No. 147, Original

In the Supreme Court of the United States

STATE OF NEW MEXICO, PLAINTIFF

v.

STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, New Mexico's motion for leave to file a bill of complaint should be denied.

STATEMENT

The State of New Mexico seeks leave to file a bill of complaint against the State of Colorado alleging that contamination from abandoned mines in Colorado has polluted New Mexico's rivers and caused economic harm. New Mexico asserts claims under federal common law; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*; and the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* New Mexico seeks injunctive relief, compensatory damages, and punitive damages. Colorado contends that the exercise of original jurisdiction is unwarranted because New Mexico lacks a

viable cause of action under any theory and may seek relief for its claimed harm in another forum.

A. Relevant Provisions Of CERCLA

Congress enacted CERCLA "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry.* v. *United States*, 556 U.S. 599, 602 (2009) (*Burlington Northern*) (citation and internal quotation marks omitted). CERCLA authorizes the President to respond to a release or substantial threat of release of any hazardous substance. 42 U.S.C. 9604; see 42 U.S.C. 9601(22) (defining "release"). The President has delegated some of that authority to the Environmental Protection Agency (EPA). Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987).[1] EPA addresses releases by performing removal or remedial actions, collectively referred to as response actions. 42 U.S.C. 9604(a); see 42 U.S.C. 9601(23) (defining removal actions); 42 U.S.C. 9601(24) (defining remedial actions).

CERCLA enables "any person," including a State and EPA, 42 U.S.C. 9601(21), to recover costs incurred in responding to a release of hazardous substances from a "facility." 42 U.S.C. 9607(a). "[F]acility" is defined broadly to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. 9601(9). To recover costs from the

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[1] As amended by Exec. Order No. 12,777, 56 Fed. Reg. 54,757 (Oct. 18, 1991); Exec. Order No. 13,016, 61 Fed. Reg. 45,871 (Aug. 28, 1996); Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003); Exec. Order No. 13,308, 68 Fed. Reg. 37,691 (June 20, 2003).

parties responsible for contamination, a plaintiff must show that the defendant falls within a category of "[c]overed persons": (1) those who "own[]" or "operate[]" a facility at which hazardous substances are located; (2) those who owned or operated the facility "at the time of disposal of any hazardous substance"; (3) those who "arrange[] for disposal or treatment" of hazardous substances; and (4) those who "accept[] * * * any hazardous substances for transport to disposal or treatment facilities." 42 U.S.C. 9607(a); see 42 U.S.C. 9601 (29) (defining "disposal" by reference to 42 U.S.C. 6903(3)).

Liability under CERCLA is typically joint and several, *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 140 n.7 (2007), and a plaintiff can therefore seek to recover its response costs from any defendant. A court may decide, however, to apportion costs among defendants when the harm is divisible and there is a reasonable basis for doing so. *Burlington Northern*, 556 U.S. at 613-615. A defendant that is found jointly and severally liable for response costs may seek contribution from other potentially responsible parties. 42 U.S.C. 9613(f).

B. The Upper Animas River Watershed

The Upper Animas River watershed is located in southwestern Colorado. The Animas River consists of three main drainage areas (Mineral Creek, Cement Creek, and the Upper Animas River) that converge in Silverton, Colorado. Office of Land & Emergency Mgmt., EPA, *Support Document for the Revised National Priorities List Final Rule—Bonita Peak Mining District* 10 (Sept. 2016) (*NPL Support Docu-*

ment).[2] The Animas River drains into the San Juan River, which runs west through New Mexico and the Navajo Nation before depositing into Utah's Lake Powell. EPA, *One Year After the Gold King Mine Incident: A Retrospective of EPA's Efforts to Restore and Protect Impacted Communities* 8 (Aug. 2016) (*One Year Report*) (map).[3]

Beginning in the 1880s, the Upper Animas River watershed became a prime location of mining activity for gold, silver, lead, and copper. *One Year Report* 2. Although mining ceased in the 1990s, the area contains over 1500 mines, including the Sunnyside and Gold King Mines. U.S. Geological Survey, Dep't of the Interior, USGS Fact Sheet 095-99, *The USGS Abandoned Mine Lands Initiative* 1 (Jan. 1999) (*USGS Fact Sheet*).[4] Inactive mines contribute to heavy metal contamination of water resources through acid mine drainage, which occurs when water flows through abandoned mines, dissolving naturally occurring heavy metals such as zinc, lead, cadmium, copper, and aluminum as the water passes through the mining features. *Id.* at 1-2.

