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:* *All Cases*	C.A. No. 1:18-md-02824-WJ

THE NAVAJO NATION'S OPPOSITION TO WESTON SOLUTIONS, INC.'S MOTION FOR SUMMARY JUDGMENT TO DISMISS THE NAVAJO NATION'S TORT DAMAGE CLAIMS AS PREEMPTED [DKT. 1478]

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INTRODUCTION

On August 5, 2015, Defendant Weston Solutions, Inc. ("Weston"), along with the Defendants the United States Environmental Protection Agency ("USEPA") and Environmental Restoration, LLC ("ER"), recklessly caused an unprecedented environmental disaster when they blew out the Gold King Mine and released at least three million gallons of toxic acid mine drainage into waters upstream of the Navajo Nation ("the Spill"). The Spill turned the San Juan River ("the River" or "the San Juan") bright yellow and contaminated it with heavy metals, causing exceedances of water quality standards and depositing contaminants upstream that still lie in wait to be resuspended and reintroduced into the River. The San Juan is not just a river to the Navajo—it is life-giving. And its ongoing desecration from the Spill has reduced crucial cultural and spiritual activities. Due to the Spill, the Nation must implement compensatory actions to ensure the health and well-being of its people.

Seeking to evade responsibility for its reckless actions and foreclose the Nation from obtaining this much-needed relief, Weston argues that the Nation's tort damages claims are preempted by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). In effect, Weston argues that before obtaining any relief, the Nation must wait for EPA—one of the parties responsible for the Spill—to implement remedial actions under CERCLA. Weston makes these arguments despite itself acknowledging that EPA has not even selected a remedial action, and that it could take decades more for EPA to complete its still-unidentified remedial action. The Nation's claims are not preempted, and Weston falls far short of meeting the standard for summary judgment on its affirmative defense of preemption for several reasons:

First, the CERCLA provision on which Weston relies for its preemption argument does

not apply to Indian tribes such as the Nation. *See* 42 U.S.C. § 9607(f)(1) (providing that neither "States" nor the "United States Government" may use natural resource damages for anything other than the restoration of natural resources, without applying the same restriction to Indian tribes despite referencing "Indian tribes" four other times within the same paragraph). Weston would have the Court ignore the unambiguous, plain meaning of CERCLA's text as a "drafting error" in favor of flimsy legislative history and the convoluted and inconclusive history of the CERCLA reauthorization process. But "[i]t is well-established that when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Lamie v. U.S. Tr.,* 540 U.S. 526, 534 (2004) (cleaned up).

Second, even if CERCLA's limitations did apply, the Nation's tort damages claims do not pose an obstacle to the accomplishment of federal goals. Weston has failed to show that the Nation's damages materially conflict with EPA's still hypothetical and as-yet undefined CERCLA remedial actions, in contrast to the circumstances in *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006) (finding certain state law remedies preempted where they conflicted with a CERCLA remediation scheme that the record showed was extensive, effective, and had been ongoing for more than twenty years). (*See* Dkt. 166 at 3 (this Court holding that it would not find the Nation's tort law claims preempted where "it is not clear at this point what the remedial scheme is for the [Nation's] territories").) Weston thus fails to carry its burden for establishing entitlement to its affirmative defense at the summary judgment stage.

Accordingly, the Court should deny Weston's Motion.

STATEMENT OF DISPUTED MATERIAL FACTS ("DMF")

1. The Nation **DISPUTES** Weston's "Undisputed Material Fact" ("UMF") No. 1. As stated in

the Nation's Response to Interrogatory No. 10 of the Federal Parties' Second Set of Interrogatories, the Spill "has significantly damaged the Navajo Nation's sacred River and surrounding lands." (Dkt. 1478-3 at 6–7.)

2. The Nation **DISPUTES** Weston's UMF No. 2. Weston misleadingly characterizes the Water Surety Program as concerning "irrigation needs" merely "in the event of 'high-flow or catastrophic events.'" Weston leaves out that the program is necessary to address ongoing concerns about reanimation of contaminants from the Spill that are settled at the bottom of the San Juan and Animas Rivers. (*See* **Ex. 1** [Jones/Unsworth] at 36 (the Water Surety Program "address[es] the resuspension of metal contaminants from the Spill that have settled upstream of the Navajo Nation and are re-mobilized during storm events or spring runoff"); **Ex. 2** [Jones Tr.] at 418:23–419:12 (the "primary" purpose of the Water Surety Program is to address the "resuspension of metal contaminations from the spill").)[1]

3. The Nation **DISPUTES** Weston's UMF No. 3. The programs outlined by Dr. Jones and Mr. Unsworth are not designed only to restore confidence, as even some of the block quotations in Weston's brief make clear. (*E.g.*, Dkt. 1478 at 3 (long-term monitoring addresses "the potential for resuspension of materials [] from the mine").) The Nation was harmed by the Spill—which released at least three million gallons of toxins into the River—in myriad interconnected ways:

Ongoing Harm to the Water Quality of the San Juan River within the Navajo Nation:

- Immediately after the spill, there was a dramatic uptick in exceedances of water quality standards. Between August 8, 2015 and August 18, 2015, the Spill caused exceedances of the

[1] Pursuant to D.N.M.LR-Civ. 10.5, the Nation obtained agreement from all parties to submit up to 90 pages of exhibits, and now submits 88 pages of exhibits in support of its response.

