No. 22O147, Original

In the Supreme Court of the United States

STATE OF NEW MEXICO,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

NEW MEXICO'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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The State of New Mexico respectfully files this Reply Brief in Support of its Motion for Leave to File Complaint against the State of Colorado pursuant to this Court's original and exclusive jurisdiction and would respectfully show as follows.

INTRODUCTION

This case is not about Colorado's purportedly lawful regulatory activities at abandoned mines. It is about Colorado's wrongful and tortious conduct that caused widespread environmental injury and damages in three states.[1] Even now, Colorado

[1] It is undisputed that the "yellow plume" from the Gold King Mine release on August 5, 2015 began near Silverton, Colorado, and flowed downstream in the Animas River into New Mexico,

refuses to recognize, much less address, the severe impact of its conduct on New Mexico's residents, environment, and economy. Colorado's request that the Court not take this case would deprive New Mexico of its Constitutionally-guaranteed forum for redress against another State. U.S. Const. Art. III, Section 2; 28 U.S.C. § 1251(a). That result is antithetical to the ideals of the Union.

What is more, Colorado urges the Court to disregard its designated rule for determining a motion for leave to file a complaint in an original action between States and instead leapfrog ahead to dispositive motion practice and dismiss the case on the merits. While dispositive motion practice surely will occur at some point, at this juncture, the Court's sole focus is "the nature of the interest of the complaining State . . . [and] . . . 'the availability of an alternative forum in which the issue tendered can be resolved.'" *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal citation omitted). In its Motion for Leave to File Complaint, its Brief in Support thereof, and herein, New Mexico has established that its interests are serious and profound, and that no other forum is available. The Court should grant New Mexico's Motion for Leave and permit New Mexico to file its Bill of Complaint.

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where it coursed into the San Juan River, and ultimately into Lake Powell in Utah.

ARGUMENT

I. Merits arguments are irrelevant to this Court's decision to grant New Mexico's Motion.

Colorado's arguments attack the truth of New Mexico's allegations and the merits of this case. For example, Colorado asserts—without support—that "[m]any of the allegations in the Bill of Complaint are false." (Opp. at 5, fn. 3.) Colorado then urges this Court to dismiss New Mexico's Motion for Leave because New Mexico's claims "are fraught with legal errors." (Opp. at 13.) But whether this Court has jurisdiction over an original action is distinct from whether the Complaint should be dismissed on the merits. The latter question is wholly inappropriate at this stage.

The sole issue here is whether New Mexico should have the chance to prove its claims. *See Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995) ("[A]t this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can"). This Court should not assess the truth or merits of New Mexico's claims at this point, but only evaluate "the nature of the interest of the complaining State, focusing on the 'seriousness and dignity of the claim' . . . [and] . . . 'the availability of an alternative forum in which the issue tendered can be resolved.'" *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal citation omitted). Thus, New Mexico must simply allege that the State or its citizens have suffered a serious injury because of Colorado's

conduct, and that no alternative forum can resolve this dispute. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (*per curiam*). New Mexico has satisfied this burden through its Motion for Leave to File a Bill of Complaint, the Bill of Complaint, and this Reply.

A. Colorado's actions have directly caused New Mexico's harms.

New Mexico's interest is patent and profound: protecting public health, its economy and the environment from past and ongoing releases of toxic substances flowing downstream from Colorado. New Mexico alleges that Colorado has directed and authorized the generation and discharge of pollutants—acid wastewater and fine-grained heavy metals—into New Mexico's rivers and sediments. (Compl. ¶¶ 7-13.) *see Missouri v. Illinois*, 180 U.S. 208, 241 (1901). New Mexico also alleges that Colorado's actions have impaired New Mexico's proprietary interest in collecting tax revenue from agriculture, tourism, and recreational uses of the Animas and San Juan Rivers. These industries suffered grievously when river access and use was restricted in the wake of the Gold King Mine release; and in the following months, when public concerns about enduring contamination chilled economic activity. And further releases from non-point source contamination "hot spots" formed by the release threaten to impair water quality and depress economic activity in the future. (Compl. ¶¶ 83, 85, 121); *see Maryland v. Louisiana,* 451 U.S. 725, 736-37 (1981). As *parens patriae* of the State's natural resources, New Mexico also claims that its citizens

