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-02824-WJ

No. 16-cv-00931-WJ/LF

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

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Defendant Weston Solutions, Inc. ("Weston"), replies in support of its Motion for Summary Judgment to Dismiss the Navajo Nation's Tort Damage Claims as Preempted, filed March 7, 2022 (Dkt. 1478) ("Motion"). The Navajo Nation ("NN") filed its response brief on April 4, 2022 (Dkt. 1541) ("Response"). In further support of the Motion, Weston states:

INTRODUCTION

Through its tort damage claims, the NN seeks compensation to "cure" the harms arising from contamination of the San Juan River. These claims are an attempt to get compensation for natural resource damages without following scheme in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). For that reason, they are preempted.

REPLY TO STATEMENT OF UNDISPUTED MATERIAL FACTS ("UMF")

1. The Nation's dispute of UMF 1 is immaterial. The NN cites no evidence that its tort damages would compensate it for damage to its proprietary interests (e.g., property that it owns).

2. The NN's dispute of UMF 2 is immaterial. The NN's clarification regarding the intent of the reservoir program is irrelevant. The program is designed to "cure" alleged damage to a natural resource with an unrestricted tort award. *See* Dkt. 1541-16, Unsworth Dep., 34:15-35:19.

3. The NN's dispute of UMF 3 is immaterial. The NN has not adduced evidence that these programs would address anything other than purported damage to its natural resources. The NN fails to demonstrate why the scheme that CERCLA provides would provide insufficient compensation to make it whole for the damages discussed in this lengthy recitation.

4. The NN's dispute of UMF 4 is immaterial. Whether or not Mr. Unsworth's opinions concerning economic valuation are appropriate in an academic sense is not at issue in the Motion. Rather, it remains undisputed that the NNs tort damages are not meant to compensate the NN for

any past fiscal losses (e.g., lost tax revenue) or any general harm to the NN's economy (e.g., a loss of gross domestic product or something similar). As Mr. Unsworth testified in portions of his deposition to which the NN cites, these programs are designed according to a "cost-to-cure approach" focusing on harm to natural resources. *See* Dkt. 1541-16, Unsworth Dep., 34:15-35:19.

5. UMF 5 is undisputed.

6. The NN disputes UMF 6 without contradictory evidence. UMF 6 states that the NN's proposed restorative actions would not remove contaminants from the San Juan River. Nothing on page 36 of Dr. Jones and Mr. Unsworth's report (which is the only evidence to which the NN cites) indicates otherwise. At most, the proposed reservoir may be seen as a partial attempt to replace the San Juan River as an irrigation supply during times of high turbidity.

7. The NN disputes UMF 7 without contradictory evidence. Plaintiffs cite only to paragraph no. 3 of the Response. None of the evidence cited in that paragraph indicates that current water quality in the San Juan River fails to meet the NN's standards for irrigation or livestock use. To the extent that the paragraph concerns exceedance of water quality standards at all, it concerns either past exceedances (e.g., Dkt. 1541-8, Email from Steve Austin to Donald Benn (Aug. 2, 2016)) or standards irrelevant to agriculture (e.g., the aquatic wildlife standard, Dkt. 1541-1, Jones & Unsworth Rep., 13). Moreover, none of the evidence that the NN cites indicates that there remains in the watercourse sufficient material from the release to cause any future exceedance of relevant standards. Consider the reference to lead "hotspots" in the river: neither the New Mexico study nor Dr. Jones's work confirmed that any of the lead was attributable to the Gold King Mine (as opposed to other listed "probable sources"). *See* Dkt. 1541-1, Jones & Unsworth Rep., 10. Finally, to the extent that any of the evidence the NN cites does create a genuine dispute, that

dispute is immaterial to the Motion. There is no dispute that the "concerns" that the NN references (Dkt. 1541, Resp., ¶ 6) are "concerns" with the suitability of the San Juan River for Navajo use. That is, there is no dispute that the tort damages are, in effect, natural resource damages.

8. The NN's dispute of UMF 8 is immaterial. It remains undisputed that Dr. Jones and Mr. Unsworth did not use the specific legal framework set out in CERCLA's regulations.

REPLY TO STATEMENT OF ADDITIONAL MATERIAL FACTS ("AMF")

A. Weston does not dispute AMFs A, C-I for the purposes of this Motion only.

B. Weston disputes AMF B to the extent that it suggests that Weston caused the release on August 5, 2015.[1] However, for the purposes of this Motion only, Weston states that the dispute among the parties concerning Weston's contribution, if any, to the release, is immaterial. The specific damage claims the NN advances are not recoverable irrespective of liability at trial.