Navajo Nation Environmental Protection Agency's ("NNEPA") water quality criteria for total lead (human contact, domestic water supply, and livestock watering). (**Ex. 3** [Andrews Rpt.] at 11–13; **Ex. 4** [S. Austin, "Takeaway for (USEPA) R9 Data Through Sept.", NN0034740].)

- Contaminants that settled on the bottom of the San Juan and Animas Rivers were and continue to be resuspended during storms and high-flow events. For example, during the first storm after the Spill on August 13, 2015, contaminants from the Spill "that had deposited in the rivers" were "stirred up" and caused numerous exceedances of NNEPA's water quality standards for agriculture. (**Ex. 5** [NN0053779]; **Ex. 4**.) And a storm on August 27, 2015 resulted in levels of dissolved aluminum and iron that exceeded NNEPA's standards for human contact and New Mexico's criteria for irrigation. (**Ex. 1** at 7–8.) That same storm—and storms on September 6 and September 24, 2015—caused total lead exceedances of NNEPA's criteria for livestock watering, domestic water supply, and human contact. (**Ex.** 3 at 11–13; *accord* **Ex. 6** [USEPA Fate and Transport Report] at iii–iv ("[T]hrough the 2015 fall months . . . the dissolved metals exceeded [NNEPA's] aluminum human contact-related criteria, and Utah aquatic chronic criteria, and New Mexico irrigation criteria").)[2] Various metals had "historic high concentrations measured after the spill," including the highest and second highest concentrations of aluminum and lead, respectively, ever seen in the River. (**Ex. 8** [August 2016 Email from Steve Austin].)
- There remain significant concerns regarding the ongoing threat of resuspension of

[2] Weston's expert, Dr. Walter Shields, has adopted the EPA's Fate and Transport Report wholesale. (**Ex. 7** [Shields Tr.] at 110:3–11 ("I pretty much agreed with [EPA's] findings, so I didn't really have any objections."); *id.* at 111:16–22 (Q: "Is there a single instance when your opinions differ from the conclusions that the EPA reached in the fate and transport report?" A: "Like, I said, I agree with their conclusions.").)

contaminants from the Spill. USEPA's Fate and Transport Report estimates that the Spill released approximately 490,000 kg of metals into the Animas River, which flows into the San Juan. (**Ex. 1** at 18.) EPA "estimates that approximately 90 percent of the solid metal load [from the Spill] initially settled in the Animas River bed" upstream of the San Juan. (**Ex. 6** at iii). While EPA initially claimed that by 2016 these metals were transported through the Animas and San Juan Rivers into Lake Powell, these conclusions are plagued by uncertainty. (**Ex. 1** at 18–20, 22.) Kate Sullivan, the author of the Fate and Transport Report, testified (as EPA's Rule 30(b)(6) witness) that the numbers in her report "should be considered rough estimates" and "there is nothing precise about it." (**Ex. 9** [Sullivan Tr.] at 95:4–7; *see also id.* at 87:21–88:5 (EPA "did not dwell" on the uncertainty of the mass estimate, including whether it may have been "twice as much").) In 2018, EPA had to revise its estimate of the mass of metals upwards to *608,000 kg*—a 20% increase. (**Ex. 10** [2017 Sullivan Pres.] at 2–3.) Even at this higher number, EPA continues to underestimate the mass of metals in the River because it started measuring "3 hours [after the Spill] in Cement Creek, after peak metal concentration and mass had passed," and this single data point, "with metals levels estimated to be many times lower than initial concentrations, drove the [EPA's] overall estimates of mass loading for the entire spill." (**Ex. 1** at 18–20.)

- There remain contaminants from the Spill lurking at the bottom of the San Juan and Animas Rivers, waiting to be reanimated in storm and high-flow events. Indeed, "aluminum and dissolved lead . . . continue to exceed [NNEPA standards for] aquatic and wildlife habitat chronic criteria in the years after 2015." (**Ex. 1** at 13.) And "[f]or many river sections and years, the average concentrations of multiple metals were significantly higher than the 97th

percentile of the pre-Spill data," and "high-flow events in 2019 carried larger concentrations of metals through the lower Animas River and into the San Juan River than were seen in pre-Spill data." (*Id.*) Moreover, the Spring 2016 snowmelt caused "27 exceedances of NNEPA domestic water supply and primary and secondary human contact for total lead." (**Ex. 3** at 15.) New Mexico listed a portion of the Animas River as impaired due to lead concentrations. (**Ex. 1** at 10.)

- These past and ongoing harms to the water quality in the River remain unresolved. The Ecological Impacts programs outlined by Dr. Jones and Mr. Unsworth would allow the Nation to undertake necessary monitoring to evaluate the ongoing effect of the Spill on the San Juan River, agriculture, and livestock, and the Water Surety Program would allow the Nation to quickly monitor and respond to high-flow events that reanimate contaminants from the Spill. (**Ex. 1** at 31, 34–37).

