No. 22O147, Original

In the Supreme Court of the United States

STATE OF NEW MEXICO,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

STATE OF NEW MEXICO'S RESPONSE TO THE UNITED STATES' BRIEF AS *AMICUS CURIAE*

HECTOR BALDERAS
ATTORNEY GENERAL OF NEW MEXICO
P. CHOLLA KHOURY
ASSISTANT ATTORNEY GENERAL OF NEW MEXICO
408 GALISTEO STREET
SANTA FE, NM 87501
TEL. (505) 827-6000

WILLIAM J. JACKSON*
JOHN D. S. GILMOUR
KELLEY DRYE & WARREN, LLP
515 POST OAK BLVD., SUITE 900
HOUSTON, TX 77027
TEL. (713) 355-5005
EMAIL: BJACKSON@KELLEYDRYE.COM

MARCUS J. RAEL, JR.
ROBLES, RAEL & ANAYA, P.C.
500 MARQUETTE AVE NW, SUITE 700
ALBUQUERQUE, NM 87102
TEL. (505) 242-2228

* *Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Sources

No. 22O147, Original

In The
Supreme Court of the United States

STATE OF NEW MEXICO,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

STATE OF NEW MEXICO'S RESPONSE TO THE UNITED STATES' BRIEF AS *AMICUS CURIAE*

For over a decade, Colorado authorized and allowed mining pollution to poison a river system shared by three states and three Indian tribes. Then, on August 5, 2015, Colorado and the United States Environmental Protection Agency ("EPA")—in an act of gross negligence and intentional misconduct—triggered the blowout of the Gold King Mine, releasing at least three million gallons of wastewater and 880,000 pounds of heavy metals into the Animas River. These chronic and acute environmental harms have damaged New Mexico's environment, natural resources, citizens, and economy.[1] Colorado was no mere regulator of abandoned mines, as the United States claims. Colorado actively managed and

[1] *See, e.g.*, Compl. ¶¶ 8-13, 27-30, 34-35, 114, 116, 130.

operated mining waste sites for many years, and refused to regulate those sites in service of its own economic and political interests.[2]

After the Gold King Mine release, New Mexico filed a citizen suit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. 6901 *et seq.*, seeking to require Colorado and EPA to abate the imminent and substantial endangerment to New Mexico's environment and citizens posed by the mining pollution flowing from Colorado into New

---

[2] New Mexico's Bill of Complaint and supporting briefs have repeatedly stressed that Colorado's actions were not merely "regulatory" or passive, administrative acts. Rather, New Mexico alleges that Colorado orchestrated a consent decree that created the hazardous conditions that precipitated the Gold King Mine release. Compl ¶ 8. When Colorado inexplicably declared that all the terms and conditions of the consent decree had been satisfied (they had not), water quality in the Animas River plummeted from 2005 until the date of the Gold King Mine release. *Id.* ¶¶ 11, 34, 35, 41, 77. When the ruinous results of Colorado's decisions became clear, Colorado chose not to mitigate the damage and not to regulate, by permit or otherwise, the years of toxic discharges. *Id.* ¶ 13. Colorado also actively managed and engaged in reclamation activities at various sites across the Upper Animas Mining District for most of the past decade, but did nothing to curtail the mining pollution flowing into the Animas and failed to notify downstream stakeholders, including New Mexico. *Id.* ¶¶ 12-13. In fact, in 2008, Colorado exacerbated the situation at the Gold King Mine by deliberately blocking the mine's collapsed adit in a manner that was likely to cause a blowout—a fact recognized in Colorado's own records. *Id.* ¶ 54. Finally, New Mexico alleges that Colorado played a "direct role in the Gold King Mine release" by "direct[ing] and allow[ing] [EPA's] contractor to dig away the blockage" despite their awareness of the risks and in violation of the "explicit directions of EPA's lead official" not to burrow into blockage until further safety measures could be performed. *Id.* ¶¶ 7-8.

