoration (opposed by Appellees), the District Court found that there were substantial legal bases in favor of Environmental Restoration's position, and certified the issue for interlocutory appeal on September 25, 2019. (ER 261-266) This Court accepted the appeal on November 7, 2019, again over Appellees' opposition. (ER 267-272)

SUMMARY OF THE ARGUMENT

When it passed the Clean Water Act, Congress sought to balance the various water pollution regulatory interests of the federal government, the source states in which such pollution arises, and the downstream affected states. A key factor in

this balancing, as well as for predictability and uniformity, was the establishment of a single governing law for private litigation that did not undermine the primary importance of the source state in regulating its waters and did not subject accused pollution sources to a hodgepodge of differing rules arising from downstream states.

In *International Paper*, the Supreme Court, after a review of its prior decisions and the legislative history, concluded that the passage of the Clean Water Act was intended by Congress to preempt all state tort claims other than those of the source State. *International Paper*, 479 U.S. at 500 (the Clean Water Act "pre-empts state law to the extent that the state law is applied to an out-of-state point source."). Instead, "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." 479 U.S. at 487 (emphasis added). Nothing in the Supreme Court's opinion, or in subsequent decisions, undermines the categorical and unqualified nature of this statement. As such, the District Court's decision to apply New Mexico law rather than the source state Colorado's law, is erroneous and should be reversed.

ARGUMENT

I. Standard of Review

The legal sufficiency of a complaint is a question of law, and Rule 12(b)(6) motions are reviewed *de novo*. *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006). "Whether a court properly applied a statute of limitations and the date a statute of limitations accrues under undisputed facts are questions of law [the Court] review[s] *de novo." Nelson v. State Farm Mut. Auto. Ins. Co.,* 419 F.3d 1117, 1119 (10th Cir. 2005) (citing *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906, 914 (10th Cir. 2005) and *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 859 (10th Cir. 1996)); *see also, e.g.*, *Bistline v. Parker*, 918 F.3d 849, 862 (10th Cir. 2019)

(citing *Edwards v. Int'l Union, United Plant Guard Workers,* 46 F.3d 1047, 1050 (10th Cir. 1995)).

Additionally, both statutory interpretations and choice of law issues are legal questions subject to *de novo* review. *See, e.g., United States v. Hernandez,* 913 F.2d 1506, 1510 (10th Cir. 1990) (statutory interpretation standard of review); *Trierweiler v. Croxton and Trench Holding Corp.,* 90 F.3d 1523, 1535 (10th Cir. 1996) (choice of law standard of review).

II. The Clean Water Act Is A Comprehensive Law Intended to Ensure Predictability in Pollution Regulation

In 1972, Congress passed the Clean Water Act, "a comprehensive program for controlling and abating water pollution," *Train v. City of New York*, 420 U.S. 35, 37 (1975), that Congress considered "the most comprehensive and far-reaching water pollution bill [it has] ever drafted." *City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 318 (1981) (quoting Congressman Wilmer Mizell from 1 Leg. Hist. 369). This law "establish[ed] an all-encompassing program of water pollution regulation" that swept aside the prior framework of federal common law. *Id.* at 318-19.

In so doing, Congress recognized that states where sources of potential pollution could be found have a significant role in protecting their natural resources. 33 U.S.C. § 1251(b); *International Paper,* 479 U.S. at 489. Even so, the federal government, through the Environmental Protection Agency, retained certain supervisory and veto powers. 33 U.S.C. § 1342; *International Paper,* 479 U.S. at 489. As the Supreme Court characterized it, the Clean Water Act "establishes a regulatory 'partnership' between the Federal Government and the source State." *International Paper,* 479 U.S. at 490.

States other than the source state occupy a "subordinate position" in relation to "source States in the federal regulatory program" *Id.* at 491. Under the Clean

Water Act, "an affected State only has an advisory role in regulating pollution that originates beyond its borders." *Id.* at 490.

III. The Supreme Court's Decision in *International Paper* Compels Adoption of The Source State's Statute of Limitations

It is against this legislative backdrop that the Supreme Court decided *International Paper*. In that case, the Supreme Court interpreted the "savings clause" in section 505(e) of the Clean Water Act, which provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law. . ." 33 U.S.C. § 1365(e).

International Paper confronted the implications of this provision. Did it preserve state law only as to waters not otherwise covered by federal law and the Clean Water Act? Or did it preserve state law only as it applies to discharges occurring within the source state? Or, finally, did this statute preserve from preemption actions "under the law of the State in which the injury occurred"? *International Paper*, 479 U.S. at 486 (setting out three interpretations).