have been, and continue to be, directly injured by Colorado's reckless decisions. (Compl. ¶¶ 1, 13, 132); *see Kansas v. Colorado*, 185 U.S. 125, 142 (1902). For over a century, this Court has found that interstate pollution is sufficiently serious to warrant its attention. *See, e.g., Vermont v. New York, 417 U.S. 270 (1974); New Jersey v. City of New York*, 283 U.S. 473 (1931); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851). In sum, New Mexico's allegations, when taken as true, are sufficiently serious for this Court to invoke its original jurisdiction.

B. No alternative forum is available to address New Mexico's claims.

New Mexico's only recourse against Colorado is in this Court. U.S. Const. Art. III § 2; 28 U.S.C. § 1251(a). No other forum—judicial or otherwise—can provide New Mexico relief. Despite the clear mandates in the United States Constitution and United States Code, Colorado argues that Congress has stripped this Court of its exclusive and original jurisdiction through CERCLA and RCRA's jurisdictional provisions. (Opp. at 13-15.)

To the contrary, Congress never intended that result.[2] Colorado concedes that "federal courts [must] be certain of Congress' intent before finding

[2] Moreover, it is "extremely doubtful" that Congress possesses "the power to limit in this manner the original jurisdiction conferred upon the court by the Constitution." *California v. Arizona*, 440 U.S. 59, 65, 66 (1979).

that federal law overrides the usual constitutional balance of federal and state powers." (Opp. at 14 n.7 (quoting *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014).) But Colorado does not identify, and New Mexico is unaware of, any legislative history showing that stripping this Court's original and exclusive jurisdiction was the intent or purpose of CERCLA and RCRA's jurisdictional provisions. Instead, Colorado flips the analysis on its head and argues that Congress must have meant to do so or "it would not have enacted mutually exclusive jurisdictional provisions." (Opp. at 14.) But as *California v. Arizona*, 440 U.S. 59 (1979), illustrates, Congress sometimes does enact mutually exclusive jurisdictional provisions through inadvertence or oversight that must be resolved by this Court. In short, Colorado has failed to identify a clear congressional intent to disrupt the settled constitutional order.

Colorado also argues that the "issue here is not whether Congress 'deprived' this Court of jurisdiction over these statutory claims, but whether it gave this Court jurisdiction over those claims in the first place." (Opp. at 15.) Colorado's argument, taken alone, appears plausible enough. But when taken with its argument that CERCLA and RC7A displaced federal common law, the result would be, for a broad swath of interstate pollution cases, the elimination of a forum guaranteed to the States by Article III, Section 2. The Constitution expressly abrogates sovereign immunity when one State sues another. That is why this Court has long recognized that "States may sue other States, because a federal forum for suits between States is 'essential to the

peace of the Union.'" *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S, 468, 487 (1987) (quoting *Monaco v. Mississippi*, 292 U.S. 313, 328 (1934)). Colorado, however, would have this Court ignore Article III, Section 2 and, despite the absence of a Constitutional Amendment but instead at the purported behest of Congress, leave New Mexico without a forum for redress against Colorado. That result flouts core principles of our constitutional system.

Accordingly, the Court should grant New Mexico's Motion for Leave to File Bill of Complaint and not reach the merits of New Mexico's claims at this time. But should the Court reach the merits now, New Mexico briefly will address the substantive legal issues out of an abundance of caution.

II. On the merits, the Complaint pleads a valid CERCLA cause of action.

Even assuming this Court reaches the merits of New Mexico's case (which it need not at this stage), New Mexico has alleged valid CERCLA claims against Colorado.

A. Colorado is a CERCLA "operator."

To be held liable as an operator, a governmental entity need only exercise "'substantial control,' or 'active involvement in the activities' at the facility." *U.S. v. Township of Brighton*, 153 F.3d 307, 325 (6th Cir. 1998) (citing *FMC Corp. v. U.S. Dept. of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994)).