Mexico. As New Mexico intended, the threat of its injunctive relief action forced Colorado to reverse its nearly decade-long opposition to federal intervention and allow EPA to list portions of the Upper Animas mining district on the National Priorities List ("NPL") for Superfund cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 6901 *et seq*. While New Mexico welcomes the long-overdue cleanup of some of the pollution that Colorado enabled, neither the Superfund process nor the Clean Water Act ("CWA"), 33 U.S.C. 1251 *et seq.*, can rectify the downstream damage caused by Colorado's misconduct. So, to obtain complete relief from the responsible parties, New Mexico brought an action in the United States District Court for the District of New Mexico, seeking redress for harms caused by EPA, and filed a Motion for Leave to File a Bill of Complaint in this Court, seeking redress for harms caused by Colorado.

Running through the Solicitor General's Brief is the unspoken argument that EPA's decision to list the Upper Animas Mining District on the NPL completely resolves the harms that EPA, Colorado, and others wrought on New Mexico's environment and economy. Similarly, in response to New Mexico's claims that EPA is responsible for the economic and environmental harms caused by its own gross negligence in breaching the Gold King Mine, the United States has asserted immunity and argued that New Mexico's claims in the district court action under CERCLA and the Federal Tort Claims Act are futile. By recommending that this Court should not even hear New Mexico's claims, the United States takes

the only position that could be consistent with its district court defense: a state that has suffered economic and environmental damages due to a neighboring state's pollution has no recourse or remedy, and is relegated to the sidelines of a cleanup process controlled by the responsible parties themselves.

The Original Jurisdiction Clause ensures that New Mexico has both a forum and a remedy for the harms Colorado has caused. This Court should reject the Solicitor General's recommendation and grant New Mexico's Motion for Leave to File a Bill of Complaint.

DISCUSSION

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

The case warrants the exercise of this Court's original jurisdiction. New Mexico's detailed allegations that Colorado directly harmed its waterways, citizens, and economy are serious and dignified. The Solicitor General does not argue otherwise. Instead, the Solicitor General contends that New Mexico "has no cognizable cause of action against Colorado."[3] While New Mexico disputes the Solicitor General's characterization of both the facts and laws at issue, the legal merits of New Mexico's claims are not now at issue. The only question before this Court—and the subject of its referral to the Solicitor General—is whether this case is fit for the

[3] Brief of United States as *Amicus Curiae*, No. 22O147 Original at 11.

Court to exercise jurisdiction.[4] It plainly is and the Solicitor General has not shown otherwise.

This case lies in the heartland of this Court's original jurisdiction, where "the disputed questions 'sound[] in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner and use of the waters of interstate lakes and rivers.'"[5] Beginning in 1901, this Court affirmed the right of states to bring common law nuisance actions to redress interstate pollution.[6] True, the Court occasionally denied relief because it found that a plaintiff state had failed to prove sufficient causal injury or was itself engaged in similar polluting activities.[7] Yet even when this Court has expressed discomfort when umpiring interstate pollution disputes, it has acknowledged its unique authority to vindicate the interests of states in protecting their citizens from transboundary pollution.[8] Indeed, the Solicitor General recently recognized that where, as here, "another State has

---

[4] The Solicitor General's Office has previously acknowledged that this Court "generally does not require a motion for leave to file to satisfy the standard for stating a claim under Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE. Instead, in cases where the threshold legal viability of the plaintiff's claims is in question, the Court invites the defendants to file a motion to dismiss and either rules on that motion itself or refers it to a special master." Brief of the United States in Opposition, *Michigan v. Illinois*, No 22O2 Original, 30 n.17 (citing cases).

[5] Brief of the United States in Opposition, *Nebraska and Oklahoma v. Colorado*, No 22O144 Original, 10 (citing SUPREME COURT PRACTICE § 10.2, at 622).

[6] *Missouri v. Illinois*, 180 U.S. 208, 241-243 (1901).

[7] *Missouri v. Illinois*, 200 U.S. 496, 523-26 (1906); *New York v. New Jersey*, 256 U.S. 296, 300, 309-10 (1921).