Both the Vermont District Court and the Second Circuit Court of Appeals adopted this third option, and held that section 1365 preserved suits under the law of the state in which the injury occurred. *Id.* The Supreme Court, however, "reverse[d] the decision below to the extent it permits the application of Vermont [the forum state] law to this litigation," and instead held "that 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." *Id.* at 487 (emphasis added).

Notably, the Supreme Court used categorical language in this holding not once, but ***three*** times: first, when it referred to the "application of Vermont law," *id.*, second when it referred to "the law of the State in which the point source is located," *id.*, and third when it concluded that the Clean Water Act "pre-empts

state law to the extent that the state law is applied to an out-of-state point source." *Id.* at 500.

In none of these three instances did the Supreme Court impose any qualifier or limitation. It did not stating that its decision only prohibited the "application of Vermont ***substantive*** law." Nor did it limit its holding to requiring the use of "the ***substantive*** law of the State in which the point source is located." And the Supreme Court did not conclude that the Clean Water Act "pre-empts ***substantive*** state law to the extent that the ***substantive*** state law is applied to an out-of-state point source." The Supreme Court intentionally used unqualified and categorical language; if it had wished to draw a distinction between the application of procedural and substantive law as the District Court in this case has done, it would have explicitly done so.

The Supreme Court was guided to the use of this categorical language by the nature of the Clean Water Act and its aims of balancing the various regulatory interests of the federal government, the source state, and other affected states. Paramount among this was to prevent announcing a rule that enabled states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *International Paper*, 479 U.S. at 495. "An interpretation of the saving clause that preserved actions brought under an affected State's law would disrupt this balance of interests" and 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." *Id.*

Beyond undermining the balance among these interests that Congress created, "[a]pplication of an affected State's law to an out-of-state source would also undermine the important goals of efficiency and predictability" in the Clean Water Act regulatory framework, since it would expose sources "to a variety of

common-law rules established by the different States along the interstate waterways." *Id.* at 496. The Supreme Court raised the specter of such a legal thicket by the example of a source located in Minnesota that discharges into the Mississippi River. Absent the categorical rule announced in *International Paper*, such a source "theoretically could be subject to the nuisance laws of any of the nine downstream States." *Id.* at 496 n.17.

Subjecting defendants, such as Environmental Restoration, to differing standards of liability based not on where the source is located, but rather on what forum allegedly affected individuals choose to bring suit, is directly counter to the Supreme Court's reasoning and decisions that seek to do so—such as the District Court's below—commit reversible error.

IV. None of the Authorities Cited by Appellees Below Overcome the Supreme Court's Categorical Approach

In the proceedings below, Appellees argued at some length that statutes of limitations are procedural rules that, under New Mexico's default choice of law rules, are governed by the law of the forum state. (ER 205-207)

This is incorrect, and the District Court's acceptance of these arguments (ER 254) was erroneous. As even the Appellees' argument concedes, such rules apply only where *International Paper* and similar cases do not. (ER 205) ("Since *Arkansas [v. Oklahoma*, 503 U.S. 91 (1992)] and *[International Paper]* do not apply, [the District Court] should proceed . . . with a standard choice of law and forum-state analysis.")

But *International Paper* does apply: as explained above, that case spoke categorically and without limitation. The universal nature of Clean Water Act's preemption of state laws, including state conflict of laws doctrines, is further demonstrated by the partial dissents of Justice Brennan and Justice Stevens in that case.

Justice Stevens took issue with the majority rendering a decision regarding the governing law. In his view, that question was not before the Court, and the majority's analysis represented an improper advisory opinion. *International Paper*, 479 U.S. at 509 (Stevens, J., concurring in part and dissenting in part).[3]

Thus, Justice Stevens' offhand statement that the International Paper majority imposed the "substantive" law of a state is, if anything, even more advisory, and should be given no weight. This is especially true give that, in 1992, Justice Stevens himself, writing for a unanimous Supreme Court, handed down the opinion in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). There, Justice Stevens explained that "[t]he Court held 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." 503 U.S. 91, 100 (discussing and quoting *International Paper*, 479 U.S. 487 & 493) (emphasis added).

Thus, whatever his views in dissent, Justice Stevens recognized, and a unanimous Supreme Court agreed, that the *International Paper* decision was, in fact, categorical, and left no room to conduct choice of law analysis or draw distinctions between procedural and substantive law. 503 U.S. at 100.