C. Cleanup Efforts Before August 5, 2015

In 1996, Sunnyside Gold Corporation (Sunnyside Gold) entered into a consent decree with the Colorado Water Quality Control Division that required Sunnyside Gold to perform cleanup and mitigation efforts in order to be released from a permit issued by Colorado under the Clean Water Act (CWA), 33 U.S.C. 1251

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[2] Available at https://semspub.epa.gov/work/08/1570791.pdf.

[3] Available at https://www.epa.gov/sites/production/files/2016-08/documents/mstanislausgkm1yrreportwhole8-1-16.pdf.

[4] Available at https://pubs.usgs.gov/fs/1999/0095/report.pdf.

et seq. That permit authorized pollutant discharges from the Sunnyside Mine. Compl. ¶¶ 27-35.[5] Among other conditions, Sunnyside Gold was required to install bulkheads (a type of retaining wall) to prevent further drainage from the American Tunnel, an underground working located approximately 600 feet below Sunnyside Gold's mine workings. *Id.* ¶¶ 17, 25, 28. In the late 1990s, after the valve was closed on the first bulkhead, water began discharging from the nearby Gold King Mine. *Id.* ¶ 41.

The CWA permit also required Sunnyside Gold to operate a plant designed to treat water flowing out of the American Tunnel. Compl. ¶ 23; see *One Year Report* 6. In January 2003, Sunnyside Gold transferred ownership of the treatment plant and its discharge permit for the American Tunnel to Gold King Mines Corporation (Gold King). Compl. ¶ 45. That same year, the court overseeing the consent decree determined that Sunnyside Gold had met its obligations under the decree and issued an order terminating the decree and Sunnyside Gold's discharge-permit obligations. *Id.* ¶¶ 34-35.

Shortly thereafter, Gold King experienced financial problems and by mid-2004 had ceased regular operation of the treatment plant. Compl. ¶ 47; *One Year Report* 6. During its operational period, the plant treated approximately 1700 gallons per minute of acid mine drainage that discharged from the American Tunnel. Compl. ¶ 23. Sampling showed that until approximately 2005, water quality in the Animas Riv-

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[5] For purposes of this invitation brief only, the United States accepts as true the relevant factual assertions in New Mexico's proposed complaint and certain corroborative factual assertions in Colorado's brief in opposition.

er was improving, but shortly after the plant's closure, water quality began to decline. *One Year Report* 6.

In 2008 and 2009, Colorado conducted reclamation work at the Gold King Mine. Personnel engaged in that work noticed that a mine opening known as the Level 7 adit had partially collapsed, blocking entrance to the mine. Compl. ¶¶ 54-57; Br. in Opp. 7. To monitor water buildup behind the adit, Colorado inserted a stinger pipe (to relieve water pressure) and an observation pipe. Br. in Opp. 7-8. Additionally, Colorado (1) "redirect[ed] existing water flow from the Gold King Mine into a drainage ditch and away from a waste rock dump"; (2) "install[ed] a grated closure" at the Level 7 adit; and (3) "constructed a flume and a concrete channel" to further divert water. *Ibid.*

In 2014, Colorado and EPA investigated the drainage situation and concluded that the Level 7 adit was likely only partially full of water. Compl. ¶ 64; *One Year Report* 7. In 2015, Colorado and EPA returned to assess a course of action. *One Year Report* 7. On August 4, 2015, EPA, its contractors, and Colorado began clearing loose debris around the drainage pipe at the Level 7 adit. Compl. ¶ 73. The next day, with the work crew present, water began leaking from the mine opening. *Id.* ¶ 74; *One Year Report* 8. The leak quickly turned into a significant breach, releasing approximately three million gallons of acid mine drainage into the North Fork of Cement Creek, a tributary of the Animas River. *One Year Report* 8. The mine water flooded the North Fork of Cement Creek, ultimately reaching the Animas River and flowing into New Mexico's San Juan River. *Ibid.*