[8] *New York v. New Jersey*, 256 U.S. at 313.

directed or affirmatively authorized the generation of pollution that by natural forces enters and causes injury in the complaining State's territory that it is powerless to prohibit,"[9] the exercise of this Court's original jurisdiction is entirely proper and necessary.[10] Given the nature and gravity of the environmental and economic harms caused by Colorado's actions, New Mexico's claims warrant this Court's immediate attention and redress. And, in this time of regulatory retrenchment, this Court's role in adjudicating interstate pollution controversies has never been more necessary.

II. The Clean Water Act has not displaced New Mexico's common law claims and associated compensatory damages.

The Solicitor General argues that *Milwaukee v. Illinois* ("*Milwaukee II*")[11] controls this case and compels the conclusion that the Clean Water Act ("CWA") has completely displaced New Mexico's claims for relief.[12] While the Solicitor General is correct that *Milwaukee II* held that the 1972 Amendments to the CWA preempted federal common

---

[9] U.S. Br., No 22O144 Original at 10.

[10] The framers of the Constitution clearly contemplated that the Supreme Court would play an important role in resolving more than just boundary disputes between states. As Alexander Hamilton explained: "there are other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among members of the union . . . . Whatever practices may have tendency to disturb the harmony of the states, are proper objects of federal superintendence and control." *The Federalist No. 90*, at 407-08 (M. Beloff ed. 1948).

[11] 451 U.S. 304, 314 (1981).

[12] U.S. Br. at 11-13.

law suits seeking *abatement* of interstate water pollution, he is wrong that the CWA leaves no room for common law to play a role in environmental disputes between sovereign states.[13] A careful reading of *Milwaukee II* reveals that its holding rested on the specific facts of the case. The majority concluded that federal common law should not govern that dispute because it "would be quite inconsistent with [the NPDES] scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law *after permits have already been issued and permittees have been planning and operating in reliance on them*."[14] In other words, the majority's foremost concern was the threat that federal common law would frustrate the implementation of the CWA's permitting regime. Significantly, the *Milwaukee II* Court did not address the issue of damages, which are a central aspect of New Mexico's common law claims.

No threat of interference with the NPDES permit program is present here. Unlike the City of Milwaukee's sewage overflows (which were covered by active NPDES permits),[15] Colorado failed to issue, enforce, or obtain permits for the Gold King and Sunnyside mines for more than a decade. If New

---

[13] Because the United States argues that the CWA itself speaks directly to the issues in this case, New Mexico assumes that the United States disagrees with Colorado's theory that *Milwaukee II* also controls whether other environmental statutes – including CERCLA and RCRA – separately displace New Mexico's common law claims.

[14] 451 U.S. at 326 (emphasis added).

[15] *Id.* at 311 (noting that the City of Milwaukee and the other petitioners in the case were "operat[ing] their sewer systems and discharg[ing] effluent under [NPDES] permits").

Mexico had alleged that Colorado's effluent limits for discharges of mining pollution were inadequate to protect water quality, which it did not, then New Mexico would be seeking to impose more stringent limitations than those provided by Colorado's permit program. That is indeed what *Milwaukee II* forbids. Even if Colorado had properly permitted the Gold King and Sunnyside mines, however, the catastrophic release on August 5, 2015 would have been a CWA violation under any standard, state or federal. That is because the NPDES permit program was not designed to deal with catastrophic pollution events like the Gold King Mine release, which deposited at least 880,000 pounds of fine particle heavy metals throughout the river system.[16] Public health officials believe that large volumes of these metals and contaminated sediments have formed "hot spots" in various "sinks" in the Animas River above and below New Mexico's border with Colorado.[17] No matter how stringent effluent limits at the point of discharge may be, those limits do nothing to address the continuing sources of pollution in the Animas River. In these extraordinary circumstances, application of the common law concepts of nuisance and negligence—which authorize both abatement *and damages*—is

[16] The latest estimate on the spill from EPA's Fate and Transport Model report is 1.1 million pounds, a 20 percent increase from earlier EPA estimates. *Analysis of the Transport and Fate of Metals Released from the Gold King Mine in the Animas and San Juan Rivers*, EPA/600/R-16/296, (January 2017), https://www.epa.gov/goldkingmine/fate-transport-analysis

[17] Compl. ¶ 84. These "hot spots" are non-point sources of pollution, which are not regulated under the CWA.

necessary to provide full relief to the victims of interstate pollution.

