**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

*This Document Relates to:* MDL 1:18-MD-2824-WJ

No. 16-cv-00931-WJ/LF

**WESTON SOLUTIONS, INC.'S, MOTION FOR SUMMARY JUDGMENT TO DISMISS THE NAVAJO NATION'S TORT DAMAGE CLAIMS AS PREEMPTED**

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Defendant Weston Solutions, Inc. ("Weston") hereby moves for partial summary judgment concluding as a matter of law that the "Restorative Action" damages that the Navajo Nation seeks in this litigation are not recoverable as tort damages under Colorado law because they are precluded by the comprehensive natural resource damages scheme in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Pursuant to D.N.M.LR-Civ. 7.1(a), Weston certifies that the Navajo Nation opposes this Motion; the other parties express no position.

**INTRODUCTION**

In this case, the Navajo Nation seeks both CERCLA damages and tort damages under Colorado Law. In expert discovery, it has identified tort damages totaling over $80 million. The stated purpose of this request is to restore the confidence of its members in the San Juan River as a natural resource. The Navajo Nation does not contend that any cleanup of the river is needed to meet water quality standards for agricultural use, livestock watering, or any other purpose. The money sought will purportedly fund several "restorative actions": (1) scientific and communications support programs; (2) long-term ecological monitoring; (3) agricultural assessments; (4) real time monitoring; (5) community involvement and education programs; (6) a "water surety" reservoir; (7) mental health assessment; (8) mental health treatment; (9) cultural impacts assessment; and (10) cultural preservation programs. Summary judgment dismissing these damage claims is appropriate because the comprehensive natural resource damages scheme found in CERCLA preempts tort damages that attempt "to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006).

## STANDARD OF DECISION

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail has a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). Summary judgment is appropriate to dismiss damage claims that are preempted by federal law. *See Vigil v. Burlington N. & Santa Fe Ry. Co.*, 521 F. Supp. 2d 1185, 1191 (D.N.M. 2007) (granting summary judgment on certain tort claims as preempted by a federal statute).

## STATEMENT OF UNDISPUTED FACTS

### I. THE NAVAJO NATION SEEKS RESTORATIVE ACTIONS TO RESTORE CONFIDENCE

1. The Navajo Nation does not seek, through its tort claims, lost tax revenue or compensation for personal injury. *See* Ex. 1, The Navajo Nation's Amended Responses and Objection to the Federal Parties' Request for Admission Nos. 33 & 65, 4-5; Ex. 2, Navajo Nation's Responses and Objections to the Federal Parties' Second Set of Requests for Admission, 4. The Navajo Nation has not, through discovery, identified any specific physical or real property that it contends was damaged as a result of the spill. Ex. 3, The Navajo Nation's Responses to the Federal Parties Second Set of Interrogatories, 6-7.

2. Through its tort claims, the Navajo Nation seeks money to fund several "Restorative Actions" proposed by their damages experts, Mr. Unsworth and Dr. Jones. Ex. 4, Jones & Unsworth Rep., 29-30. The restorative actions comprise ten programs that fall into four categories: (1) $17,382,416 for Environmental Impact Restorative Programs, which includes a long-term monitoring plan for the San Juan River, an agricultural assessment plan, a real-time monitoring

effort, a community involvement and education on environmental monitoring program, and a scientific support team; (2) $54,124,552 for a Water Surety Program to construct a 11,122 acre-feet reservoir for irrigation needs in the event of "high-flow or catastrophic events;" (3) $8,358,011 for Health Impacts Restorative Programs, including a continued health assessment program and community mental health support; and (4) $2,649,561 for a Cultural Preservation program. *Id.* at 30. The total cost of the restorative actions is $80,787,511. *Id*.

3. The harm sought to be addressed by the restorative actions is the loss of "confidence" by members of the Navajo Nation in the San Juan River as a resource. Ex. 5, Jones Dep. (Dec. 16, 2021), 197:21 – 202:25; *see also* Ex. 6, Unsworth Dep. (Dec. 8, 2021), 246:5-8 ("the goal here is to restore confidence in the river"). Dr. Jones testified as follows when asked about the harm that each program was intended to address:

> Q. So I want to look at Exhibit 1-1 and just tell me what harm these things are related to then. So looking first at the ecological impacts and the components there. So you have scientific and communication support. What harm is that addressing?
> A. So I would say that scientific and communication support is addressing harms related to confidence in the resource.
> Q. We've talked about that. So the next one, long-term ecological monitoring plan, what harm is that addressing?
> A. So a long-term ecological monitoring plan would -- is also part of the addressing of confidence in the resource and also identification of, you know, the potential for resuspension of materials and from -- from the mine.