ARGUMENT

There are two issues germane to the Motion: (1) whether the use limitation for natural resource damages under CERCLA § 107(f)(1) applies to the NN and, (2) if it does, whether the tort damages that the NN seeks in this case would be preempted as a result.

I. THE NATURAL RESOURCE DAMAGES USE RESTRICTION APPLIES TO INDIAN TRIBES BECAUSE SARA § 207(C)(2)(D) CONTROLS

As discussed in the Motion, a threshold issue is whether the use restriction for natural resource damages under CERCLA § 107(f)(1) applies to the NN. Weston asserts that it does because the text of Section 207(c)(2)(D) of the Superfund Amendments and Re-Authorization Act

[1] The testimony from Mr. Morgan that the Nation cites indicates only that "in the absence of" excavation activity at the site on August 5, 2015, a release would have been unlikely on that day. *See* Dkt. 1541-17, Morgan Dep., 28:15-31:5. Weston did not perform any excavation into the adit; participate in planning for any excavation into the adit; or control, direct, or supervise any excavation into the adit. *See, e.g.*, UMFs 27-30, 52-58, 69-70, and 74-77 of Weston's Motion for Partial Summary Judgment to Dismiss Claims of Negligence, filed March 7, 2022 (Dkt. 1487).

of 1986, Pub L. No. 99-499, 100 Stat. 1613 ("SARA")—which Congress has never repealed—plainly amends CERCLA § 107(f)(1) as follows: "[s]ums 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 State government or Indian tribe." (Emphasis added).

The problem is that this language does not appear in CERCLA § 107(f)(1) as it is codified (42 U.S.C. § 9607(f)(1)) due to an apparent error in which Congress made separate amendments that rendered codification of SARA § 207(c)(2)(D) a grammatical impossibility. *Compare* SARA § 207(c)(2)(D), 100 Stat. at 1706, *with* SARA § 107(d)(2), 100 Stat. at 1630. Thus, the codified version of CERCLA § 107(f)(1) is inconsistent with the enacted statute. To resolve this inconsistency, the Court must construe the enacted statute (i.e., SARA) to determine Congress's intent. *See Stephan v. United States*, 319 U.S. 423, 426 (1943) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent"). Thus, the plain language of the enacted statute, not the codified version, controls, and that language plainly applies the natural resource damages use restriction to Indian tribes. Additionally, the legislative history, structure of CERCLA, and other indications of Congressional intent indicate that the use restriction in CERCLA § 107(f)(1) were intended to apply to Indian tribes. *See* Dkt. 1478, Mot., 11-14.

The NN makes two principal responses: First, the NN argues the Court should not resort to legislative history or other indices of Congressional intent because the "plain language" of the CERCLA § 107(f)(1), as codified, is unambiguous. Second, the NN argues that evidence of Congress's intent is inconclusive, and any ambiguity should benefit the NN. Both arguments fail.

A. The Court must construe CERCLA § 107(f)(1), as amended by SARA §§ 107(f)(1), 207(c)(2)(D), because the codified version is inconsistent with enacted law.

To begin, the NN argues forcefully that the Court should not resort to an analysis of

Congressional intent to reconcile SARA's amendments to CERCLA because 42 U.S.C. § 9607(f)(1) is facially unambiguous. *See* Dkt. 1541, Resp., 12-13, 15 ("[T]he plain language of CERCLA could not be clearer"). The NN is correct that Weston does not argue that Section 9607(f)(1) of Title 42 of the U.S. Code is ambiguous (or absurd or irrational), but that is not the issue. The NN's argument fails because it presumes, without analysis, that the version of CERCLA § 107(f)(1) appearing in the U.S. Code governs this action.

Unless specifically enacted into positive law, the U.S. Code is only "prima facie" evidence of the law. 1 U.S.C. § 204(a). The Statutes at Large, rather than the U.S. Code, is the conclusive "legal evidence of laws." *See* 1 U.S.C. § 112; *accord U.S. Nat. Bank of Ore. v. Ind. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). Thus, where there is an inconsistency between the U.S. Code and the Statutes at Large, the Court must construe the language in the Statutes at Large unless the U.S. Code has been enacted into positive law. *See United States v. Welden*, 377 U.S. 95, 99 n.4 (1964); *Preston v. Heckler*, 734 F.2d 1359, 1367-68 (9th Cir. 1984). The NN fails to even address this argument in its response.