Colorado's decade-long abdication of its regulatory duties over the Gold King and Sunnyside mines also casts the displacement standard in a different light. As the Solicitor General explains:

> [F]ederal common law claims for relief from interstate water pollution * * * 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. "The test for whether congressional legislation [displaces] federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue."[18]

While the Solicitor General has accurately articulated the standard for displacement, he has failed to correctly apply the standard to the facts. New Mexico is seeking damages for concrete economic harms caused by Colorado's creation of a decade-long interstate pollution problem, its refusal to enforce its own permit program, and its rejection of remedial measures that would have prevented vast amounts of pollutants from poisoning New Mexico's waters. Contrary to the Solicitor General's contention, New

[18] U.S. Br. at 11-12 (citations omitted).

Mexico is not seeking to impose "more stringent discharge limitations than those provided by Colorado's permit program."[19] That New Mexico is also seeking to compel EPA to enforce existing limits and standards and protect the citizens of both New Mexico and Colorado does not affect the displacement analysis. This Court has never endorsed the proposition that a state's decision *not* to regulate can displace the federal courts' common law authority to grant relief—and damages in particular—to downstream states harmed by pollution.[20]

True, a plaintiff cannot resort to federal common law merely because the federal statutory and regulatory regime fails to address a problem in the

---

[19] *Id.* at 14-15.

[20] A paragraph at the heart of the *Milwaukee II* majority opinion shows that this premise is flawed:

> It is quite clear from the foregoing [discussion] that the state agency duly authorized by the EPA to issue discharge permits under the Act has addressed the problem of overflows from petitioners' sewer system. The agency imposed the conditions it considered best suited to further the goals of the Act, and provided for detailed progress reports so that it could continually monitor the situation. Enforcement action considered appropriate by the state agency was brought, as contemplated by the Act, again specifically addressed to the overflow problem. There is no 'interstice here to be filled by federal common law: overflows are covered by the Act and have been addressed by the regulatory regime established by the Act." 451 U.S. at 323. Thus, the Court found dispositive the fact that Milwaukee's effluents were well regulated. The problem was addressed not simply by the 1972 Amendments, but by those amendments *as implemented* by "the agency charged by Congress with administering this comprehensive scheme.

Id. at 320.

way it would prefer. That would be inappropriate because federal courts have authority only to "fill[] gap[s]" in a federal regulatory scheme, not to "provid[e] a different regulatory scheme."[21] Here, the relevant regulators ignored or refused to address an interstate pollution problem, and when the ruinous results of that failure became clear, they did nothing to mitigate the damage or otherwise regulate these mines. To say that there is no "gap" for the protections of federal common law to fill shows scarce regard for New Mexico's sovereign interests,[22] and would leave states like New Mexico with fewer federal rights and protections after the passage of the CWA than they enjoyed before the statute's enactment. This would also leave states with fewer rights and remedies than their citizens, who may seek property and economic damages when they are harmed by interstate pollution.[23] That incongruous and untenable result shows insufficient regard for states' "reasonable demands on the ground of their still remaining quasi-sovereign interests."[24]

---

[21] *Id.* at 324 n.18.

[22] *Cf. Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("When the states by their union made the forcible abatement of outside nuisances impossible to reach, they did not thereby agree to submit to whatever might be done."); *see also Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906) (describing one state's pollution of a river as a "*casus belli* for a State lower down").

[23] *See International Paper Co. v. Ouellette*, 479 U.S. 481, 497-500 (1987) (recognizing that the law of the state in which pollution has its source may impose higher common law requirements than federal law, and thus the source state's law of nuisance may be available as an additional remedy for private citizens affected by interstate pollution).