Ex. 5, Jones Dep., 197:13 – 198:3 (emphasis added). *See also* Ex. 4, Jones & Unsworth Rep., 4 (Exhibit 1-1 from Dr. Jones' and Mr. Unsworth's report).

> Q. Turning to the agricultural assessment plan. What harm is the agricultural assessment plan addressing?
> A. I would say that the agricultural assessment plan addresses, you know, confidence in -- in the resource and the -- you know, and the overall well-being and, particularly, the cultural engagement with -- that certain agricultural products have for the Navajo Nation overall.

Ex. 5, Jones Dep., 199:6-14 (emphasis added).

> Q. So -- all right. Let's -- turning to real-time monitoring effort. What harm does that address?

> A. So the real-time monitoring effort additionally feeds into cultural -- excuse me – the confidence -- you know, confidence in the resource, and in particular, will feed -- you know, feed, you know, together with, you know, kind of communication and communication support and understanding of the condition of the resource.

*Id.* at 200:4 – 13 (emphasis added).

> Q. How about the next one, community involvement and education on ecological monitoring. What harm is that intended to address?
> A. So really, you know, this is related to the level of confidence in the resource, and particularly how that relates to the well-being, you know, of the Navajo Nation to be able to, you know, understand the resource and the -- and have confidence and, you know, as -- as we go forward.
> Q. How about the turning to water surety, what -- what harm does the reservoir to protect irrigation water address?
> A. I would say that the -- the reservoir to protect irrigation water in -- in -- primarily contributes to the confidence in the resource, in knowing that if -- you know, that if -- if resuspension of materials occurs, that there are alternatives for irrigation purposes.
> Q. How about the continued health assessment, what does -- what harm does that address?
> A. So the continued health assessment is to -- in large part, to inform the implementation of the community health support program. So I would -- I would kind of say that they go hand in hand in addressing harms to the well-being of the Navajo Nation that result in part from a lack of confidence in the resource.

*Id.* at 200:25 – 201:25 (emphasis added).

> Q. And how about the cultural impacts assessment, what harm does that address?
> A. So the -- the cultural impacts assessment is to -- addresses the -- the -- the confidence of the, you know -- sorry -- addresses the -- the -- the harms to the nation from, you know, disruptions in their use of the resource, you know, related to -- related to the spill. In particular, the -- the cultural impacts -- so there's two -- I mean, I guess we -- as with the mental health impacts, the cultural impacts assessment is to help target the cultural preservation actions that are necessary and to ensure that the programs are working effectively. So the -- you know, the cultural impacts assessment, you know, based on our, you know, experience in putting -- you know, in -- in looking at these, is necessary to understand the -- you know, any kind of -- you know, what the -- how best to address the harms to the Navajo Nation.

*Id.* at 202:6 – 25 (emphasis added).

4. These programs do not assess "incurred response costs immediately after the event that might count as fiscal losses." Ex. 5, Jones Dep., 205:4 – 10. *See also* Ex. 6, Unsworth Dep., 41:1 – 21. Nor does the approach provide a monetary estimate of some "economic measure of -- of

being made worse off." *Id.* at 40:6 – 10. For example, there was no effort "to place an economic value of diminishment in spiritual well-being." *Id.* at 74:21 – 75:3.

## II. THE NAVAJO NATION DOES NOT SEEK ENVIRONMENTAL CLEAN UP

5. The Navajo Nation contends that the Gold King Mine release caused "hazardous substances, including heavy metals," to settle in the San Juan River in Navajo territory, and that "these substances will re-mobilize during storms and other natural events." Ex. 3, The Navajo Nation's Responses to the Federal Parties Second Set of Interrogatories, 6-7.

6. The restoration actions proposed by the Navajo Nation's damages experts do not seek the removal of substances that may remain in the San Juan River as a result of the Gold King Mine release. As Mr. Unsworth stated, "we are not recommending, for example, going out and removing hot spots in the river in sediment depositional areas." Ex. 6, Unsworth Dep., 120:20 – 25. Dr. Jones similarly testified that she has not determined "what the remedy would be and what the cost of the remedy . . . would be" to repair environmental effects of the Gold King Mine release. Ex. 7, Jones Dep. (Dec. 17, 2021), 382:4 – 11.