Desecration of a Diné Deity and Attendant Harms to the Use and Enjoyment of the River and the Well-Being of the Navajo People.

- The Navajo people (or Diné) believe that the world is "a living, breathing entity in an animate universe." (**Ex. 11** [Stack/Unsworth] at 8.) The Navajo people "maintain an ancient relationship with the San Juan River," which is "the most important of the sacred rivers in [the Nation]" and is identified with a deity "who protects the Diné and provides life-giving water." (*Id.*) "[H]arm to the [R]iver is understood as not only harm to a natural resource, but harm to an identifiable and cherished entity, much like a family member." (*Id.*)
- The River has "served hundreds of agricultural, spiritual, cultural, medicinal, and recreational purposes since time immemorial," and is "an indispensable part of maintaining a state of

hózhǫ́." (*Id.* at 8–9.) "*Hózhó* means a balance of normalcy," and if this balance is disrupted, it may "affect a [Navajo] person's thinking, mind, heart, feelings, and outlook, and then also the [] physical part of a person that may not be in harmony." (**Ex. 12** [Antone-Nez] at 56:4–18.)

- The pollution and degradation of the River by the Spill—and the disruption of *hózhǫ́*—resulted in serious harm to the Nation's culture, spirituality, and well-being. A study done after the Spill showed that there are 43 ways in which the Navajo people interact with the River, and that after the Spill, these activities had reduced by an average of 56.2%. (**Ex. 1** at 24.) "[T]he decrease in cultural and ceremonial activities . . . are related to the contamination of a river that's a deity to the Navajo people, and so there was a disruption in [] their world views of harmony and balance." (**Ex. 13** [Chief Tr.] at 133:4–20.) The cultural and spiritual harm is ongoing. (**Ex. 1** at 25 ("[U]ncertainty about the continued impact of the Spill on the San Juan River exacerbates harms that began with an initial, widespread reduction in cultural practices in reaction to the Spill," and "may lead to a decrease in Diné cultural teachings, which could have setbacks for generations to come.").)
- Immediately following the Spill, the Navajo Nation Epidemiology Center administered a Community Assessment for Public Health Emergency Response ("CASPER") survey in which 37.9 percent of household respondents reported having "emotional concern" about the Spill. (**Ex. 14** [CASPER]; *see also* **Ex. 15** [Van Horne] at 35–36 ("[T]he trauma from the [Spill] is likely to lead to long-term mental health impacts."). A senior epidemiologist for the Navajo Nation concludes that "ongoing community mental health counseling is necessary following the [Spill]." (**Ex. 12** at 177:6–11; *see also id.* 174:18–176:2 (cultural and spiritual harms,

including to *hózhǫ́,* also support the need for continued health assessments of the community).

- The Ecological Monitoring and Water Surety Programs are necessary but not sufficient to address ongoing cultural and spiritual harms. (**Ex. 1** at 3.) To address the community's concern about the degradation of the sacred river, the Nation must implement Health Impacts Restorative Programs—including a Continued Health Assessment and Community Mental Health Support. (*Id.* at 37–39; **Ex. 12** at 177:6–11.) Finally, "[t]o maintain linkages to the river it will be necessary to document past and ongoing cultural use and beliefs, and to take actions to ensure that these uses and beliefs can survive the Spill and the disruptions to cultural practices it caused." (**Ex**. **1** at 39–40.) Accordingly, the Nation must implement a Cultural Preservation Program, to ameliorate the cultural and spiritual harms caused by the Spill. (*Id.*)

4. The Nation **DISPUTES** Weston's UMF No. 4. Weston's characterization of the Nation's damages as lacking measures of economic or fiscal losses is misleading and incomplete. Mr. Unsworth, who has spent three decades working on tribal claims in similar settings, testified that "the best, most reliable measure of damages [to the Nation] is the cost-to-cure approach." (**Ex. 16** [Unsworth Tr.] at 34:21–25; *see id.* at 48:4–50:3.) Dr. Jones and Mr. Unsworth thus "have monetized projects [and] come up with economic values for projects," through "cost estimates which would [] become expenses to the Navajo Nation to accomplish these projects." (*Id.* at 39:12–22, 41:11–21.)

5. The Nation **DISPUTES** Weston's UMF No. 6. Dr. Jones and Mr. Unsworth recommend the construction of an alternative reservoir to be used during high-flow events so that the Nation has a source of water untainted by the resuspension of contaminants from the Spill in the San Juan River. (**Ex. 1** at 36.) This reservoir would effectively remove reanimated contaminants from the

water the Nation uses for agriculture and livestock watering.

6. The Nation **DISPUTES** Weston's UMF No. 7. As explained in **DMF 3**, there exist "objective, science-based" concerns with the water quality in the San Juan River as a result of the Spill, including exceedances of water quality standards and the ongoing threat of contaminants being reanimated. The programs recommended by Dr. Jones and Mr. Unsworth are aimed at addressing those concerns. (*See* **Ex. 1** at 3.)