D. EPA's Response

In the immediate aftermath of the release from the Gold King Mine, EPA acted to provide support to downstream water users. EPA constructed settling ponds to treat the metal-laden water discharging from the mine and began operating a portable treatment plant designed to treat up to 1200 gallons of acid mine discharge per minute. *One Year Report* 10. It also collected water and sediment samples from the Animas and San Juan Rivers in coordination with New Mexico and other jurisdictions pursuant to its authority under 42 U.S.C. 9604. *One Year Report* 8-10. Sampling has demonstrated that the plant, which remains in operation, is removing 95% of metals from the discharge. *Id.* at 10.

In September 2016, EPA listed the Bonita Peak Mining District on the National Priorities List (NPL) under CERCLA—a list of priority sites "among the known releases or threatened releases [of hazardous substances, pollutants, or contaminants] throughout the United States." 42 U.S.C. 9605(a)(8)(B); see 81 Fed. Reg. 62,401 (Sept. 9, 2016); *NPL Support Document* 10. The site extends to the release of contamination from mines in the Animas River watershed, wherever that contamination "come[s] to be located." *NPL Support Document* 10, 13. As a result of the listing, EPA is collecting samples and reviewing data to evaluate ecological risk throughout a long stretch of the Animas River, including near the mines in the Upper Animas River watershed and 50 miles downstream. See, *e.g.*, EPA, *Sampling and Analysis Plan/ Quality Assurance Project Plan Fall 2016 Sampling*

Event, Bonita Peak Mining District, San Juan County, Colorado 2-3 (Sept. 2016).[6]

E. New Mexico's Lawsuits

1. On May 23, 2016, New Mexico filed a complaint in the United States District Court for the District of New Mexico against EPA, its contractor Environmental Restoration, and the Sunnyside Mine owners. *New Mexico* v. *EPA*, No. 16-cv-00465 D. Ct. Doc. 1 (D.N.M. Compl.). New Mexico seeks to hold the defendants jointly and severally liable under CERCLA for costs that New Mexico has incurred and will incur in responding to the Gold King Mine release and to past and future releases from other mines. *Id.* ¶¶ 96-111. New Mexico further seeks under the CWA, 33 U.S.C. 1365(h), to compel the EPA Administrator to abate pollution from inactive and abandoned mines in the Upper Animas River watershed. D.N.M. Compl. ¶¶ 130-137. New Mexico also seeks injunctive relief against Environmental Restoration and the mine owners under RCRA, which authorizes citizen suits for injunctive relief against "any person * * * who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B); see D.N.M. Compl. ¶¶ 116-129. Finally, New Mexico brought claims against the private-party defendants for public nuisance, trespass, negligence, and gross negligence, seeking injunctive relief and damages. D.N.M. Compl. ¶¶ 138-178. New Mexico has moved to amend its complaint to add tort claims against the

[6] Available at https://quicksilver.epa.gov/work/08/1834196.pdf.

United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680. D. Ct. Doc. 86 (Nov. 15, 2016).

All defendants in the district court have moved to dismiss New Mexico's complaint. D. Ct. Docs. 32-33 (July 18, 2016); D. Ct. Docs. 45-47 (July 29, 2016); D. Ct. Doc. 126 (Feb. 13, 2017). The United States and EPA also opposed New Mexico's motion for leave to amend. D. Ct. Doc. 125 (Feb. 13, 2017). Those motions remain pending.

2. In this Court, New Mexico seeks leave to file a bill of complaint alleging that Colorado is liable for the Gold King Mine release and historic acid mine drainage in the surrounding area. Compl. ¶¶ 86-133. New Mexico alleges that Colorado is liable under federal common law for public nuisance, contending that Colorado was negligent or grossly negligent in failing to regulate the Gold King and Sunnyside Mines with reasonable care. *Id.* ¶¶ 91, 93; see *id.* ¶¶ 112-133. New Mexico alleges that Colorado is liable under CERCLA, as an "operator" and "arranger," for costs that New Mexico has incurred and will incur in responding to the Gold King Mine release and to past and future releases from other mines. *Id.* ¶¶ 86-102. New Mexico seeks an injunction under RCRA to require Colorado to investigate and remediate conditions at the Gold King Mine. *Id.* ¶¶ 103-111. New Mexico also seeks compensatory and punitive damages. *Id.* at 50-51.