7. The restorative actions proposed by the Navajo Nation's damages experts also are not designed to address objective, science-based environmental concerns with crops or livestock watered by the San Juan River. As Mr. Unsworth explained, "there's no advisories or data that would indicate that they [crops irrigated by the San Juan River] are not safe." Ex. 8, Unsworth Dep. (Dec. 9, 2021), 429:14 – 21. But, "[t]hat's very different than what people's perceptions may be," and "perceptions are in effect all that matters." *Id.* at 429:22 – 430:9. Mr. Unsworth further stated that "the average person bases their perceptions on a lot of factors, not just exceedance of water quality standards." *Id.* at 123:16 – 18. Indeed, "you don't always find individuals' risk perception to be linear with what you would call an objective measure of -- of risk." *Id.* at 126:17 – 21. Dr. Jones similarly testified in the context of the proposed agricultural assessment plan that

the proposal is not based on "samples that may have been measured in the past, but rather on the kind of understandings and concerns of -- you know, of the Navajo Nation." Ex. 7, Jones Dep., 410:13 – 411:9.

8. Although Dr. Jones and Mr. Unsworth identified, through their proposed "Restorative Actions" the same "harms" that would be considered in a natural resource damages assessment, they did not conduct their work under any "specific legal framework," such as the CERCLA implementing regulations applicable to a natural resource damages assessment. Ex. 7, Jones Dep., 383:20-385:9.

## ARGUMENT

The argument proceeds in two parts. First, CERCLA establishes a set of statutory limitations on the use of natural resource damages that apply to the Navajo Nation. Second, the Navajo Nation's claimed tort damages in this action are inconsistent with those limitations and, for that reason, are precluded under conflict preemption principles.

### I. THE LIMITATIONS ON CERCLA NATURAL RESOURCE DAMAGES APPLY IN EQUAL MEASURE TO NATIVE AMERICAN TRIBES

The test for CERCLA preemption in the Tenth Circuit turns on application of the use limitations for natural resource damage awards under CERCLA Section 107(f)(1) (42 U.S.C. § 9607(f)(1)). *New Mexico*, 467 F.3d at 1244-47. In prior briefing, the Navajo Nation has taken the position that the limitation in CERCLA Section 107(f)(1) does not apply to tribal entities. *See* Dkt. 61, p. 68 n.40. This argument raises a threshold matter to consider before determining whether the Navajo Nation's damage claims are preempted under the test in *New Mexico*. The Navajo Nation's argument fails because it relies on a narrow interpretation of Section 107(f)(1) that ignores the text and purpose of the Superfund Amendments and Re-Authorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("SARA"). *See, generally,* Matthew Duchesne, *Tribal*

*Trustees and the Use of Recovered Natural Resource Damages Under CERCLA*, 48 Nat. Resources J. 353 (2008) (arguing that omission of tribal trustees from Section 107(f)(1) was a drafting error). Specifically, SARA Section 207(c)(2)(D) plainly applied the same restrictions to tribal trustees that apply to state trustees, and there is no indication that Congress intended SARA Section 207(c)(2)(D) to have no effect.

Section 107(f)(1) concerns recovery and use of natural resource damages by natural resource damage trustees, including tribal trustees:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: Provided, however, That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

42 U.S.C. § 9607(f)(1) (emphasis added). The Navajo Nation is correct that the statute permits "any Indian tribe" to recover damages for "injury to, destruction of, or loss of natural resources," but the limitation on the use of damage proceeds—appearing in the underlined sentences—does not explicitly apply to tribes. *See id.* The Navajo Nation reads this silence to mean that there is no limitation on the tribe's use of natural resource damages, short circuiting a preemption argument. *See* Dkt. 61, p. 68 n.40. This argument ignores the text, purpose, and intent of SARA, the statute that amended CERCLA to permit recovery by tribal trustees.

The Navajo Nation's reading of Section 107(f)(1) as codified is contrary to the plain text of SARA. Prior to Congress's amendment through SARA, CERCLA Section 107(f)(1) read as follows:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State: Provided, however, That no liability to the United States or State shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources. There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

CERCLA, Pub. L. No. 96-510, 95 Stat. 2767, 2783 (1980) (emphasis added). The original provision did not permit tribes to recover natural resource damages. The introduction of tribal

trustees came with the enactment of SARA. Section 207(c) of SARA amended Section 107(a), (f) of CERCLA to permit recovery by tribes:

> (c) Liability—Section 107 of CERCLA is amended as follows:
> (1) In subsection (a) by inserting "or an Indian tribe" after "State";
> (2) In subsection (f):
> (A) Insert after "State" the third time that word appears the following: "and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation".
> (B) Insert "or Indian tribe" after "State" the fourth time that word appears.
> (C) Add before the period at the end of the first sentence the following: ", so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe".
> (D) Insert "or the Indian tribe" after "State government".

SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1705-06 (1986). Thus, SARA Section 207's amendment to CERCLA Section 107(f) would read as follows, with amended language underlined:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State <u>and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation</u>: Provided, however, That no liability to the United States or State <u>or Indian tribe</u> shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license<u>, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe.</u> The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the

> Federal Government or the State government or Indian tribe, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources. There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

*Compare* CERCLA, Pub. L. No. 96-510, 95 Stat. 2767, 2783 (1980), *with* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1705-06 (1986). The plain text of Section 207 of SARA—i.e., the very provision which permitted tribal trustees to collect natural resource damages in the first place—applied the restrictions on natural resource damages for state and federal trustees to tribal trustees in equal measure.

However, CERCLA Section 107(f), as codified, does not contain the language from SARA Section 207(c)(2)(D) (i.e., "Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government or Indian tribe . . . ."). This inconsistency owes to another section of SARA. Section 107(d)(2) of SARA removed and replaced part of Section 107(f) of CERCLA:

> (2) USE OF RECOVERED FUNDS—Section 107(f)(l) of CERCLA (as designated by paragraph (1) of this subsection) is amended by striking out the third sentence and inserting in lieu thereof the following: "Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource".

SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1630 (1986). Section 107(d)(2) of SARA removed the phrase "State government" from CERCLA Section 107(f), which removed the trigger for SARA Section 207(c)(2)(D), so the codified version (42 U.S.C. § 9607(f)(1)) gives *no effect*

*whatsoever* to SARA Section 207(c)(2)(D). The question is whether this codification is consistent with the underlying statute and the legislative intent.

When there is an inconsistency in the codification of a law as compared to the underlying statute, the Court should consider the legislative history to determine whether there is a codification error, and in the event of an error, the underlying statute should prevail. *See Stephan v. United States*, 319 U.S. 423, 426 (1943) (examining the "plain purpose" of the Judicial Code, as evidenced by the legislative history, and concluding that "the Code cannot prevail over the Statutes at Large when the two are inconsistent"); *see also Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 379-80 (1958) ("[T]his codification seems to us, for the reasons set forth in this opinion, to be manifestly inconsistent with the Robinson-Patman Act, and in such circumstances Congress has specifically provided that the underlying statute must prevail"). *Cf. Walter v. Nat. Ass'n of Radiation Survivors*, 473 U.S. 305, 318 (1985) (reasoning that absent "substantive comment" from the Congress in the legislative history, "it is generally held that a change during codification is not intended to alter the statute's scope").

Here, the legislative history strongly indicates that Congress intended to apply the same restrictions concerning the use of natural resource damages to tribal trustees that apply to state trustees. In both versions of SARA, as introduced in the House of Representatives and the Senate, the provision that introduced changes to CERCLA Section 107(a), (f) to include Indian tribes retained the language, from the initial enactment of CERCLA, limiting the use of natural resource damages to restore the resource, replace the resource, or acquire equivalent resources. *See* S. 51, 99th Cong. § 101(d); H.R. 2817, 99th Cong. § 207(a). The legislative history concerning amendments to the provision that became SARA Section 207, concerning Indian tribes,

consistently indicate that Congress intended to confer the same rights and obligations on tribal trustees as state trustees. House Report No. 99-253, pt. 1, 108-09 (1985) states:

> This section adds a definition of 'Indian tribes' in section 101 of CERCLA. The section also provides that the requirements for prior assurances from a state that it will pay a share of the costs of remedial action and future maintenance shall not apply to actions on Indian lands; and that in such cases the Federal government, instead of the state, shall assure that the availability of acceptable facilities to manage any hazardous substance removed from the site. The section also authorizes Indian tribes to recover damages for injury to, destruction of, or loss of natural resources resulting from releases of hazardous substance. Finally, the section amends certain provisions of CERCLA to afford Indian tribes substantially the same treatment as states.

(Emphasis added); *see also, e.g.*, H.R. Rep. No. 99-253, pt. 5, 85 (1985) ("The sums recovered are to be available for use to restore, rehabilitate or acquire the equivalent of the natural resources by the appropriate agencies of the Indian Tribe.").

Conversely, the legislative history concerning the provision that became SARA Section 107(d)(2) contains no specific mention of Indian tribes; instead, Congress' express intent in amending CERCLA Section 107(f) through SARA Section 107(d)(2) was to clarify the disposition of money received by the federal trustee:

> This amendment clarifies the language of Section 107(f)(1) of CERCLA to provide specifically that sums recovered by a federal natural resource trustee shall be retained by that federal natural resource trustee, and shall be used, without further appropriation, to restore, replace, or acquire the equivalent of the damaged resource.