7. The Nation **DISPUTES** Weston's UMF No. 8. Although Dr. Jones stated that she "was not asked to conduct [her] work under a specific legal framework," she also testified that the harms and restorative actions "would be the same under any framework." (**Ex. 2** at 384:2–16.) Moreover, to the extent Weston implies that Dr. Jones and Mr. Unsworth applied no methodological framework, that is inaccurate. As explained in **DMF 4**, Dr. Jones and Mr. Unsworth applied a "cost-to-cure" approach that provided economic, monetary values for accomplishing necessary programs.

STATEMENT OF ADDITIONAL MATERIAL FACTS ("AMF")

A. The Navajo people "maintain an ancient relationship with the San Juan River," the well-being of which "is an indispensable part of maintaining a state of *hózhǫ́*," (**Ex. 11** at 8–9)—in Navajo culture, a critical, spiritual "balance of normalcy." (**Ex. 12** at 56:11–18.)

B. On August 5, 2015, USEPA and its contractors—Weston and ER—caused the blowout, which released at least three million gallons of "acidic, mine-impacted waters" into the Animas River, which flows into the San Juan River within the Nation. (**Ex. 17** [Morgan Tr.] at 29:24–30:8.); **Ex. 6** at ii.) The Spill turned the rivers a "bright yellow color that was visible for days." (**Ex. 6** at ii.)

C. As explained in **DMF 3**, the Spill has harmed water quality and caused numerous exceedances

of water quality standards in the San Juan River within the Navajo Nation, both in the immediate aftermath and in the months and years following the Spill.

D. The harm to the water quality of the River is ongoing, particularly due to high-flow events such as storms and spring snowmelt reanimating contaminants from the Spill. (*See* **DMF 3**; **Ex. 1** at 13 (exceedances of NNEPA aluminum and lead standards have continued since 2015); *id.* ("[H]igh-flow events in 2019 carried larger concentrations of metals through the lower Animas River and into the San Juan River than were seen in pre-Spill data.").)

E. Due to the significance of the San Juan River to Navajo culture and religion, the harm to the River from the Spill caused cultural and spiritual damage to the Nation and its people, including a steep (and ongoing) drop in use of the River for cultural and spiritual activities. (**DMF 3**; **AMF A**; **Ex. 1** at 24–27; **Ex. 13** at 133:4–20; *see also* **Ex. 12** at 60:23–61:11, 174:22–176:2 (there was a "very great impact" to *hózhǫ́* from seeing "the plume change color and [cause] an imbalance to the water that we hold as part of our sacredness to our ceremonies and our religions"); **Ex. 14** (after the Spill, 37.9 percent of household respondents reported having "emotional concern" about the Spill).) This cultural harm is ongoing. (**Ex. 1** [at 25–27.)

F. More than six-and-a-half years after causing the Gold King Mine Spill, USEPA has not selected remedial action under CERCLA to redress the harms from the Spill. (*See* Dkt. 1478 at 21 n.3 (Weston acknowledging that EPA "has not yet made its remedy selection for the Bonita Peak Mining District, which includes the Gold King Mine").)

G. Dr. Jones and Mr. Unsworth recommend a series of environmental monitoring and communication/outreach programs—long term monitoring, real time monitoring, agricultural and livestock assessment, and hiring of staff to conduct such monitoring and communicate it

effectively to the uniquely situated residents of the Nation—"to determine the quality of water resources and to generate confidence in the quality of the water." (**Ex. 1** at 3, 31, 34–36.) For the same reasons, and in particular the threat of contaminants being reanimated, Dr. Jones and Mr. Unsworth also propose the construction of a reservoir for use during high-flow events. (*Id.* at 36; **Ex. 2** at 418:23–419:12 (the "primary" purpose of the Water Surety Program is to address the "resuspension of metal contaminations from the spill").) Dr. Jones and Mr. Unsworth estimate that constructing the reservoir will cost $54 million—a reasonable estimate, given that the United States Bureau of Reclamation estimated the cost of an alternative water supply to be between $22 and $680 million. (**Ex. 1** at 4, 37; **Ex. 18** [BOR Study] at 6.)

H. Due to the ongoing contamination of the River (**DMF 3, AMFs C, D, E)**, and reductions in cultural and spiritual engagement with the River (**DMF 3, AMFs A, E),** the Navajo people have expressed deep emotional concern, such that the Nation must conduct continued health assessments and support to ensure the well-being of its people. (**Ex. 1** at 3, 37–39; **Ex. 12** at 177:6–11.)

I. Because the effects of the Spill have caused spiritual and cultural harm to the Nation, as reflected by the drop in engagement with the River for ceremonial activities (**DMF 3, AMFs A, E**), a Cultural Preservation Program is necessary to assess and ameliorate the cultural harm from the Spill. (**Ex. 1** at 3, 39–40.)

LEGAL STANDARD

To obtain summary judgment, Weston must demonstrate that there are no disputes of material fact and that it is entitled to judgment as a matter of law. *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 569 (10th Cir. 1994). In applying that standard, the Court must "view all facts

and any reasonable inferences that might be drawn from them in the light most favorable to the nonmoving party." *Id.* Additionally, as Weston's conflict preemption argument is an affirmative defense, *New Mexico v. General Electric Co.*, 467 F.3d 1223, 1244 (10th Cir. 2006), Weston bears the burden of proving that the Nation's tort damage claims are preempted, *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1133–34 (10th Cir. 2007).