Put differently, a "governmental entity may maintain a significant degree of control over a facility's treatment of hazardous waste without 'hands on' involvement in a facility's activities." *Township of Brighton*, 153 F.3d at 327. Here, Colorado's actions as alleged in the Bill of Complaint, when taken as true, demonstrate its substantial control over and active involvement in the activities that preceded and triggered the August 5, 2015 release, including operations at the Gold King Mine. (*See, e.g.,* Compl. ¶¶ 7, 50-59, 63-76, 118-19, 131.)

Colorado's claims that it is not subject to CERCLA operator liability because it was either acting in a purely "regulatory and remedial" capacity, or that its actions were wholly subordinate to EPA-led actions, are groundless. Congress did not carve out an exception to CERCLA for regulatory activity. *Township of Brighton,* 153 F.3d at 325 (Congress "intended that a governmental entity acting in its regulatory capacity should be held responsible for cleanup costs where it operates a hazardous waste facility").[3] Nothing in CERCLA suggests that there cannot be multiple "operators" at a particular facility. *See, e.g., City of North Miami v. Berger*, 828 F. Supp. 401, 414-15 (E.D. Va. 1993)

[3] However, New Mexico does not concede that Colorado was acting in a regulatory capacity in the first place. New Mexico alleges direct injury resulting from Colorado's *failure* to regulate the appropriate mines and mine owners. (*See, e.g.*, Compl. ¶¶ 8-13, 27-30, 34-35, 114, 116, 130.) Thus, Colorado's alleged acts and omissions arguably fail even to rise to the level of regulatory conduct.

(holding three different parties individually liable as operators of same facility). Accordingly, Colorado can be subject to operator liability under CERCLA.[4]

B. Colorado is a CERCLA "arranger."

New Mexico sufficiently alleges that Colorado possessed[5] hazardous substances and took intentional steps to dispose them, establishing its liability as a CERCLA "arranger." (Compl. ¶¶ 7, 50-59, 64, 70-76.) *See, e.g.*, *Tanglewood East Homeowners v. Charles-Thomas, Inc.,* 849 F.2d 1568, 1571-73 (5th Cir. 1988) (finding that contractor could be liable as arranger even where contractor's acts occurred before construction and on previously contaminated property, and despite contractor playing no role in original disposal of hazardous substances).

III. On the merits, the Complaint pleads valid common law claims.

Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) (*Milwaukee II*) is not as broad as Colorado claims. Rather, *Milwaukee II* held that federal common law

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[4] Colorado also is not protected by the provisions of CERCLA Section 9607(d)(1). That section explicitly does not "preclude liability for costs or damages as the result of negligence." New Mexico summarizes several of its factual allegations regarding Colorado's negligent or grossly negligent conduct in paragraphs 129-31 of its Bill of Complaint.

[5] Courts have interpreted "possess" to simply mean exertion of some measure of control over the hazardous substance. *See United States* v. *Ne. Pharm.* & *Chem. Co.,* 810 F.2d 726 743 (8th Cir. 1986).

should not apply where it would frustrate the regulatory regime established by the CWA. 451 U.S. at 320. That is not the case here.

Even if one accepts Colorado's unbounded reading of *Milwaukee II*, the CWA does not speak directly to the question at issue: whether Colorado is liable for stigma damages and economic injuries caused by the Gold King Mine release. No matter what *Milwaukee II* said about the CWA's impact on federal common law, it has no bearing on whether CERCLA or RCRA displace common law claims. Indeed, CERCLA and RCRA's savings clauses expressly preserve the role of federal and state common law. 42 U.S.C. § 6972(f); 42 U.S.C. § 9652(d).[6] New Mexico's claims for stigma damages and economic injuries do not conflict with these statutes. So New Mexico's common law claims have not been displaced.