Colorado contends that CERCLA and RCRA give federal district courts exclusive jurisdiction over controversies arising under those statutes and thereby preclude a State from bringing CERCLA and RCRA claims in this Court (Br. in Opp. 13-15); Colorado is

not liable as an "operator" or "arranger" under CERCLA (*id.* at 16-21); RCRA claims are barred because a CERCLA response action has been initiated to address the release (*id.* at 21-23); and Congress has displaced New Mexico's federal common law claims by statute (*id.* at 23-27). Colorado further contends that the pending district-court litigation provides an alternative forum to litigate the issues raised in New Mexico's complaint. *Id.* at 27-29.

DISCUSSION

This Court has original and exclusive jurisdiction over a justiciable case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). The Court has determined that its exercise of this exclusive jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972) (*Milwaukee I*)); see *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983). When deciding whether to exercise its exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State," "focusing on the seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citations and internal quotation marks omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* In analyzing those considerations, this Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Texas* v. *New Mexico*, 462 U.S. at 570. Applying those standards, New Mexico's complaint does not warrant the exercise of this Court's original jurisdiction.

I. NEW MEXICO'S PROPOSED COMPLAINT DOES NOT ALLEGE A VIABLE CAUSE OF ACTION AGAINST COLORADO

For a complaint to present a "justiciable controversy" within this Court's original jurisdiction, "it must appear that the complaining State has suffered a wrong * * * furnishing ground for judicial redress" or "is asserting a right against the other State which is susceptible of judicial enforcement." *Massachusetts* v. *Missouri*, 308 U.S. 1, 15 (1939). Thus, at the threshold, the Court must "determine whether there is any principle of law and, if any, what, on which the plaintiff can recover." *Missouri* v. *Illinois*, 200 U.S. 496, 519 (1906). New Mexico has no cognizable cause of action against Colorado. It is therefore within this Court's discretion to conclude that there is no practical necessity for an original forum in this Court.

A. Congress Has Displaced New Mexico's Federal Common Law Claims For Interstate Water Pollution

1. New Mexico alleges that Colorado's failure to adequately regulate and abate mining discharges entering the Animas River gives rise to federal common law claims based on theories of public nuisance and negligence. In decades past, the Court recognized federal common law claims for relief from interstate water pollution. See, *e.g.*, *Milwaukee I*, 406 U.S. at 107 (upholding suit by Illinois to abate sewage discharges into Lake Michigan); *Arizona Copper Co.* v. *Gillespie*, 230 U.S. 46, 56 (1913) (recognizing federal common law claim where mining discharges contaminated interstate waterway). Such claims, however, can be extinguished by congressional action. The Court has explained that federal courts are not "general common-law courts" and that "when Congress

addresses a question previously governed by * * * federal common law[,] the need for such an unusual exercise of law-making by federal courts disappears." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312-314 (1981) (*Milwaukee II*). "The test for whether congressional legislation [displaces] federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*) (brackets in original; citation omitted) (citing *Milwaukee II* and distinguishing displacement from the higher standard necessary to show preemption of state laws).

In *Milwaukee II*, the Court concluded that federal common law claims brought by Illinois and Michigan against the City of Milwaukee for unlawful discharge of inadequately treated sewage had been displaced by the CWA—an "all-encompassing program of water pollution regulation" that prohibits "[e]very point source discharge" without a permit. 451 U.S. 317-318 (emphasis omitted). The "establishment of such a self-consciously comprehensive program by Congress," the Court explained, "strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Id.* at 319.

The Court explained in *Milwaukee II* that the CWA addressed the conduct about which the States complained. Under the CWA, discharges and overflows are "prohibited unless subject to a duly issued permit" and are "referred to expert administrative agencies for control." 451 U.S. at 320. That the States sought more stringent pollution limitations than the permits had established did not allow the States to obtain relief under federal common law. *Id.* at 324-326. Rather, the CWA provided "ample oppor-

tunity" for an impacted State "to seek redress," including, for example, participation in a public hearing on proposed permits. *Id.* at 326. The Court reasoned that "[i]t would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law." *Ibid.*; see *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981) (*Milwaukee II* "disposes entirely" of federal common law claims seeking relief from pollution of coastal waters).