ARGUMENT

Weston cannot demonstrate entitlement to the defense of preemption both because (1) the supposedly preemptive limitations in CERCLA do not apply to Indian tribes, and (2) the Nation's state tort damages claims do not materially conflict with the accomplishment of federal policy. At a minimum, disputes of material fact exist that preclude summary judgment.

I. The Limitations on CERCLA Natural Resource Damages Do Not Apply to Indian Tribes in the Same Way as They Apply to the United States and State Governments

As a threshold matter, the Nation's damages claims are not preempted by CERCLA because the limitations in CERCLA that—according to Weston—create a conflict with state law, do not apply to Indian tribes. Specifically, Weston's argument is that (1) CERCLA limits Indian tribes' recovery of natural resource damages unless that recovery will be used only to "restore, replace, or acquire the equivalent of such natural resources," and (2) the Nation's requests for tort damages conflict with that limitation. (*See* Dkt. 1478 at 1, 6.) However, straightforward application of basic principles of statutory interpretation shows that Weston's motion fails at the first step.

"As in all cases requiring statutory construction, 'we begin with the plain language of the law.'" *St. Charles Inv. Co. v. Comm'r*, 232 F.3d 773, 776 (10th Cir. 2000). Here, the plain language of CERCLA could not be clearer. Although CERCLA limits natural resource damages

recovery by the United States and State governments to restoring, replacing, or acquiring the equivalent of such natural resources, it places no such restriction on Indian tribes:

> 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.

42 U.S.C.A. § 9607(f)(1) ("CERCLA § 107(f)(1)"). The exclusion of any reference to Indian tribes is meaningful, as four times elsewhere in the same paragraph, the statute explicitly uses the term "Indian tribe" separately and in addition to the terms "United States Government" and "State." "Under the doctrine of *expressio unius est exclusio alterius, . . .* the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced," especially where the rest of the statute shows that "Congress knows how to use more inclusive language . . . when it so chooses." *United States v. Brown*, 529 F.3d 1260, 1264–65 (10th Cir. 2008) (cleaned up). Accordingly, the relevant limitation applies to the United States and State governments, and not to Indian tribes. "It is well established that 'when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.'" *Lamie v. U.S. Tr.,* 540 U.S. 526, 534 (2004) (citation omitted). As Weston does not dispute that this is the plain meaning of the text, that should be the end of the inquiry.

Instead, relying on legislative history and the convoluted reauthorization process of CERCLA through the Superfund Amendments and Re-Authorization Act of 1986 ("SARA"), Weston seeks to rewrite the plain text of the operative statute. (*See* Dkt. 1478 at 6–14.) This is improper. Without first showing any ambiguity in the statute, Weston tries to cast the plain text as a "drafting error," needlessly leading the Court "through the labyrinth of the [Act's] drafting

history" and arguing that the legislature *must have* meant something other than what the law says. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 133 (1989). But even if Weston were right about the import of that drafting history (it is not), courts "must . . . be governed by the text" irrespective of "whatever conclusions might be drawn from the intricate drafting history." *Id.* That is because although "[t]he latter may of course be consulted to elucidate a text that is ambiguous . . . where the text is clear, as it is here, [courts] have no power to insert an amendment." *Id.*

Weston's citations supposedly to the contrary are inapposite. (Dkt. 1478 at 11.) Those cases involved circumstances where the text and purpose of the underlying statutes were unambiguously clear, but where that manifest meaning nevertheless did not make it into the code because of transcription error by the codifiers. *See, e.g.*, *Stephan v. United States*, 319 U.S. 423, 425–26 (1943) (where an underlying statute explicitly decreed that all other acts on a subject were "hereby repealed," the failure to remove one of those acts from the code was an obvious transcription error). Here, the text of the underlying statute, SARA, is *not* plain; as Weston's briefing demonstrates, it is internally contradictory at best and, by its terms, directed CERCLA to be amended exactly as it was in fact amended. In other words, CERCLA § 107(f)(1) reads as it does *not* because of a codifier's error in transcribing it into the code, but because it was transcribed into the code in exactly the way that SARA specified. Weston's assertion that SARA § 207(c)(2)(D) necessarily controls rather than SARA § 107(d)(2)—which conflicts with § 207(c)(2)(D) and matches the language ultimately codified in CERCLA—is hardly a clear expression of purpose sufficient to overcome the plain meaning of CERCLA § 107(f)(1) itself. That Weston prefers one of SARA's contradictory provisions over another does not give it license

to rewrite the plain meaning of the operative statute, CERCLA, on the basis only of the underlying statute's ambiguity.[3]

Weston similarly ignores the basic precept of statutory construction that "[w]here the language of the statute is plain, it is improper for this Court to consult legislative history." *St. Charles*, 232 F.3d at 776. Indeed, Weston invites the Court to ignore the text of the statute by using legislative history to insert language about Indian tribes and create ambiguity where the text has none. (Dkt. 1478 at 11–14.) But "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *St. Charles*, 232 F.3d at 776 ("[L]egislative history may not be used to create ambiguity in the statutory language."). Weston's invitation is thus improper.