New Mexico's reading of *Milwaukee II* is consistent with this Court's later decisions. In *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), this Court recognized that the CWA does not address every water pollution issue, and that it leaves some interstices that common law may fill. Drawing on its

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[6] CERCLA also states that "[n]othing in this Act shall be construed as pre-empting any state from imposing any additional liability . . . with respect to the release of hazardous substances within such state." 42 U.S.C. § 9614(a). One court said this savings clause leaves "untrammeled the right of an individual to invoke principles of statutory or common law in damage actions pendant [sic] to CERCLA . . . ." *Allied Towing Corp. v. Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1351 (E.D. Va. 1986).

jurisprudence after *Milwaukee II*, the Court reasoned that where claims for compensatory and punitive damages will not interfere with the CWA's statutory scheme or administrative judgments (as Illinois' requested injunction would have in *Milwaukee II*), those claims may proceed. *Id.* at 489. *Baker* thus clarifies that despite the CWA's comprehensiveness (at least insofar as it addresses point source pollution) it does not extinguish all preexisting common law remedies. And nothing in the CWA displaces stigma damages and economic injuries, including a state's right to seek compensation for lost tax revenues. *Milwaukee II*'s displacement analysis does not control.[7]

Colorado's citations to *NCR Corp. v. George A Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2012) and *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223 (10th Cir. 2006) are inapposite. In *NCR Corp.*, the Court affirmed that because CERCLA's savings clauses are meant to protect *victims* of toxic wastes they do not preserve common law *counterclaims*. 768 F.3d at

[7] In *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court held that state common law causes of action survive even in the face of the CWA's scheme, thereby recognizing that common law remedies do not necessarily conflict with the statute. New Mexico's citation to *Ouellette* was not meant to suggest that state law should apply in this suit. Rather, the point was to stress that this Court can adjudicate common law claims even in a case about point sources permitted under the CWA. Colorado's reading of *Milwaukee II* cannot be reconciled with *Ouellette*, and Colorado mischaracterizes *Milwaukee II* in tandem with *Ouellette* in order to deprive its New Mexico of the only forum and causes of action capable of providing compensation for stigma injuries and economic damages.

712. Here, New Mexico is the victim—not a CERCLA defendant—so *NCR Corp.*'s preemption analysis has no bearing on New Mexico's common law claims.

General Electric is likewise inapposite. There, New Mexico brought claims for natural resource damages under CERCLA and various state statutory and common law causes of action. 467 F.3d at 1236. The Court found that CERCLA presents "at most" the possibility of conflict preemption as an affirmative defense to claims, remedies, and damage theories available under state law. *Id.* Thus, the preemption issue in *General Electric* was whether the state's natural resource damage claims stood "as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA." *Id.*

No conflict with CERCLA's natural resource damages provision is present here. New Mexico is not seeking natural resource damages against Colorado (or any other party). Rather, New Mexico seeks compensation for economic losses resulting from reduced business activity and lost tax revenue.[8] These damages are the direct result of Colorado's conduct at the Gold King Mine, and could not possibly interfere with the current upland cleanup

[8] Stigma damages provide compensation for a property's diminished market value due to negative public perception caused by physical injuries. *See* L. Neal Ellis, Jr. & Charles D. Case, *Toxic Tort and Hazardous Substance Litigation* § 6-5(a) (1995). The Gold King Mine release has continued to shape the public's perception of the health of the Animas River system, as shown by a simple Google search of the phrase "Animas River" and the resulting images and web stories.

effort in Colorado, over eighty miles above the New Mexico-Colorado border. Nor, for that matter, will this type of compensation thwart CERCLA's remedial purposes: promoting the cleanup of hazardous waste sites and ensuring that the costs of contamination are borne by responsible parties.

CONCLUSION

Colorado's Brief in Opposition is unavailing. New Mexico's Bill of Complaint, on its face, presents a serious and significant "controversy between two or more States" that this Court alone has authority to adjudicate. U.S. Const. Art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). If this Court does not exercise jurisdiction over this dispute, then New Mexico will have no judicial forum to bring claims against Colorado. Accordingly, the State of New Mexico respectfully requests leave to file its Bill of Complaint against Colorado and any other relief this Court deems just and proper.

Respectfully Submitted,

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