H.R. Rep. No. 99-253, pt. 4, 49-50 (1985). There is no discussion, in this legislative history, of Congress's purpose in removing the phrase "State government" (i.e., the phrase to which SARA Section 207(c)(2)(D) was keyed) in favor of simply "State," in CERCLA Section 107(f)(1). *See, e.g., id.*

The legislative history contains no evidence that Congress intended for SARA Section 107(d)(2) to nullify SARA Section 207(c)(2)(D). For instance, the House of Representatives

Conference Report—compiled during consolidation and reconciliation of the House and Senate amendments—contains both provisions. With respect to SARA Section 107, the report states:

> The conference substitute adopts the Senate amendment to section 107(f)(2) and the House amendment to section 107(f)(1), modifying it so that the trustee, rather than the Administrator, retains the recovered funds for use without further appropriation. A trustee may use recovered funds retained under this provision to defray costs expended for damage assessment. In addition, section 107(f) is amended to clarify that there can be no double recovery for the same money damages under this subsection.

H.R. Conf. Rep. No. 99-962, 205 (1986). Again, Congress stated that the express purpose of SARA Section 107(d)(2) was to clarify the disposition of moneys awarded to the federal trustee. There is no mention of tribal trustees. Meanwhile, the report indicates that the conference adopted the Senate amendment to SARA Section 207, to the following effect:

> For the purposes of sections 107(f) and 111, Indian tribes (or in certain cases, the United States acting on behalf of a tribe) are treated as trustees of natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe (if such resources are subject to a trust restriction on alienation). Indian tribes are generally afforded substantially the same treatment as a State under sections 103, 104, 105, and 107.

*Id.*, 275 (emphasis added). Again, Congress expressed the intention to afford "substantially the same treatment" to tribes under CERCLA Section 107 as states. There is no indication that Congress understood or intended that the semantic changes to CERCLA Section 107(f) in SARA Section 107 would render parts of SARA Section 207 inoperable.

The legislative intent to limit tribal trustees' use of natural resource damages is also apparent when reading CERCLA Section 107(f) in a wider statutory context. Initially, both the double recovery provision of Section 107(f)(1) and the provisions concerning expenditures from the superfund presume that natural resource damage funds will be used for restoration, replacement, or acquisition. *See* 42 U.S.C. § 9607(f)(1) ("There shall be no double recovery under this chapter for natural resource damages, including the cost of damage assessment or restoration,

rehabilitation, or acquisition for the same release and natural resource.") (Emphasis added); 42 U.S.C. § 9611(i) (concerning use of the superfund by Indian tribes for "restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resource"). Moreover, reading CERCLA *in pari materia* with other environmental laws authorizing natural resource damage recovery reveals a consistent approach: the use of recovered funds is *always* restricted. *See, e.g.*, 33 U.S.C. § 1321(f)(5) (Clean Water Act); 16 U.S.C. 1443(d) (National Marine Sanctuary System); Duchesne, 48 Nat. Resources J. at 366-67 (surveying "six separate laws," passed between 1974 and 1990, that authorized damage recovery by natural resource damage trustees, and concluding that "[f]rom the first to the last, every one of those laws has prohibited natural resource trustees from using recovered damages for any purpose other than as reimbursement for response and assessment costs and to restore, replace, or acquire the equivalent of the resources that were injured").

Taking this evidence together, the Court should hold that the codified version of CERCLA Section 107(f)(1) contains an error to the extent that it omits a provision requiring tribal trustees to restrict their use of natural resource damage funds. SARA Section 207(c)(2)(D) plainly applied the same restrictions to tribal trustees that apply to state trustees, and the codified language fails to give that section appropriate effect.

## II. THE NAVAJO NATION'S TORT DAMAGE CLAIMS ARE PREEMPTED

The Supremacy Clause of the United States Constitution states that "the Laws of the United States ... shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. To determine whether a federal statute preempts a state law or statute, the Court must determine whether Congress expressly or impliedly intended to preempt state law by enacting a federal statute. *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007). If Congress intends that federal law should entirely occupy a particular field, state regulation in that field is preempted.

*California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989). If Congress does not intend to occupy the field and wholly prevent state regulation, a state law may be preempted to the extent that it conflicts with federal law. *Id.* The Tenth Circuit has found a conflict between state and federal law in cases "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000).

CERCLA does not occupy the entire field of hazardous waste liability; rather, it contains three savings clauses that preserve latitude for state and local regulation: 42 U.S.C. § 9614(a), 42 U.S.C. § 9652(d), and 42 U.S.C. § 9659(h). *See New Mexico*, 467 F.3d at 1244. Accordingly, conflict preemption principles apply to determine whether a given state law remedy is preempted by CERCLA. *See United States v. City & Cnty. of Denver*, 100 F.3d 1509 (10th Cir. 1996) (applying conflict preemption analysis to determine if local ordinance preempted by CERCLA).