An inconsistency between the enacted law and a codification can occur when Congress passes into law a statute that is impossible to codify. In this regard, *Panjiva, Inc. v. U.S. Customs & Border Protection*, 342 F. Supp. 3d 481, 488 (S.D.N.Y. 2018), provides a helpful example. There, the Southern District of New York heard a dispute concerning the text of the Tariff Act. Congress amended the subject provision of the Tariff Act several times. Initially, the relevant passage read: " 'information, when contained in such manifest, shall be available for public disclosure.' " *Id.*, at 487 (quoting Trade and Tariff Act of 1984, Pub. L. No. 98-573, Title II, § 203, 98 Stat. 2948, 2974). Then, in 1996, Congress inserted the phrase "vessel or aircraft" before

"manifest." *Id.* (citing Pub. L. No. 104-153, § 11(1), 110 Stat.1386, 1389). Finally, Congress amended the disclosure requirement again, directing that the phrase "such manifest" be struck in favor of "a vessel manifest." *Id.*, at 487 (citing Miscellaneous Trade and Technical Corrections Act, Pub. L. No. 104-295, § 3(a)(3), 110 Stat. 3514, 3515). Of course, the second amendment was impossible because the statute no longer contained the phrase "such manifest." *See id*, at 488. Thus, the Southern District of New York concluded that the "codified version" of the statute failed to "execute" the change Congress required, demonstrating "an inconsistency between the codification and the enactment." *See id.* The court concluded that Congress was "working off" of text that predated the first amendment and intended the second amendment apply to that text. *See id* 489-90. The court went on to review other indications of legislative intent to confirm that it must give effect to the second amendment. *See id.*, at 490-94.

Here, there is an inconsistency between the Statutes at Large and the U.S. Code with respect to CERCLA § 107(f)(1). The codified version of CERCLA § 107(f)(1) gives no effect at all to SARA § 207(c)(2)(D). This is the case because codification of SARA § 207(c)(2)(D) was impossible. As in *Panjiva, Inc.*, another amendment (i.e., SARA § 107(d)(2)) revised the language that SARA § 207(c)(2)(D) amended. Specifically, SARA § 107(d)(2) removed the phrase "State government," in favor of simply "State," so Congress's instruction in SARA § 207(c)(2)(D) to insert "or Indian Tribe" after "State government" was impossible. Thus, the codified version of CERCLA § 107(f)(1) does not "execute" the amendment required in SARA § 207(c)(2)(D). The NN suggests that the Court need go no further than examine the plain text of 42 U.S.C. § 9607(f)(1). This argument is incorrect because Congress has not enacted Title 42 of the U.S. Code into positive law. 1 U.S.C.A. § 204 (table) (West). 42 U.S.C. § 9607(f)(1) is only prima facie

evidence of law; it must yield to the Statutes at Large in the event of any inconsistency. Failure to execute SARA § 207(c)(2)(D) is an inconsistency.

The Court must apply positive law, and 42 U.S.C. § 9607(f)(1) is not positive law. The positive law, which is reflected in SARA § 207(c)(2)(D), is unambiguous. It plainly applies the natural resource damages use restriction of CERCLA to Indian tribes. This conclusion is supported by legislative history, the structure of CERCLA, and other indications of legislative intent.

B. Congress clearly intended to apply the same restrictions to the use of natural resource damages to Indian tribes as apply to state governments.

Weston argued in the motion that the evidence of Congressional intent indicates that SARA § 207(c)(2)(D) should apply to Indian tribes the restrictions on use of natural resource damages. As in *Panjiva, Inc.*, the obvious explanation for the failure of the operative language to become codified is simply that Congress, in drafting SARA § 207(c)(2)(D), did not realize that the language to which it keyed the amendment would, by the time of codification, no longer appear in the statute. That mistake does not mean that Congress did not intend SARA § 207(c)(2)(D) to have any effect. The legislative history indicates that the Congressional committees working on SARA § 207(c)(2)(D) specifically intended to treat Indian tribes in a manner substantially similar to States under CERCLA § 107(f)(1). *See, e.g.*, H.R. Conf. Rep. No. 99-962, 275 (1986). By contrast, the committees working on SARA § 107(d)(2) had no apparent objective with respect to the treatment of Indian tribes when it used the term "State" in place of the term "State government" *See, e.g., id.* at 205.

The NN does not address the heart of this argument. It does not provide the Court with any evidence that Congress intended, by passing SARA § 107(d)(2), to nullify SARA § 207(c)(2)(D), which was enacted simultaneously. Instead, the NN makes several arguments to

argue that there is no "clear" Congressional mandate. These arguments fail.

First, the NN argues that the codifiers transcribed SARA "into the code in exactly the way that SARA specified." Dkt. 1541, Resp., 14. This argument fails because as codified CERCLA § 107(f)(1) simply gives no effect to SARA § 207(c)(2)(D). NN does not argue otherwise.