In *AEP*, the Court similarly held that the Clean Air Act, 42 U.S.C. 7401 *et seq.*, displaced "any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fued fired power plants," because Congress delegated decisions about regulation of such emissions to EPA. 564 U.S. at 424-426. It made no difference to the displacement analysis whether EPA had exercised its authority and in fact regulated the carbon dioxide emissions at issue. Rather, "the delegation is what displaces federal common law." *Id.* at 426.

2. As in *Milwaukee II* and *AEP*, a comprehensive federal statute, the CWA, speaks directly to the issue here. The CWA prohibits "the discharge of any pollutant by any person" into the waters of the United States without a permit, 33 U.S.C. 1311(a), and acid mine drainage is a "pollutant" under the Act, 33 U.S.C. 1362(6). The CWA provides broad authority to EPA, as well as to States like Colorado that administer permitting programs, to regulate sources of pollution. 33 U.S.C. 1342(b). The CWA also provides for control of nonpoint source pollution (*i.e.*, pollution from diffuse sources like land runoff) that affects water quality. 33 U.S.C. 1329. Matters concerning

interstate water pollution caused by mining discharges are "referred to expert administrative agencies for control," *Milwaukee II*, 451 U.S. at 320, leaving no room for the Court to apply nuisance and negligence concepts under federal common law, *id.* at 317.

If New Mexico believes that Colorado is not administering its permitting program in accordance with the CWA, it can petition EPA to withdraw Colorado's authorization to administer that program. 33 U.S.C. 1342(c). Alternatively, if a particular discharge is without a permit or in violation of a permit condition, New Mexico can bring a citizen suit against the person responsible for the discharge. 33 U.S.C. 1365(a); *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 616 (1992) (a State is a "person" entitled to bring a citizen suit). The CWA thus provides New Mexico multiple avenues to seek redress for harm caused by water pollution originating in another State.

New Mexico's reliance (Br. in Support 16) on *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471 (2008), is misplaced. *Exxon Shipping* evaluated whether, where plaintiffs brought a cause of action for compensatory damages under federal maritime law, punitive damages were also available in light of the CWA's savings clause. *Id.* at 488 (citing 33 U.S.C. 1321(*o*)). The Court did not modify the test for displacement articulated in *Milwaukee II*. To the contrary, as New Mexico recognizes, the Court explicitly distinguished *Middlesex* and *Milwaukee II*, explaining that the displaced claims in those cases "amounted to arguments for effluent-discharge standards different from those provided by the CWA." Br. in Support 16-17 (citing *Exxon Shipping*, 554 U.S. at 489 n.7). That is what New Mexico seeks here: more stringent discharge

limitations than those provided by Colorado's permit program. See *id.* at 16-17 (contending that the "release was not covered by any permit" and would have violated permit requirements "under any circumstance").

3. RCRA also speaks directly to the issue here. RCRA assigns to EPA the authority to address imminent and substantial endangerments caused by the treatment or disposal of solid or hazardous waste, 42 U.S.C. 6973, and authorizes citizen suits to address imminent and substantial endangerments created by others, 42 U.S.C. 6972(a)(1)(B). Congress intended for RCRA to be "essentially a codification of the common law public nuisance." *United States* v. *Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir. 1984) (citation omitted); *ibid.* (RCRA incorporates and expands on common law of nuisance regarding hazardous waste). RCRA thus displaces New Mexico's federal common law claims.[7]

B. New Mexico Has No Claim Under CERCLA Or RCRA

1. New Mexico's allegations that Colorado is liable as an "operator" or "arranger" under CERCLA do not state a cognizable claim. A person may be liable under CERCLA as an "operator" if, "at the time of disposal of any hazardous substance[,] [that person]

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[7] RCRA's savings clause provides that "[n]othing in [RCRA's citizen-suit provision] shall restrict any right which any person * * * may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief." 42 U.S.C. 6972(f). In *Milwaukee II*, this Court concluded that a nearly identical provision in the CWA did not preserve federal common law claims that were displaced by that Act. 451 U.S. at 328-329.

owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. 9607(a)(2); see 42 U.S.C. 9601(20)(A) (defining "operator"). In *United States* v. *Bestfoods*, 524 U.S. 51 (1998), the Court concluded that "an operator must manage, direct, or conduct operations specifically related to * * * leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

Applying that definition, a government may be an operator when it "make[s] the relevant decisions regarding the disposal of hazardous wastes on a frequent, typically day-to-day, basis." *TDY Holdings, LLC* v. *United States*, 122 F. Supp. 3d 998, 1017 (S.D. Cal. 2015) (citations and internal quotation marks omitted); see *United States* v. *Township of Brighton*, 153 F.3d 307, 325-326 (6th Cir. 1998) (Moore, J., concurring in the result); *Nu-West Mining Inc.* v. *United States*, 768 F. Supp. 2d 1082, 1085-1086, 1088 (D. Idaho 2011) (federal agency was an operator where it managed the design and location of waste dumps and "no mining or waste disposal could occur without [the government's] approval"); *City of Wichita* v. *Trustees of the Apco Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1055 (D. Kan. 2003) (citing circuit decisions). In contrast, a government is not liable for exercising of failing to exercise its conventional police power to protect public health and safety. *Township of Brighton*, 153 F.3d at 315-316 & n.11; *United States* v. *Dart Indus., Inc.*, 847 F.2d 144, 145-146 (4th Cir. 1988) (finding no liability for permitting and inspecting a dumpsite).

Colorado's cleanup activities at the Gold King Mine were an exercise of the State's conventional police

power. See *Township of Brighton*, 153 F.3d at 315-316; *Dart Indus.*, 847 F.2d at 146; *United States* v. *New Castle Cnty.*, 727 F. Supp. 854, 864-866 (D. Del. 1989). Furthermore, it is undisputed that Colorado undertook reclamation activities and response work to address releases of hazardous substances caused by others. See, *e.g.*, Compl. ¶¶ 50-56, 65, 70-76. Those activities do not demonstrate that Colorado was "manag[ing], direct[ing], or conduct[ing]" mine operations with respect to pollution. *Bestfoods*, 524 U.S. at 66-67. Nor are such efforts similar to circumstances where the government is the current or former owner of a facility or has some responsibility for its operations or disposal activities that extends beyond its exercise of governmental response authority. See, *e.g.*, *Nu-West Mining*, 768 F. Supp. 2d at 1085-1086, 1088 (finding operator liability where a federal agency managed the design and location of waste dumps on government-owned land); *TDY Holdings*, 122 F. Supp. 3d at 1015-1017 (finding government liable as former owner of a facility under 42 U.S.C. 9607(a)(2), where it owned the equipment from which releases occurred).

2. A person may be liable under CERCLA as an "arranger" if that person "by contract, agreement, or otherwise arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person." 42 U.S.C. 9607(a)(3). The Court has explained that "an entity may qualify as an arranger * * * when it takes intentional steps to dispose of a hazardous substance." *Burlington N. & Santa Fe Ry.* v. *United States*, 556 U.S. 599, 610-611 (2009).

In *Burlington Northern*, Shell Oil Company sold chemicals to a distributor with knowledge that the chemicals would leak or spill when transferred from

tanker trucks to tanks. 556 U.S. at 603-604. Although Shell took precautions to minimize spills, the operation remained "sloppy" and spills continued. *Id.* at 604 (brackets and citation omitted). The Court nevertheless held that Shell's "mere knowledge that spills and leaks continued to occur is insufficient grounds for concluding that Shell 'arranged for' the disposal." *Id.* at 613.

Similarly, here, Colorado's awareness of and precautionary actions to control ongoing releases from the Gold King Mine prior to August 5, 2015, do not demonstrate an "intent to dispose" of hazardous substances. Indeed, such precautions show the opposite—that Colorado (and later, EPA) did *not* intend for the August 2015 release to take place and attempted, albeit unsuccessfully, to avoid such an outcome.