[24] *Tennessee Copper Co.*, 206 U.S. at 237.

Even if one accepts the Solicitor General's selective reading of *Milwaukee II*, the CWA simply does not speak directly to the question of whether Colorado is liable for damages—like those from stigma and economic injuries in New Mexico—directly caused by the Gold King Mine release. The Solicitor General downplays this gap in the CWA's remedial structure and argues that two other provisions in the statute can provide New Mexico with complete relief.[25] On that point, the Solicitor General's position is flatly wrong. First, the CWA's citizen suit provision does not authorize parties to recover compensatory damages, which New Mexico seeks, except in narrow circumstances that do not apply here; the statute limits the remedies available to citizen plaintiffs to injunctive relief, the assessment of civil penalties, and attorney's fees.[26] Second, if New Mexico asked EPA to withdraw Colorado's authority to administer NPDES permits, the immediate effect would likely be *less* environmental regulation and enforcement, an outcome squarely at odds with the goals of New Mexico's suit. It is also a fool's errand: EPA has never withdrawn, in whole or in part, a state's authority to

---

[25] U.S. Br. at 14 (arguing that New Mexico can petition EPA to withdraw Colorado's authorization to administer the CWA permitting program or bring a citizen suit against Colorado).

[26] See 33 U.S.C. 1365(a), (d). *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, Inc., 528 U.S. 167, 175 (2000). No compensatory damages are authorized under the CWA. *See Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 18 (1981) (no private right of action for compensatory damages under the CWA). Furthermore, civil penalties are payable to the United States Treasury. *Laidlaw*, 528 U.S. at 175 (noting that civil penalties under CWA are "payable to the United States Treasury").

administer the NPDES permit program under Section 402 of the CWA, despite dozens of past requests to do so. Thus, neither provision, invoked separately or jointly, could afford New Mexico complete relief.

Finally, *Exxon Shipping Co. v. Baker* instructs that the CWA does not govern every issue involving water pollution and that parties may seek compensatory damages under federal common law. There, drawing on its post-*Milwaukee II* jurisprudence on the standards for displacement,[27] this Court reasoned that compensatory damages do not invariably interfere with the CWA's statutory scheme or EPA's administrative judgments (as Illinois' requested injunction would have in *Milwaukee II*). *Exxon Shipping Co.* thus clarifies that even though the CWA is a comprehensive statute, it does not preclude all preexisting common law claims and remedies.

III. Colorado is a covered person under CERCLA.

The Solicitor General also recommends that the Court decline to exercise its jurisdiction on the ground that New Mexico has no viable CERCLA claim

---

[27] It is noteworthy that the Court relied on *United States v. Texas*, 507 U.S. 529 (1993), authored by Chief Justice Rehnquist. In *Texas*, the eight-member majority held that, while the Debt Collection Act is comprehensive and addresses many aspects of interest collection, it does not speak to the issue of whether interest can be collected from states. Because the statute did not answer or address the specific question before the Court, the Court determined that Congress did not intend to displace the existing rules, and thus the common law survived later legislation.

against Colorado.[28] This threshold legal issue may be tested by briefing under FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) and (6).[29] At this stage, however, the focus is on whether New Mexico has stated a serious and dignified claim and whether an alternative forum is available and can tender relief.[30]

New Mexico's CERCLA claims against Colorado are cognizable and deserve a forum. By expressly including states in its definition of persons who can incur liability under § 9607, CERCLA's text makes clear that a state shall be held liable when it falls within any of the four categories of liable persons, including when it "operates" a facility where hazardous substances are disposed or "arranges" for the disposal of hazardous substances.[31] The "cascade of plain language" in CERCLA clearly shows that Congress intended to abrogate the states' sovereign immunity from CERCLA claims.[32] And while this Court later held that Congress may not abrogate the states' Eleventh Amendment sovereign immunity under its Commerce Clause powers,[33] states enjoy no immunity where there has been a "'a surrender of this immunity in the plan of the convention.'"[34] This Court has recognized many times that a "State may recover monetary damages from another State in an original

---

[28] U.S. Br. at 15.
[29] *See* Sup. Ct. R. 17.2.
[30] *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).
[31] 42 U.S.C. 9601(21).
[32] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7-13 (1989).
[33] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996).
[34] *Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934) (quoting The Federalist No. 81).

action, without running afoul of the Eleventh Amendment."[35] The only issue, then, is whether Colorado is a covered "person" –specifically, an "operator" and an "arranger"—under CERCLA.