But even if it were appropriate to consider legislative history, Weston's argument fails. Weston's main argument is that certain legislative history suggests that "Indian tribes are generally afforded substantially the same treatment as a State under sections 103, 104, 105, and 107." (Dkt. 1478 at 13 (quoting H.R. Conf. Report No. 99-962, 275 (1986)).) Putting aside the fact that "generally afforded substantially the same treatment" does not mean "always afforded exactly the same treatment," Weston ignores a critical fact: the plain *enacted* text of SARA itself states that "an Indian tribe shall be afforded substantially the same treatment as a State with respect to" Sections 103, 104, and 105, *but does not mention Section 107*. SARA, Pub. L. No. 99-499, 100 Stat. 1613, § 207(e) (1986) (codified as 42 U.S.C. § 9626(a)). To the extent the phrase "afforded

[3] Furthermore, even if Weston were right that this was a drafting error, "[i]t is beyond [the Court's] province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *Lamie*, 540 U.S. at 542.

substantially the same treatment" is illustrative at all, it is the enacted text of SARA and CERCLA—which conspicuously do not state that Indian tribes receive substantially the same treatment under Section 107—that matter, not an isolated snippet of legislative history.

Moreover, even if there *were* any ambiguity in CERCLA § 107(f)(1), the Indian canon of construction dictates that such ambiguity be construed in favor of Indian tribes, not against them. *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) ("A well-established canon of Indian law states that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985))); *accord Pub. Serv. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1108–09 (10th Cir. 2017).[4]

Notably, Weston does not argue that it would be absurd or irrational for CERCLA to treat Indian tribes differently in some ways from the United States or State governments. Nor could it. It is common knowledge that the history and sovereignty of tribal governments have developed and are treated differently than other sovereigns. But more than that, CERCLA explicitly

[4] The Indian canon of construction is of particular force where limitations on tribal sovereignty are at issue. *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) ("[R]espect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization."). A tribe's decisions about how to manage its economy by determining how to budget and disburse funds is an essential element of tribal self-governance. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). Of course, Congress could limit or regulate the scope of such sovereignty where it does so expressly. But the conspicuous *absence* of such limitations in Section 107(f)(1) cannot be used so lightly to transgress tribal sovereignty. *Barboan*, 857 F.3d at 1108–09 (where any limitation of tribal rights is "starkly absent from § 357's language," the court has "no license to disregard or slant § 357's plain language," and "[e]ven if § 357 were ambiguous, we still would apply the Indian-law canon to rule in favor of tribal sovereignty"); *Dobbs*, 600 F.3d at 1284 ("'[I]n cases where ambiguity exists,' including those where there is silence with respect to Indian tribal governments, 'and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights . . . , the court is to apply the special canons of construction to the benefit of Indian interests." (emphasis in original) (citation omitted)).

acknowledges some of these differences. For example, Section 107(f)(1) itself, while exempting from liability releases of hazardous materials done pursuant to permit, qualifies that this exemption applies only "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." 42 U.S.C. § 9607(f)(1). This example illustrates the statute's special recognition of the unique circumstances and rights of tribal sovereigns. Another amendment to CERCLA, implemented by SARA § 207(b) and codified as 42 U.S.C. § 9604(c)(3), acknowledged the unique financial position of Indian tribes as compared to States by exempting Indian tribes from the cost-sharing requirements applicable to States. This decision to put fewer financial limitations on Indian tribes' use of funds under CERCLA is consistent with Congress's exclusion of limitations on Indian tribes' use of natural resource damages under CERCLA § 107(f)(1). It is thus not absurd for Congress—consistent with the unique financial circumstances and characteristics of many Indian tribes, including their more expansive cultural and spiritual reliance on natural resources—to grant Indian tribes certain rights under CERCLA without placing on them limitations identical to those on States.

Where the plain text, common sense, and the Indian canon of construction all weigh heavily against treating Indian tribes identically to the United States and State governments, this Court should not take up Weston's invitation to rewrite the statute by "inserting language [about Indian tribes] that is not there," *Barboan*, 857 F.3d at 1109, based on ambiguous drafting history and what Weston "think[s] . . . is the preferred result," *Lamie*, 540 U.S. at 542. Accordingly, because the relevant limitation in Section 107(f)(1) does not apply to Indian tribes, it cannot pose a conflict to

the application of state tort law. Weston's motion for summary judgment on grounds of conflict preemption must therefore be denied.

II. The Nation's Tort Damage Claims Are Not Preempted by CERCLA

Even if the limitations of Section 107(f)(1) applied to Indian tribes (they do not), the Nation's tort damages are not preempted.

Weston acknowledges, as it must, that CERCLA does not occupy the field of hazardous waste liability. (Dkt. 1478 at 15); *see, e.g.*, *United States v. Colorado,* 990 F.2d 1565, 1575 (10th Cir.1993) ("Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem."). Instead, CERCLA preempts state law only if state law remedies are in actual conflict with the operation of CERCLA's remedial scheme—i.e., only if state law "stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA." *New Mexico v. General Electric Co.*, 467 F.3d 1223, 1244 (10th Cir. 2006); *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 796 (10th Cir. 2000) ("Conflict preemption requires that the state or local action be a material impediment to the federal action, or thwart[] the federal policy in a material way." (citation omitted)). Preemption is an affirmative defense, and thus it is Weston's burden to demonstrate—in addition to showing no disputes of material fact—that state law materially conflicts with the accomplishment of CERCLA's goals. *General Electric*, 467 F.3d at 1244. Weston has not done so.