3. Finally, New Mexico's RCRA claim is jurisdictionally barred by provisions of both RCRA and CERCLA. RCRA's citizen-suit provision authorizes suit against any person that "has contributed" or "is contributing to" the "handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). Such suits, however, are expressly prohibited when EPA "is actually engaging in a removal action" or "has incurred costs to initiate a Remedial Investigation and Feasibility Study * * * and is diligently proceeding with a remedial action under [42 U.S.C. 9604]," 42 U.S.C. 6972(b)(2)(B), which is the case here. See pp. 7-8, *supra*.

Furthermore, CERCLA provides that "[n]o Federal court shall have jurisdiction" under federal or state law "to review any challenges to removal or remedial

action selected" under Section 9604. 42 U.S.C. 9613(h); *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 328 (9th Cir.) (Section 9613(h) is a "blunt withdrawal of federal jurisdiction") (citation omitted), cert. denied, 516 U.S. 807 (1995). A lawsuit is a "challenge" when it "interferes with the implementation" of a CERCLA response action. *Cannon* v. *Gates*, 538 F.3d 1328, 1335 (10th Cir. 2008) (citation omitted), cert. denied, 556 U.S. 1151 (2009). A "challenge" also includes suits that seek to substitute a court-ordered remedy for EPA's "flexible and dynamic" process of evaluating contamination and choosing appropriate cleanup actions. *New Mexico* v. *General Elec. Co.*, 467 F.3d 1223, 1249-1250 (10th Cir. 2006); see *El Paso Natural Gas Co.* v. *United States*, 750 F.3d 863, 875 (D.C. Cir. 2014) (EPA's entry into an administrative settlement requiring a remedial investigation and feasibility study was sufficient for Section 9613(h) to apply); *Cannon*, 538 F.3d at 1334 (bar applies "even if the Government has only begun to monitor, assess, and evaluate the release or threat of release of hazardous substances") (citation and internal quotation marks omitted).

Here, in the time since New Mexico filed its complaints, EPA has begun comprehensive efforts to examine the extent of the contamination and to identify appropriate response actions through its remedy-selection process for the Bonita Peak Mining District NPL listing, which extends to the release of contamination from mines in the Upper Animas River watershed wherever that contamination "come[s] to be located." *NPL Support Document* 10, 13. The injunctive relief under RCRA sought by New Mexico—a full investigation and remediation of segments of the

Animas River downstream of Silverton, Colorado—would interfere with EPA's ongoing response actions. See Compl. ¶ 111.[8]

II. IF THE COURT GRANTS NEW MEXICO LEAVE TO FILE, IT SHOULD PROVIDE FOR RESOLUTION OF THRESHOLD LEGAL ISSUES OR STAY THE PROCEEDINGS

A. The significant legal flaws in New Mexico's legal theories make this Court's exercise of original jurisdiction unwarranted. But if the Court grants New Mexico leave to file its bill of complaint, it should provide for resolution of threshold legal issues. Upon granting leave to file a complaint, the Court typically directs the defendant to file an answer and then refers the matter to a Special Master to conduct appropriate proceedings. See, *e.g.*, *Mississippi* v. *Tennessee*, 135 S. Ct. 2916 (2015); *New Jersey* v. *New York*, 511 U.S. 1080 and 513 U.S. 924 (1994); *Nebraska* v. *Wyoming*, 479 U.S. 1051 (1987). In certain situations, however, this Court has resolved preliminary or potentially controlling legal issues before, or in lieu of, referring

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[8] Colorado contends (Br. in Opp. 13-15) that a State may not bring claims against another State under CERCLA or RCRA because Congress provided federal district courts with exclusive jurisdiction over such claims. 42 U.S.C. 9613(b); 42 U.S.C. 6972(a)(2). That argument is undermined by *California* v. *Arizona*, 440 U.S. 59 (1979), in which the Court avoided the constitutional question whether Congress could provide for exclusive jurisdiction in federal district courts over suits within this Court's original jurisdiction by interpreting 28 U.S.C. 1346(f) ("The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States") to do nothing more than ensure that such claims could not be filed in state court. 440 U.S. at 68.

the case to a Special Master. See *New Hampshire* v. *Maine*, 530 U.S. 1272 (2000); *United States* v. *Alaska*, 499 U.S. 946 and 501 U.S. 1275 (1991), and 503 U.S. 569 (1992); *Wyoming* v. *Oklahoma*, 488 U.S. 921 (1988); *United States* v. *California*, 375 U.S. 927 (1963); *United States* v. *Louisiana*, 338 U.S. 806 (1949). This case is one in which the latter course might be followed.