Faced with CERCLA's tautological definition, this Court has defined "operator" according to its ordinary meaning:

> [A]n operator is simply one who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.[36]

The Court later summarized that, "when [Congress] used the verb 'to operate,' we recognized that the statute obviously meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities."[37] Thus, *Bestfoods* instructs that to be held liable as an "operator," Colorado must have performed affirmative

---

[35] *Kansas v. Colorado*, 533 U.S. 1, 7 (2001); *see also Texas v. New Mexico*, 482 U.S. 124, 130 (1987); *Maryland v. Louisiana*, 451 U.S. 725, 745, n. 21 (1981); *South Dakota v. North Carolina*, 192 U.S. 286, 317-321 (1904).

[36] *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).

[37] 524 U.S. at 71.

acts: *to wit*, directing the workings, managing, or conducting the affairs at the Gold King Mine.

As alleged in the Bill of Complaint,[38] Colorado dominated environmental decision-making at the Gold King Mine site between 2007 and 2009, when it undertook incomplete and ultimately counter-productive measures to control the mine's polluted discharges. Colorado even recognized that the bulkheads it approved years before made a catastrophic release more likely, but refused to take responsibility for its ill-conceived plan. Once Colorado asserted control of the hazardous waste operations at the site, it had a continuing obligation to manage the site and could not simply abandon its responsibility while untreated discharges continued to flow into New Mexico's waters. Colorado also worked alongside EPA in 2014 and 2015 to investigate the discharges, and was directly involved in the botched excavation that triggered the catastrophic release. Colorado's activities were thus plainly related to the "leakage or disposal of hazardous waste" and involved "decisions about compliance with environmental regulations." Under *Bestfood*'s definition of an "operator," New Mexico's CERCLA claims against Colorado claim are not just cognizable, they are compelling.

The Solicitor General also claims that New Mexico has failed to allege facts showing that Colorado was an "arranger" under CERCLA. Yet, the Solicitor General ignores specific allegations that Colorado built a conveyance structure to contain and channel acid mine drainage from the Gold King Mine

[38] *See* footnote 2, *supra*.

into a series of settling ponds below the Red and Bonita Mine.[39] To that end, Colorado, EPA, and EPA's contractor arrived at the site in July 2015, and, among other things, began constructing a water management and treatment system to receive the Gold King Mine discharges.[40] These allegations plainly state a claim that Colorado took "intentional steps to dispose of a hazardous substance."[41]

Rehashing the United States' position in the district court action, the Solicitor General posits that states are categorically immune from CERCLA liability when they undertake cleanup activities as part of their "conventional police power" or respond to "releases of hazardous substances caused by others."[42] In essence, the Solicitor General argues that Congress carved out a "police powers exception" to CERCLA's otherwise sweeping waiver of sovereign immunity. This limit on CERCLA liability is entirely absent from the language Congress actually chose. In fact, it contradicts the unrestricted character of the statutory language.[43]

While Congress did carve out several narrow exceptions and defenses to CERCLA liability, which apply exclusively to states like Colorado, none of them

---

[39] Compl. ¶ 54.
[40] *Id.*
[41] *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 610-11 (2009).
[42] U.S. Br. at 16.
[43] *Accord United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1442 (E.D. Cal. 1995) (rejecting this position as contrary to the "clear statutory language subjecting government entities to liability").