Second, the NN argues that the legislative history is unclear. Specifically, the NN argues that the language, appearing throughout the legislative history, indicating Congress's intent to afford "substantially the same treatment" under CERCLA § 107 to Indian tribes as States does not appear in the enacted text of SARA § 207(e). *See* Dkt. 1541, Resp., 19 (citing SARA, 100 Stat. at 1706). SARA § 207(b)-(d) directly amended CERCLA §§ 104(c)(3), 107, and 111 (unlike CERCLA §§ 103, 104(c)(2), 104(e), 104(i), and 105), so mention of Sections 104(c)(3), 107, and 111 in SARA § 207(e) was unnecessary.

Third, the NN argues that omitting use restrictions for Indian tribes would be consistent with other provisions of CERCLA. Dkt. 1541, Resp., 17. Specifically, the NN references language in CERCLA § 107(f)(1) concerning releases pursuant to permit. 42 U.S.C. § 9607(f)(1). The NN is correct that this language recognizes the United States' fiduciary duty with respect to Indian tribes, but it says nothing about the use of natural resource damages. The NN also references language in CERCLA § 107(c)(3) (SARA § 207(b), 100 Stat. at 1705) that exempts Indian tribes from certain cost sharing requirements. Again, this provision recognizes the special duties the federal government has to Indian tribes, but it says nothing about the tribes' use of damage awards.

Finally, the NN argues that the Indian canon of construction should cause the Court to resolve any ambiguity in Congress's intent in its favor with respect to CERCLA § 107(f)(1). The Indian canon has its genesis in interpretation of treaties. *See Jones v. Meehan,* 175 U.S. 1, at 10-

11 (1899). Of course, this case does not involve the same sovereignty issues and negotiation equities as a treaty. The Supreme Court has rejected the notion that, when different statutory interpretation rules counsel different results, "the pro-Indian canon is inevitably the stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue." *Chickasaw NN v. United States*, 534 U.S. 84, 95 (2001). Here, a whole broadside of other canons militate against the NN's preferred interpretation, including the surplusage canon (the Court should attempt to give meaning to every word of SARA); the harmonious reading canon (the Court should attempt to interpret SARA § 107(d)(2) and § 207(c)(2)(D) in a manner compatible with one another); the general/specific canon (if irreconcilable, SARA § 207(c)(2)(D) should prevail over § 107(d)(2) because § 207(c)(2)(D) is specific with respect to the treatment of Indian tribes and § 107(d)(2) is not); and the presumption against implied repeal (the Court should not presume that Congress intended SARA § 107(d)(2) to nullify § 207(c)(2)(D) unless the intent is expressly stated). *See, generally*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 174, 180, 183, 327 (2012) (describing canons and citing cases).

II. CERCLA'S COMPREHENSIVE SCHEME PREEMPTS THE NN'S BID FOR TORT DAMAGES TO "CURE" DAMAGES TO NATURAL RESOURCES

Because the use restriction in CERCLA § 107(f)(1) applies to the NN, the preemption test in *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006), applies here. In the Motion, Weston argued that the NN's tort damage claims are preempted under this standard because the NN seeks unrestricted monetary damages to compensate it for natural resource damages. The NN argues that Weston has misapplied the standard in *New Mexico*. It is mistaken.

Initially, the NN argues that preemption under the standard articulated in *New Mexico* requires proof that the tort damages would conflict with an "ongoing remedial action under

CERCLA." Dkt. 1541, Resp., 19 (emphasis added). This argument misreads *New Mexico*. In *New Mexico*, the Tenth Circuit reasoned that "CERCLA's comprehensive [natural resource damages] scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of a contaminated natural resource." 467 F.3d at 1246. The rule applies specifically to prohibit "an unrestricted award of money damages." *See id.* This analysis does not depend on whether there is an ongoing remediation action. Much to the contrary, the Tenth Circuit specifically analyzed why tort damages awarded *before* a remedial action begins would frustrate CERCLA's purpose:

> Under the logic of the State's approach, hazardous waste sites never need to be cleaned up as long as PRPs are willing or required to tender money damages to the state as trustee. Similarly, PRPs might conceivably be liable for double recovery where a state's successful state law claim precedes an EPA- ordered cleanup.