Colorado contends that each of New Mexico's claims suffers from fatal legal flaws. Br. in Opp. 10-27. Federal Rule of Civil Procedure 12(b)(1) and (6), which can provide guidance for the Court's proceedings in original actions, see Sup. Ct. R. 17.2, would provide a mechanism for Colorado to test its theory by moving to dismiss New Mexico's complaint for lack of subject matter jurisdiction or for failure to state a claim upon which relief may be granted.[9] The Court may therefore wish to apply the procedure suggested by Rule 12(b) to facilitate the disposition of this action. See, *e.g.*, *Texas* v. *New Mexico*, 134 S. Ct. 1050 (2014); *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999). If the Court follows that course, the Court may wish to set a schedule for the motion and supporting brief, opposition, and reply. The Court would retain the option of referring the motion to dismiss to a Special Master in the first instance once briefing is completed, if that course seemed advisable at that time. See *Texas* v. *New Mexico*, 135 S. Ct. 474 (2014); *Montana* v. *Wyoming*, 552 U.S. 1175 and 555 U.S. 968 (2008).

B. Alternatively, if the Court grants New Mexico leave to file its bill of complaint, it should stay the proceedings pending resolution of New Mexico's dis-

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[9] The defense that New Mexico's lawsuit would interfere with the implementation of a CERCLA response action, see 42 U.S.C. 9613(h), is a jurisdictional defense.

trict court action. With some possible exceptions, Colorado's liability for New Mexico's claims cannot be resolved in the district court action because this Court has exclusive jurisdiction over suits between States. 28 U.S.C. 1251(a).[10] Nevertheless, there is substantial overlap between the factual allegations and relief sought in New Mexico's two complaints. Compare, *e.g.*, Compl. ¶ 98 (seeking response costs under CERCLA), with D.N.M. Compl. ¶ 111 (same); compare Compl. ¶ 111 (requesting RCRA injunction), with D.N.M. Compl. ¶ 129 (same); compare Compl. 51 (requesting compensatory, consequential, and punitive damages, including damages for economic loss and stigma), with D.N.M. Compl. 49 (same); compare Compl. 51 (requesting abatement of nuisance), with D.N.M. Compl. 49 (same).

New Mexico acknowledges that its claims against Colorado are "intertwined with its claims against the defendants in the District Court case." Br. in Support 26 n.6. Indeed, New Mexico suggests that the Court should "refer[] this case to a Special Master in the United States District Court for the District of New Mexico for all discovery and pretrial proceedings" to

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[10] If the district court were to find EPA jointly and severally liable under CERCLA, EPA could potentially seek contribution from Colorado for response costs. 42 U.S.C. 9613(f). In those circumstances, Colorado's liability for New Mexico's CERCLA claims, but not its liability for New Mexico's federal common law claims (if they have not been displaced by statute), could be resolved in the district court action. Moreover, New Mexico seeks injunctive relief under RCRA in the district court that is similar to the RCRA injunction it seeks in this Court. See Compl. ¶ 111 (requesting "a full investigation and remediation of segments of the Animas River downstream of Silverton, Colorado"); D.N.M. Compl. ¶ 129 (same).

avoid piecemeal litigation and to "ensur[e] consistent pretrial determinations in both suits." *Id.* at 26-27 n.6 Although that approach does not seem appropriate in a suit over which this Court has exclusive original jurisdiction, it does highlight the real possibility of inconsistent rulings on the legal issues in these cases and the inefficiency of conducting discovery in two forums should any of New Mexico's claims survive motions to dismiss. Accordingly, if the Court grants New Mexico leave to file its bill of complaint, the Court may wish to stay the proceedings until the proceedings in New Mexico's district court action have concluded.[11] Given the substantial legal and factual overlap between the two actions, this Court would benefit from development and resolution of legal and factual issues in the district court, as well as the resolution of any appeal, which could be reviewed by this Court on a petition for a writ of certiorari.

[11] If the proceedings are not stayed and the complaint is not dismissed, a Special Master should coordinate any necessary discovery with the district court.

CONCLUSION

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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