No. _____, Original

IN THE
Supreme Court of the United States

STATE OF NEW MEXICO,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BILL OF COMPLAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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
JACKSON GILMOUR & DOBBS, PC
3900 ESSEX, SUITE 700
HOUSTON, TX 77027
TEL. (713) 355-5005
EMAIL: BJACKSON@JGDPC.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

No. _____, Original

IN THE
Supreme Court of the United States

STATE OF NEW MEXICO,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The State of New Mexico moves this Court for leave to file a Bill of Complaint against the State of Colorado. The grounds for the Motion are set forth in the accompanying Brief in Support of Motion for Leave to File Bill of Complaint.

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
JACKSON GILMOUR &
DOBBS, PC
3900 ESSEX, SUITE 700
HOUSTON, TX 77027
TEL. (713) 355-5005
FAX. (713) 355-5001 (FAX)
EMAIL:
BJACKSON@JGDPC.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*

No. _____, Original

IN THE
Supreme Court of the United States

STATE OF NEW MEXICO,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

BILL OF COMPLAINT

The State of New Mexico brings this action against the State of Colorado, and for its Bill of Complaint asserts as follows:

PARTIES

1. Plaintiff State of New Mexico ("New Mexico") is a sovereign State of the United States of America. New Mexico brings this suit in its capacity as sovereign trustee and parens patriae for its citizens.

2. Defendant State of Colorado ("Colorado") is a sovereign State of the United States. Process may be served upon Colorado as provided in Supreme Court Rules 17 and 29 (service

upon both the Governor of Colorado and the Attorney General of Colorado).

JURISDICTION

3. The Court has original and exclusive jurisdiction over this controversy between two States under Article III, § 2, cl. 2 of the Constitution of the United States and 28 U.S.C. § 1251(a).

STATEMENT OF THE CASE

4. On August 5, 2015, the United States Environmental Protection Agency ("EPA"), the Colorado Division of Reclamation, Mining and Safety ("DRMS"), and EPA's contractor breached the portal of the Gold King Mine, releasing over three million gallons of mine wastewater and 880,000 pounds of metals into Cement Creek, a tributary of the Animas River in southwestern Colorado. The garish yellow plume flowed down the Animas through Colorado and into New Mexico, where the Animas joins the San Juan River. The plume then coursed hundreds of miles through the San Juan River in northern New Mexico, the Navajo Nation, and into Utah. One week later, the contamination reached Lake Powell in Utah.

5. The plume of contamination from the Gold King Mine carried toxic metals like arsenic, lead, cadmium, copper, mercury, and zinc throughout the river systems. When the plume entered New Mexico's waters, it caused a staggering

spike in metal concentrations, far exceeding federal and state drinking water standards. As the contamination flowed downstream, a substantial amount of these metals fell out of the water column and settled in the riverbeds of the Animas and San Juan. Many segments of the Animas River contain "sinks" that have temporarily captured these metals. But rainfall, snowmelt, and other high flow events will re-suspend these metals and push them further downstream into and through New Mexico. Contamination from the Gold King Mine release thus presents imminent and long-term health risks to New Mexico's residents, farmers, ranchers, and recreational users of the Animas and San Juan. The contamination also threatens fish, invertebrates, plants, and the environment in New Mexico.

6. Contamination from the Gold King Mine wrought environmental and economic damage throughout the Animas and San Juan River riparian systems and severely strained New Mexico's already stressed water and economic resources. The shocking sight of the bright yellow plume of contamination eroded the public's confidence in the health of New Mexico's waters. Many businesses along the riverfront lost customers; others were forced to close. Agricultural uses ground to a halt. Potable water was hauled in by truck for humans and livestock. Tens of thousands of local residents, farmers, anglers, and tourists were denied access to the rivers. The reputation of New Mexico's prized sport fishing and recreational waters was tarnished.

7. The immediate cause of the Gold King Mine release is not in dispute. On August 5, 2015,

EPA's contractor, supervised by Colorado and EPA employees, used an excavator to dig away tons of rock and debris in front of the Gold King Mine's portal entrance. Water had been building within the mine and seeping out of the portal for years, and Colorado and EPA officials knew the water was highly acidic and laced with metals. Colorado DRMS's records and EPA's work plan not only recognized that the mine was filled with acidic wastewater, but also highlighted the risk of a significant "blowout," especially if workers attempted to dig away the blockage. Moreover, Colorado and EPA employees had been given specific instructions by EPA's lead official at the Gold King Mine not to excavate the earthen debris blocking the portal and not to drain the mine without first performing precautionary testing and setting up equipment to contain the discharge. In fact, the lead EPA official told Colorado and EPA employees to postpone excavation until an engineer from the Department of Interior's Bureau of Reclamation could visit the site and evaluate the risks of excavating the portal. Despite the evident dangers and explicit directions of EPA's lead official, Colorado and EPA employees directed and allowed the contractor to dig away the blockage without taking those precautions. The environmental and economic consequences of Colorado and EPA's decisions have been catastrophic for New Mexico's people, environment, and economy.