See id., at 1248 (emphasis added). It is true that the Tenth Circuit reasoned that New Mexico's bid for damages in that case was, "in all respects, a challenge to an EPA-ordered remediation." *See id.* at 1249. But, the court's reasoning applies in equal measure to the NN's attempt to use tort claims to supplant the administrative process before the administrative remedy is even decided. CERCLA preempts challenges to the implementation of an ongoing remedy (42 U.S.C. § 9613(h)), but it also proscribes natural resource damages actions during the pendency of the administrative process (42 U.S.C. § 9613(g)(1)). Permitting tort damages for "the same" (Dkt. 1478-7, Jones Dep., 383:20-385:9) natural resource damages prior to the remedial action would permit a state-law "end around" the timing restrictions of Section 9613(g)(1).

For this reason, the EPA's pace in the administrative process (Dkt. 1541, Resp., 20-21) does not change the analysis. Again, *New Mexico* forecloses the NN's argument. The Tenth Circuit recognized that CERCLA's scheme represents "Congress' considered judgment as to the

best method of serving the public interest in addressing the cleanup of hazardous waste." *See* 467 F.3d at 1247. It is not the province of this Court to determine that the deliberate and careful process that Congress chose for dealing with these claims is too slow.

Next, the NN makes a last-minute attempt to transform its tort damages into claims for "interim loss of use." Dkt. 1541, Resp., 19. The Tenth Circuit excepted from preemption claims for "all interim loss-of-use damages on behalf of the public from the time of any hazardous waste release until restoration." *New Mexico*, 467 F.3d at 1251 n.39. The Court reasoned that these damages are "unredressed" under an EPA remedial scheme. *Id.* (citing *Alaska Sports Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 772 (9th Cir. 1994)). The court continued: "[a]ny such remedy, however, must be tailored to redress specific injury to the State's role as trustee . . . [c]laims of impairment of beneficial use are better left to water rights holders whose uses are impaired." *Id.*; *cf. Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1355 (2020) (concerning the rights of individual landholders to seek redress of their loss of use and enjoyment of property due to contamination). The NN's attempt to recategorize its damages fails simply because the damages model that Dr. Jones and Mr. Unsworth developed does not address interim loss of use. Rather, according to Mr. Unsworth, the damages are designed to fully compensate the NN for the injury to its natural resources through a "cost to cure approach." *See* Dkt. 1541-16, Unsworth Dep., 34:21-25, 48:4-50. Dr. Jones likewise indicated that the damages their approach analyzed are the "same" damages that a natural resources damages assessment would consider. *See* Dkt. 1478-7, Jones Dep., 383:20-385:9.[2] Further, even if the damages model was focused on compensating the

[2] In footnote 6 of the Response (Dkt. 1541, 20), the Nation argues that uncertainty regarding whether and under what circumstances cultural resources may be awarded as natural resource damages militates against finding preemption in this case. This puts the proverbial cart before the horse. The reasoning in *New Mexico* permits a trustee like the Nation to seek an action to recover damages that are unredressed by CERCLA's process. It is not appropriate, at this

NN for interim loss of use, the model does not attempt to segregate the NN's quasi-sovereign interest as trustee from the rights of individual Navajo citizens seeking use of the resources; under the analysis of *New Mexico*, for instance, claims regarding loss of access to irrigation water (i.e., the harm that the NN claims the water surety program would resolve (Dkt. 1541, Resp., ¶ 2)) are better left to the farmers themselves. And, as NN is aware, individual NN farmers have sought such damages in the *Allen* lawsuit.

Finally, the NN argues in passing that the Court could shape a remedy to avoid the bar on "unrestricted money damages" in *New Mexico*. Dkt. 1541, Resp., 22-23.[3] The NN in effect invites the Court to use its discretion over remedies to re-create the administrative process that CERCLA provides (i.e., to restrict the "*measure* and *use* of damages arising from the release of hazardous waste" to "accomplish CERCLA's essential goals," *New Mexico*, 467 F.3d at 1245 (emphasis original)), in a judicial setting. There is no need for these gymnastics. The comprehensive scheme that CERCLA provides is sufficient, and the NN does not argue otherwise.

Ultimately, CERCLA and its implementing regulations set out specific requirements concerning the process to measure natural resource damages, restricting the use those damages, and directing the timing of claims. The NN may not sidestep these processes.

CONCLUSION

For the foregoing reasons, Weston respectfully requests that the Court enter an order dismissing the Navajo NN's tort damage claims.

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point, to predict that CERCLA will fail to leave the Nation whole and award damages on the speculative possibility that the remedial action and any natural resource damages will be inadequate compensation.

[3] Theoretically, the district court in *New Mexico* could have done the same, but the Tenth Circuit found the State's claim for a replacement reservoir (a type of damage directly analogous to the case at bar) preempted all the same. 467 F.3d at 1248. *Cf. New Mexico v. General Elec. Co.*, 335 F. Supp. 2d 1185, n.95 (D.N.M. 2004).

Dated: April 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 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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