The court in *General Electric* made clear that state tort damages claims are not completely preempted by CERCLA. *Id.* at 1247. Instead, the court held that it could not endorse a "state law suit that seeks to undermine [Congress's] judgment" that the use of NRDs should be restricted in

certain ways, specifically where the plaintiff's state tort claims (1) sought natural resource damages ("NRD"), (2) whose use would not be restricted to restoring, replacing, or acquiring the equivalent of the injured natural resources, and (3) which conflicted with EPA's extensive, ongoing remedial action under CERCLA. *Id.* at 1247–48; *see also Quapaw Tribe of Okla. v. Blue Tee Corp.*, 2009 WL 455260, at *5 (N.D. Okla. Feb. 23, 2009) (summarizing that *General Electric* "dismissed the plaintiffs' claim that the EPA's selected remedy was inadequate, because this was a direct attack on the EPA's cleanup").[5]

At base, Weston propounds a theory that effectively makes it impossible to recover under state law, vitiating *General Electric*'s recognition that "CERCLA should work in conjunction with" state law, does not "completely" preempt state law, and "allow[s] for damages due to interim loss of use" of natural resources, in addition to restoration and replacement. 467 F.3d at 1244, 1247–48 (quoting *Colorado*, 990 F.2d at 1575); *see also Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1355 (2020) ("Potentially Responsible Parties" in a CERCLA remedial action "remain[] potentially liable under state law for compensatory damages, including loss of use and enjoyment of property, diminution in value, incidental and consequential damages, and annoyance and discomfort"); *Quapaw*, 2009 WL 455260, at *5 (*General Electric* "allows a state law claim for loss-of-use NRD if such a claim is supported by the evidence and the requested remedy would

[5] Notably, *General Electric* did not rule that all of the plaintiff's state tort damages claims were preempted, as by this point the plaintiff had "narrowed [the] claim for damages" such that "the 'core of the controversy'" had already "[become] the intended scope of CERCLA-mandated remedial efforts." 467 F.3d at 1240 (quoting *New Mexico v. General Elec. Co.,* 322 F. Supp. 2d 1237, 1243 (D.N.M. 2004)). In fact, even within these narrowed remedial claims, the district court dismissed several of them for lack of "evidentiary support, rather than on the grounds that the relief was preempted." *New Mexico on behalf of New Mexico Env't Dep't v. USEPA*, 310 F. Supp. 3d 1230, 1254–55 (D.N.M. 2018) (citing *General Electric*, 467 F.3d at 1238).

not interfere with CERCLA's goals of replacement and restoration of a contaminated natural resource"). On the one hand, Weston asserts that all of the Nation's tort claims—indeed, *any* remedies that "arise [] from" or relate *at all* to the Spill impacting the San Juan River, regardless of the nature of that remedy or the harm being addressed—are at core NRD claims preempted by CERCLA. (Dkt. 1478 at 18.)[6] On the other hand, Weston acknowledges that any NRD claims are not ripe and will not be ripe until EPA—one of the parties responsible for the Spill and subject to potential liability, both in tort and under CERCLA—chooses a remedial action. (Dkt. 1478 at 21 n.3 (stating that the Nation's NRD claims are not ripe because EPA "has not made its remedy selection").)

Essentially, Weston places the fate of the Navajo Nation obtaining any recovery or interim redress for the harms caused by the Spill in the hands of EPA, the very party that caused the Spill and faces potential NRD liability as soon as it selects a remedial action. This is untenable. In addition to Weston's reading of *General Electric* being wrong, that case did not involve potential liability against EPA itself on account of its negligent actions. What that case *did* involve was a State's attempt to obtain remedies in addition to the remedial actions by EPA which had already been underway *for more than twenty years* and which, as the court documented, were extensive:

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[6] Yet, Weston itself questions whether harms to Navajo culture, spiritual practices, and community physical and mental health are harms to "natural resources" under the meaning of CERCLA. (Dkt. 1478 at 21 n.2 ("[T]here is significant uncertainty concerning whether, and under what circumstances, natural resource damages for loss of cultural services . . . may be recovered."), citing *Couer D'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1107 (D. Idaho 2003) (where plaintiffs brought NRD claims, stating that "[c]ultural uses of water and soil by Tribe are not recoverable *as* natural resource damages" (emphasis added)) and *Kennecott Utah Copper Corp v. Interior*, 88 F.3d 1191, 1221–23 (D.C. Cir. 1996) (not addressing the parties' dispute that, "because state tort law already provides a private remedy for injury to archaeological and cultural resources," such harms were not NRDs).) Weston cannot have it both ways and obtain summary judgment on contradictory grounds.