Under CERCLA, government entities, acting as trustees, can seek natural resource damages. 42 U.S.C. § 9607(a), (f). There is a complex regulatory process to value the damage to natural resources in terms of economic loss of use, restoration costs, and other parameters. 43 C.F.R. §§ 11.10-11.93. Once awarded, use of natural resource damages is restricted: CERCLA natural resource damages may only be used to restore or replace the injured natural resource. 42 U.S.C. § 9607(f)(1); *General Electric*, 467 F.3d at 1247 (observing that the purpose to the law is to restore natural resources and "not… provide a windfall to the public treasury" through an unrestricted money damages award) (quoting *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980) (concerning territorial statute). By contrast, money damages for tort are "unrestricted." *Id.* at 1248. The restriction on damages is a critical feature of CERCLA's natural

resources damages scheme, ensuring that the law serves the purpose of restoring resources and does "not . . . provide a windfall to the [state] treasury." *Id.* at 1247.

This restriction preempts inconsistent damage awards under state law. In *New Mexico*, the state brought tort claims for a hazardous substance release that impacted the aquifer beneath Albuquerque's South Valley. Reviewing the state's claim for damages on nuisance and negligence theories, the Tenth Circuit ruled that a tort damage award pursuant to New Mexico's common law would conflict with Congress's objective in establishing the CERCLA-natural-resource-damage remedy. *Id.* at 1245. The court found allowing claims outside of that carefully developed scheme for natural resource damages could "seriously disrupt CERCLA's principle aim of cleaning up hazardous waste." *Id.* at 1248. The court announced the rule for preemption as follows: "CERCLA's comprehensive [natural resource damage] scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *Id.* at 1247. The court reasoned that, "[t]he restrictions on the use of NRDs in § 9607(f) (1) represent Congress' considered judgment as to the best method of serving the public interest in addressing the cleanup of hazardous waste. We cannot endorse any state lawsuit that seeks to undermine that judgment." *Id.* The court reached this conclusion "notwithstanding CERCLA's savings clauses because we do not believe that Congress intended to undermine CERCLA's carefully crafted NRD scheme through these savings clauses." *Id.* at 1447.

In applying those principles, the court held that the damage claims that New Mexico pursued through its tort theories were preempted. New Mexico sought an "unrestricted award of money damages" through tort. *Id.* at 1248. The Court reasoned that such damages would be inconsistent with CERCLA Section 107(f)(1) for the following reasons:

> Under the logic of the State's approach, hazardous waste sites need never be cleaned up as long as PRPs are willing or required to tender money damages to a state as trustee. Similarly, PRPs conceivably might be liable for double recovery where a state's successful state law claim for money damages precedes an EPA-ordered cleanup. Finally, in a case where an NRD claim is premised upon both CERCLA and state law, a portion of the recovery if earmarked for the state law claims could be used for something other (for example, attorney fees) than to restore or replace the injured resource. The remainder of the NRD recovery, earmarked for the CERCLA claim, would then be insufficient to restore or replace such resource. Clearly, permitting the State to use an NRD recovery, which it would hold in trust, for some purpose other than to "restore, replace, or acquire the equivalent of" the injured groundwater would undercut Congress's policy objectives in enacting 42 U.S.C. § 9607(f)(1).

*See id.* On that basis, the court affirmed the district court's summary judgment order dismissing New Mexico's common law damage claims.

The preemption rule established in New Mexico preempts the Navajo Nation from seeking unrestricted tort damages for injuries to natural resources. As noted, *New Mexico* recognized two categories of relief for injury to natural resources: (i) "restoration," or (ii) "replacement or acquisition of the equivalent of a contaminated natural resource." Both of these categories are defined in CERCLA's implementing regulations. Initially, "restoration" means "actions undertaken to return an injured resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties or the services it previously provided." 43 C.F.C. § 11.14(ll). Restoration refers to cleanup necessary to reinstate certain "services," meaning the "physical and biological functions performed by the resource" that result from "the physical, chemical, or biological quality of the resource." *See* 43 C.F.R. § 11.14(nn). The focus is upon remediation of an "injury." An "injury" is defined in physical or tangible terms as the "measurable adverse change, either long- or short-term, in the chemical or physical quality or the viable of a natural resource resulting either directly or indirectly from the exposure to a discharge of oil or release of a hazardous substance." 43 C.F.R. § 11.14(v). Next, "acquisition of the equivalent" or "replacement" is defined, in relevant part, as follows: "the substitution for an

injured resource with a resource that provides the same or substantially similar services." 43 C.F.R. § 11.14(a), (ii).