apply here.[44] The exception most relevant here is Section 107(d)(2), which concerns the liability of state and local governments acting in a remedial capacity and are otherwise not liable as owners or operators. This exception provides states with protection from strict liability, but not when they commit gross negligence or intentional misconduct:

> No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government.[45]

With respect to Colorado's gross negligence and intentional misconduct at the Gold King Mine, New Mexico's allegations speak for themselves. In 2008, Colorado exacerbated the situation at the Gold King Mine by recklessly blocking the mine's collapsed adit in a manner that Colorado employees recognized was

---

[44] Other state-specific liability defenses include: the protection of state and local governments that acquire contaminated property either through eminent domain or involuntarily by virtue of their sovereign power, 42 U.S.C. 9601(2)(D), 9601(35)(A), 9607(b)(3); the "*bona fide* prospective purchaser" provision, 42 U.S.C. 9601(40), 9607(r), and the permit exception for onsite removal or remedial actions. 42 U.S.C. § 9621(e)(1).

[45] 42 U.S.C. 9607(d)(2).

likely to cause a blowout.[46] Colorado played a "direct role in the Gold King Mine release," and along with EPA employees "directed and allowed [EPA's] contractor to dig away the blockage" despite their actual awareness of the risks and in violation of the "explicit directions of EPA's lead official."[47]

As the Solicitor General himself acknowledges, "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.'"[48] Because Colorado is jointly "responsible for the contamination" in this case, it should pay the costs of cleanup.

CONCLUSION

The United States here turns its back on facts showing the environmental and economic damage wrought on Colorado's sovereign neighbor. For more than a decade, Colorado authorized and allowed hundreds of millions of gallons of acidic mine water and heavy metals to pollute and degrade the Animas

---

[46] Compl. ¶ 54.

[47] *Id.* ¶ 7. After New Mexico filed its Bill of Complaint in June 2016, EPA began to release records related to the Gold King Mine operation and release in response to Freedom of Information Act ("FOIA") requests. EPA's records have revealed that Colorado officials were significantly involved in the activities and decisions which immediately preceded and ultimately caused the Gold King Mine release. If the District Court denies EPA's or its contractor, Environmental Restoration's, motions to dismiss, and New Mexico obtains discovery, Colorado's status as "operator" and "arranger" may become even clearer.

[48] U.S. Br. at 2 (citing *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009)).

and San Juan Rivers in New Mexico. And for nearly a decade, Colorado fought EPA's efforts to commence a Superfund cleanup, ostensibly to protect local business interests and the property value of land and mine owners in southwestern Colorado. Simply put, Colorado placed its parochial economic interests ahead of the health, safety and welfare of New Mexico's citizens, environment, and other downstream communities. The concrete injuries to New Mexico's environment, natural resources, and economy deserve complete redress, which only this Court can provide, and which the Solicitor General's brief passes over without so much as a word of explanation. But even without the Executive Branch's support, New Mexico, as a sovereign state, has a duty to protect its citizens from the harms caused by Colorado's maladministration and misconduct, with this Court as its sole forum for relief.

For these reasons, New Mexico respectfully requests that its Motion for Leave to File Complaint be granted.

Respectfully Submitted,

HECTOR BALDERAS
ATTORNEY GENERAL OF
NEW MEXICO
P. CHOLLA KHOURY
ASSISTANT ATTORNEY
GENERAL OF NEW
MEXICO
408 GALISTEO STREET
SANTA FE, NM 87501
TEL. (505) 827-6000

WILLIAM J. JACKSON*
JOHN D. S. GILMOUR
KELLEY DRYE &
WARREN LLP
515 POST OAK BLVD.,
SUITE 900
HOUSTON, TX 77027
TEL. (713) 355-5005
FAX. (713) 355-5001
EMAIL:
BJACKSON@KELLEYDRY
E.COM

MARCUS J. RAEL, JR.
ROBLES, RAEL &
ANAYA, P.C.
500 MARQUETTE AVE
NW,
SUITE 700
ALBUQUERQUE, NM
87102
TEL. (505) 242-2228

* *Counsel of Record*