"The record . . . indicates that EPA's *selected* remedy . . . is intended to address *all* contamination at or emanating from the Plant 83 site" and that "[t]he array of *existing* remedial actions at South Valley—actions that the State has initiated, approved of, acquiesced in and agreed to—have largely occupied the field, leaving little or no room for the operation of the damages remedy that Plaintiffs seek." *General Electric*, 467 F.3d at 1241 (emphasis added) (quoting *New Mexico v. General Elec. Co.*, 322 F. Supp. 2d 1237, 1248, 1271 (D.N.M. 2004))).

In earlier proceedings in this case, Judge Armijo acknowledged these important procedural differences in refusing to dismiss the Nation's tort claims, reasoning that, unlike here, the *General Electric* court had before it "evidence pertaining to . . . [EPA's] remediation efforts which had occurred and were ongoing," which in turn enabled the court "to compare the damage theories to the relief obtained through the remediation process." *New Mexico on behalf of New Mexico Env't Dep't v. USEPA*, 310 F. Supp. 3d 1230, 1254–55 (D.N.M. 2018). Similarly, this Court has itself held that it would not find Plaintiff's state law claims preempted where "it is not clear at this point what the remedial scheme is for the Sovereign Plaintiffs' territories." (Dkt. 166 at 3.)

Even now, more than six-and-a-half years after the Spill, and despite its burden to prove its affirmative defense of preemption, Weston presents no evidence that makes it "clear . . . what the remedial scheme is for the [Nation's] territories." (*Id.*) As the Court has no evidence before it regarding what EPA's remedial actions *eventually* may be, Weston has given it no basis "to compare the damage theories to the relief [to be] obtained through the remediation process." *New Mexico Env't Dep't*, 310 F. Supp. 3d at 1254–55. Plainly, Weston has not shown that EPA's unidentified remedial actions have "occupied the field, leaving little or no room for the operation of the damages remedy that Plaintiffs seek," as was the case in *General Electric*. 467 F.3d at 1241.

Nor is there even a timetable for when such action might occur and whether it will "address *all* contamination" from the Spill. *Id.* Weston's argument is thus untethered to this Court's prior preemption ruling and to the principle that state law is preempted only if "it is impossible for a [responsible] party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution" of federal policy. *Choate*, 222 F.3d at 792. Weston's vague concerns about the Nation's tort claims conflicting with EPA's still-unclear remedial scheme "is too remote to justify preemption." *Quapaw*, 2009 WL 455260, at *6.

Furthermore, even if the Court now concluded that some of the Nation's tort damage claims can only be NRD claims and might *potentially* overlap with CERCLA,[7] there would be no actual conflict so long as the award of money damages is not "unrestricted." *General Electric*, 467 F.3d at 1247–48 (holding that plaintiff's tort theories of recovery were not "completely preempted in view of the ongoing remediation," but were instead preempted only to the extent plaintiff would recover "an unrestricted award of money damages" that might be used inconsistently with "CERCLA's [principal] aim of cleaning up hazardous waste"). This Court has broad discretion to tailor remedies and could, if necessary, condition recovery of any tort awards that overlap with NRD on their use for the restorative programs proposed by the Nation's damages experts, e.g.,

[7] Weston argues that if the Nation's tort damage claims are indeed NRD claims, then the Nation's damages experts have "assign[ed] to them values in a common-law context" without adhering to "the CERCLA implementing regulations [that] provide specific rules concerning valuation." (Dkt. 1478 at 20–21.) The Nation applied a "cost-to-cure" valuation methodology—"a very common approach" that measures "what will be the cost to cure the . . . harms that have been identified." (**Ex. 16** [Unsworth Tr.] at 34:21–35:7, 48:4–50:3.) If the Nation's claims *are* for NRD, this cost-to-cure approach would clearly comply with CERCLA's implementing regulations permitting "[o]ther methodologies that measure compensable value in accordance with . . . the cost of a project that restores, replaces, or acquires services equivalent of natural resource services lost," 43 C.F.R. § 11.83(c)(3).

through a court-supervised trust. *WildEarth Guardians v. Bernhardt*, 501 F. Supp. 3d 1192, 1225 (D.N.M. 2020) ("District courts have broad discretion to 'fashion[] appropriate remedies.'" (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770 (1976))). Although the Court need not make that decision now, this option further shows that the Nation's tort claims are not a material impediment to the accomplishment of CERCLA's objectives, and, in any event, Weston's motion is premature.

At a minimum, the facts are unsettled as to what remedial actions EPA *may* eventually take, whether any or all of the Nation's proposed remedies are in fact natural resource damages claims, and whether any of those remedies conflict materially with EPA's as-yet unclear course of action. Weston cannot satisfy its summary judgment burden—including its burden to establish the affirmative defense of conflict preemption—on such tenuous, speculative grounds.

CONCLUSION

While the Navajo Nation and its people continue, after more than six-and-a-half years, to await remedial action from EPA (the very party that caused the Spill), they should not be left without remedy in the interim, on the basis only of Weston's flawed statutory interpretation and its legally and factually deficient preemption defense. Cutting off the Nation's possibility of recovery at the summary judgment stage, with so many factual questions unresolved, would be particularly unwarranted. For the foregoing reasons, Weston's motion should be denied.

Dated: April 4, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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/ Andrew K. Walsh

Andrew K. Walsh