8. Besides Colorado's direct role in the Gold King Mine release, Colorado is directly responsible for the hazardous conditions that preceded the catastrophe. In 1996, Colorado entered

into a consent decree with Sunnyside Gold Corporation ("Sunnyside Gold"), the operator of the Sunnyside Mine, part of the same network of mines as the Gold King Mine. The consent decree allowed Sunnyside Gold to install concrete plugs—known as bulkheads—in two drainage tunnels below the Sunnyside Mine, and in the portals of several neighboring mines. Sunnyside Gold had permanently closed the mine five years earlier, but it was still operating a water treatment facility that processed wastewater from the drainage tunnels to comply with the Clean Water Act. Because the treatment facility was expensive to operate and maintain, Sunnyside Gold devised a plan to end perpetual treatment of its wastewater discharges and terminate its Clean Water Act discharge permit. Sunnyside Gold's "solution" was to plug the drainage tunnels so that the mine's tunnels and workings would fill with potentially billions of gallons of water, essentially transforming the mine into an enormous wastewater storage facility.

9. In 2002, six years after it placed the first bulkhead in the American Tunnel, Sunnyside Gold signed an agreement with Colorado and a cash-strapped local company named Gold King Mines Corporation that wanted to revive mining in the area. Gold King Mines Corporation would take title to the water treatment plant and treat lingering discharges from the Sunnyside Mine, as well as water that had started to discharge from nearby mines as a result of the American Tunnel's bulkheads. Meanwhile, Sunnyside Gold was quietly settling litigation alleging that the Sunnyside Mine was flooding another mine: the Mogul.

10. Colorado was fully aware that Sunnyside Gold's strategy carried substantial risks, but signed-off on the plan anyway. The stated intent of the consent decree was to ensure that water quality in the Animas River would not decline if the treatment plant was closed. But after six years, water quality was not being maintained and in some respects had gotten worse. Then, in 2003, Colorado inexplicably declared that Sunnyside Gold had met all of its obligations under the consent decree, terminated Sunnyside Gold's Clean Water Act discharge permit, and released the company's multi-million dollar bond that was supposed to ensure the company would be held financially responsible if the plan degraded the Animas River watershed.

11. The consent decree failed in every respect. As anticipated, a vast pool of acidic and toxic water rapidly filled the Sunnyside Mine soon after the first bulkheads were placed in the drainage tunnels. But the bulkheads also caused water from the Sunnyside Mine to enter the workings of neighboring mines, including the Gold King Mine and Mogul Mine. Mines that had been virtually dry for decades started discharging hundreds of gallons of acid mine drainage each minute into the river systems. Unsurprisingly, Gold King Mines Corporation went bankrupt in 2005 and the water treatment facility was swiftly shuttered and demolished. Thus, wastewater from the Sunnyside mine pool discharged directly into the Animas River watershed without any treatment.

12. Since 2005, water quality and trout populations in the Animas River have declined

dramatically. By 2011, acid mine drainage from four abandoned mine sites at and above the former treatment plant—the American Tunnel, the Gold King, the Mogul, and the Red and Bonita—was pouring into Cement Creek at a rate of nearly 850 gallons per minute. Contamination from those mines compelled EPA to study the area for a potential Superfund cleanup. While EPA considered the problem severe enough to place it on the National Priorities List, local support and a sign-off from Colorado's governor was also required. Unfortunately, Colorado and San Juan County would not support Superfund listing in 2011, choosing instead to protect the local tourism and skiing economy. Besides invoking Superfund, Colorado could have pursued other options: seeking to require Sunnyside and Kinross to treat the contamination flowing from their mine, reinstating water treatment at Gladstone, or any other measures to reverse the river's decade-long degradation. Instead, Colorado did nothing to achieve downstream water quality standards, at the expense of the entire watershed—from Durango, Colorado to Farmington, New Mexico, and ultimately Lake Powell. While Colorado refused to act, the volume of water and hydraulic pressure within the Gold King Mine continued to build, setting the stage for the catastrophic blowout on August 5, 2015.

13. Colorado's reckless actions have prejudiced New Mexico's economy, finances, and natural resources, and have injured the health, comfort, safety, and property of New Mexico's citizens. Colorado authorized and allowed

Sunnyside Gold and its parent companies to evade their environmental responsibilities and create an enormous environmental and human health hazard by plugging the Sunnyside Mine. When the ruinous results of Colorado's decisions became clear, Colorado did nothing to inform New Mexico of the dangers. Colorado took no action to mitigate the pollution from the mines and, in fact, refused to support EPA's plan to place the mines on the National Priorities List. Then, understanding the highly unstable condition of the mines, Colorado—acting in concert with EPA and EPA's contractor—triggered the Gold King Mine release and grievously polluted an interstate river that provides drinking and irrigation water for tens of thousands of people in New Mexico. The Gold King Mine release was the *coup de grâce* of two decades of disastrous environmental decision-making by Colorado, for which New Mexico and its citizens are now paying the price.