In *International Paper*, where Justice Stevens asserted that the question of governing law was not before the Court and no opinion should be given, Justice Brennan went further and attacked the majority's point source rule. Justice

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[3] The Appellees below misleadingly characterized Justice Stevens' remarks as part of a "concurrence." (ER 204) Reading Justice Stevens' opinion makes it clear that, on this issue, he was in dissent and criticizing the majority on the relevant point. *See International Paper*, 479 U.S. at 510 (Stevens, J., concurring in part and dissenting in part) ("I therefore respectfully dissent from that part of the Court's opinion holding that the Clean Water Act requires the District Court to apply the nuisance law of the source State.").

Brennan's dissent focused on his belief that, contrary to the majority, the Clean Water Act did ***not*** preempt application of the forum state's laws in favor of that of the source state. *International Paper,* 479 U.S. at 500 (Brennan, J., concurring in part and dissenting in part) ("I disagree only with the Court's view that a Vermont court must apply New York nuisance law.").

In order to state his position, Justice Brennan necessarily needed to draw a contrast with the majority opinion. Tellingly, he did so by disagreeing with the majority's conclusion that the Clean Water Act "pre-empts the usual two-step analysis undertaken by federal district courts to determine which state tort law should be applied in interstate tort suits." *Id.* at 501.

Justice Brennan proceeded to conduct a traditional conflict of law analysis that looked to the forum state for its conflict of law principles and then weighed whether the forum or the source state's law should govern the action. *Id.* at 501-02.

The District Court's opinion at issue in this appeal is squarely in line with the dissenting portions of Justice Brennan's opinion. Both disregard the Clean Water Act's emphasis on the primacy of the source state in favor of traditional conflict of laws analysis. *Compare International Paper,* 479 U.S. at 501 (Brennan, J.) ("First, the district court must apply the conflict-of-law rules of the State in which the court sits.") *with* ER 254 ("Generally, the statute of the limitations of the forum state applies to claims in federal court.")). Both assert that, contrary to the *International Paper* majority, their position would not frustrate Congressional intent. *Compare International Paper,* 479 U.S. at 506-07 (Brennan, J.) *with* ER 254-55). And, in fact, both cite to and rely on the Restatement (Second) of Conflict of Laws in order to support their reasoning. *Compare International Paper,* 479 U.S. 508 (Brennan, J.) *with* ER 254.

Had Justice Brennan been writing for the majority, rather than a dissent, the

District Court's decision below would have been entirely consistent with precedent. Instead, because the decision below so closely mirrors the arguments and reasoning of the ***dissent*** from *International Paper,* it can logically be concluded that, like the dissent, the District Court's decision is contrary to that of the *International Paper* majority. Where, however, a dissent merely indicates disagreement, a District Court's decision contrary to a Supreme Court majority's opinion represents reversible error.

CONCLUSION

When the District Court carved out an exception to the point source rule for statutes of limitations, it did so in direct contravention of the Supreme Court's ruling in *International Paper*. Nowhere in that decision, and nowhere in any other Clean Water Act jurisprudence, is there found any support for such an exception. Indeed, the District Court itself did not cite to any authority applying the Clean Water Act when it created this exception, because no such authority exists.

Instead, the District Court specifically diverged from the majority's holding in *International Paper,* and adopted the view urged by Justice Brennan—***in dissent.*** The District Court's ruling adopting the *International Paper* dissent should be vacated.

STATEMENT OF REASONS WHY ARGUMENT IS NECESSARY

Pursuant to 10th Circuit Rule 28.2(C)(2), oral argument on this appeal is necessary as the case raises important questions about the proper interpretation of Supreme Court precedent, the reasons for preferring one interpretation to another, and an issue of first impression in this Circuit.

DATED: January 21, 2020

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APPENDIX: DISTRICT COURT ORDER

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

(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

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 3,638 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 2013 with the Times New Roman font at 14 points.

DATED: January 21, 2020

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CERTIFICATE OF DIGITAL SUBMISSION

[10th Circuit Rule 25.5]

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection, and according to the program are free of viruses.

DATED: January 21, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on January 21, 2020.

I certify that all participants in the appeal are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: January 21, 2020

GLASER WEIL FINK HOWARD
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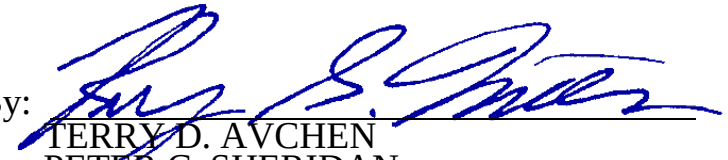
By: 

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