In this case, the Navajo Nation's claims arise, fundamentally, from an alleged injury to natural resources held in trust by the tribe for the benefit of its members. It does not seek any recovery for lost or damaged real or personal property owned by the Nation; nor does it seek any recovery for personal injury. *See* UMF 1. It alleges, instead, that the Defendants in this action "poisoned the San Juan River." Dkt. 214, ¶ 3. On that basis, it seeks restoration of the "Nation's natural resources" on its own behalf and *parens patriae*[1] on behalf of the Navajo people. *See id.*, ¶¶ 11-12. The Navajo Nation's tort damages are nominally directed at restoring confidence in the tribes' natural resources. UMF 3. At root, these are natural resource damages claims premised on the alleged release of contaminants affecting the San Juan River. UMF 5.

Applying the rule in *New Mexico*, the Navajo Nation's claims for unrestricted tort damages are precluded. The Navajo Nation couches its tort damage claims in terms of proposed "Restorative Actions," but being tort damages, they would be unrestricted awards payable to the tribe irrespective of any environmental remediation. For instance, although the Navajo Nation nominally seeks $54,124,557 of damages for a "water surety program" involving a large irrigation reservoir (UMF 2), that amount, if awarded, would be unrestricted money damages payable to the tribe. *New Mexico* involved directly analogous claims. New Mexico sought tort damages pegged to an expert's analysis of "the cost of replacing the storage capacity of a portion of the Middle Rio Grande Basin aquifer through construction and maintenance of a large surface storage reservoir." *See New Mexico v. General Electric Co.*, 335 F. Supp. 2d 1266, 1276 (D.N.M. 2004), *aff'd on*

[1] Notably, *parens patriae* standing is premised upon the "quasi-sovereign' interests," including its duty as trustee to safeguard the Nation's natural resources. *Cf. New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1257-58 (D.N.M. 2004), *aff'd* 467 F.3d 1223 (discussing New Mexico's standing *parens patriae* to "protect the public's supply of drinking water").

*other grounds*, 467 F.3d at 1239-42. The district court did not permit this claim to proceed to trial. *Id.* (citing *New Mexico v. General Electric Co.*, 335 F. Supp. 2d 1185, 1205 (D.N.M. 2004), *aff'd on other grounds*, 467 F.3d at 1239-42). Following the state's appeal, the Tenth Circuit discussed the state's damages claim, including this proposed reservoir (*see New Mexico*, 467 F.3d at 1237 & n.24 (citing *New Mexico*, 335 F. Supp. 2d at 1231 & n.95)) and after analyzing the preemption principles discussed above, the court concluded that "[a]n interpretation of the saving clauses that preserved the State's NRD claim for money damages in its original form would seriously disrupt CERCLA's principle aim of cleaning up hazardous waste." *Id.* at 1248 (emphasis added). Despite the state's purported intention to use the damages to replace alleged lost storage capacity, the Tenth Circuit reasoned that the claim was precluded because the damages "could be used for something other (for example, attorney fees) than to restore or replace the injured resource." *See id.* at 1248 (emphasis added); *cf. New Mexico*, 335 F. Supp. 2d at n.95 (describing the state's damage as "cash compensation, including . . . up to $609,000,000 million for the construction of a 289,500 acre-foot 'replacement' surface storage reservoir that likely will never be built"). The Navajo Nation's proposed "water surety" reservoir is directly analogous to New Mexico's proposed "replacement" reservoir, and the Tenth Circuit's analysis in *New Mexico* forecloses recovery in this case.

The Navajo Nation seeks through tort to recover natural resource damages without the restrictions—regarding the disposition of a money award, the process for identifying the injury, or standards for judging appropriate restorative programs—that CERCLA and its implementing regulations require. The damages that Dr. Jones and Mr. Unsworth analyze mirror the approach that one might take in a natural resource damages assessment at a broad, conceptual level, but they did not abide by the analytical requirements of the CERCLA implementing regulations. Dr. Jones recognized as much, testifying as follows:

> Q. And I think we talked about you were familiar with the natural resource damage – damages assessment regulations under CERCLA; is that right?
> A. Yes. I'm familiar with the regulations under CERCLA.
> Q. But you didn't use those as part of your work in – in this case, did you?
> A. No. I was not asked to conduct my work under a specific legal framework.
> Q. Would you agree generally that the restorative actions that you're identifying in Exhibit 3-1 that your recommending are the same types of remedies you might recommend in a natural resource damage assessment?
> MR. WALSH: Objection. Form.
> THE WITNESS: I think that the – yeah, the harms that we identified and the remedies of those harms are similar. You know, if – if I were restricted to a CERCLA, like, I mean, these are the – these are the harms. We're – we're identifying the harms that are present. I think they would – they would be the same under any framework.
> Q. And when you say "they," do you mean the restorative actions would be the same under any framework?
> A. So these – I mean, these harms and these restorative actions, you know, they exist in – you know, I guess they exist independent of what the framework is. Any given case under CERCLA has particular – I guess there – There are particular limitations depending on, you know, who – who's involved in a case under – you know, under CERCLA. And, you know, so I can't – I can't really speculate as to, you know, whether, you know, my client, if I were doing this specifically under a CERCLA regulation, would ask – you know, would – this would change. That this is – this is simply a statement of the harms and the – and – and the restorative actions.

*See* UMF 8; Ex. 7, Jones Dep., 383:20-385:9. Stated differently, the Navajo Nation's bid for tort damages takes the same harms that would be subject to a natural resource damages assessment—"they would be the same under any framework"—and assigns to them values in a common-law context outside of the strict structure that CERCLA's comprehensive natural resource damages scheme provides. For instance, CERCLA's implementing regulations do permit loss of use damages, which may, under certain circumstances, include the "economic value" and subjective "hedonic" value of lost environmental services. *See* 43 C.F.R. § 11.83(c). These damages mirror the types of lost confidence or lost "wellbeing" that Dr. Jones and Mr. Unsworth analyze, but

unlike their approach, the CERCLA implementing regulations provide specific rules concerning valuation by which Dr. Jones and Mr. Unsworth fail to abide.[2]

CERCLA, rather than tort, provides the Navajo Nation a viable and complete remedy to receive compensation for the repair or replacement of any natural resources that it can prove were damaged.[3] Its tort damage claims, to the extent that they permit unrestricted recovery, are not consistent with that goal, and such damages would provide the Nation with nothing more than a windfall to its general treasury. If, in fact, there remains significant contamination in the San Juan River resulting from the Gold King Mine spill—which Defendants dispute—the Navajo Nation's alleged tort damages would only raise the specter of double recovery when the Court orders, in later phases of this proceeding, actions to restore or replace the affected resources. Or, if the Court considers the amounts awarded in tort to set off a natural resources damage award (or other CERCLA award) to prevent double-recovery, then the amounts remaining for CERCLA uses would be insufficient to complete remediation. This double-bind is the type of situation that *New Mexico* counseled against.

[2] Notably, there is significant uncertainty concerning whether, and under what circumstances, natural resource damages for loss of cultural services, of the type that Dr. Jones and Mr. Unsworth analyze, may be recovered and, if so, how they may be appropriately valued. *Cf. Kennecott Utah Copper Corp v. Interior*, 88 F.3d 1191, 1221-23 (D.C. Cir. 1996) (declining to consider as unripe challenge to the Department of the Interior's position that the CERCLA authorizing regulations potentially authorize recovery for loss of "archeological and cultural" services); *Coeur D'Alene Tribe v. Asarco, Inc.* 280 F. Supp. 2d 1094 (D. Idaho 2003) ("Cultural uses of water and soil by Tribe are not recoverable as natural resource damages").

[3] The Navajo Nation has not yet filed a claim for natural resource damages, and to the extent that the claim would involve damages arising from historic mining activities within the broader Bonita Peak Mining District, which includes the Gold King Mine, the claim is not yet ripe. Under 42 U.S.C. § 9613(g)(1), a claim for natural resource damages under CERCLA may not be brought with respect to a site on the national priorities list (e.g., the Bonita Peak Mining District) until after the Environmental Protection Agency selects its remedial action. The Environmental Protection Agency has not yet made its remedy selection for the Bonita Peak Mining District. Previously, the Sovereign Plaintiffs entered into a "tolling agreement" regarding actions for natural resource damages. *See* Dkt. 284-6. This agreement expired on August 1, 2020, with none of the Sovereigns taking action to extend it.

## CONCLUSION

For the foregoing reasons, Weston respectfully requests that the Court dismiss the tort damage claims of the Navajo Nation as a matter of law.

Dated: March 7, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 7, 2022, the foregoing document was filed via the U.S. District Court of New Mexico's CM/ECF electronic filing system and a copy thereof was served via the CM/ECF electronic transmission upon all counsel of record, as reflected by the Court's CM/ECF system.

*/s/ Jeffrey J. Wechsler*
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