FACTS

The Gold King Mine and Sunnyside Mine

14. The headwaters of the Animas River begin in the San Juan Mountains of southwestern Colorado. The confluence of three streams—Mineral Creek, Cement Creek, and the upper Animas—define the Upper Animas River Basin. The river basin contains hundreds of inactive or abandoned mines, among them the Gold King Mine, on the slopes of Bonita Peak, and the much larger Sunnyside Mine, two miles west in Eureka Gulch. Bonita Peak and the surrounding topography is a

maze of faults, fissures, and fractures—both natural and manmade. *See* Appendix A-1.

15. The Upper Animas River Basin lies within a heavily mineralized area that was mined extensively for metals, mainly gold and silver, from the 1870s to the mid-1990s. Historic mining activities significantly increased the exposure of the mineralized rock to atmospheric conditions. This exposure increased the concentrations of metals in and the acidity of waters in the mine, creating an effluent known as acid mine drainage, which reaches surface water and sediments.[4] The most common metals associated with acid mine drainage in the river basin are zinc, copper, lead, aluminum, iron, and manganese, with lesser amounts of other metals.

16. Discovered in 1873, the Sunnyside Mine soon emerged as one of the most prolific and profitable mines in Colorado. At the height of mining activities in the 19th and early 20th centuries, the Sunnyside mine complex was a self-contained community, complete with offices, boarding houses, a hospital, and a commissary. In

[4] Acid mine drainage is caused by a chemical reaction when oxygen and water flow over or through rock containing metallic minerals. The reaction causes the release of hydrogen atoms, which lowers the pH of water—making it more acidic—and dissolves metals from rock into the water. Dissolved metals can remain in the water, or eventually settle as sediment when the pH of the water rebounds. This natural reaction generally occurs when oxygen from the air is introduced into areas where it normally would not be found (*e.g.*, through drilling, excavating, or mining tunnels).

1927, the Sunnyside became the first Colorado mine to produce 1,000 tons of ore per day and had a payroll of over 500 people. The mine opened and closed many times during its life, eventually producing more than seven million short tons of ore before its final closure in 1991.

17. The Sunnyside Mine contains myriad underground workings on seven levels ranging from 10,660 feet to over 13,000 feet above sea level. The Sunnyside also includes parts of two haulage and drainage tunnels: the Terry Tunnel and the American Tunnel. The latter tunnel is actually part of the lower level of the Gold King Mine, but was renamed "the American Tunnel" in 1959. In 1960 and 1961, Standard Metals Corporation extended the American Tunnel more than a mile to intersect Sunnyside mine orebodies 600 feet below the Sunnyside mine workings. Thus, the American Tunnel is not a mine but the lowest transportation and ore-haulage level of the Sunnyside Mine. *See* Appendix A-2.

18. The Gold King Mine was discovered in 1887, and ore production began in 1896. Like the Sunnyside Mine, the Gold King Mine contains numerous workings on seven levels ranging from 11,440 feet to 12,300 feet above sea level. At first, operations occurred at the "Upper Gold King" portal at Level 1 (12,160 feet above sea level). Later, miners developed the "Lower Gold King" tunnel at Level 7 (portal elevation 10,617 feet above sea level) to further explore the mine's vein system.

19. In 1985, Standard Metals Corporation went bankrupt. Echo Bay Mines Inc. ("Echo Bay"), a Canadian corporation, purchased the Sunnyside Mine, operating and doing business as Sunnyside Gold.

20. In 1986, Gerber Minerals Corporation, a subsidiary of Gerber Energy Internationals Inc., acquired control of the Gold King Mine, leasing it from Pitchfork "M" Corp. Gerber Minerals Corporation also entered into an agreement with Echo Bay to develop the Gold King Mine claims together. According to a 1986 Sunnyside Gold-Gerber Minerals Corporation venture agreement, Gerber Minerals Corporation changed its name to Gold King Mines Corporation ("Gold King Mines Corp.").

21. In 1988, Sunnyside Gold overhauled an old water treatment facility at the historic town of Gladstone, which received acid mine drainage from the American Tunnel. Sunnyside Gold used one ton of lime per day to raise pH levels, causing toxic metals to precipitate out of solution and settle into ponds, and cleaning 1,600 gallons per minute of discharge to a level that could support sensitive aquatic life. This process cost hundreds of thousands of dollars per year to operate.

22. The main Gold King Mine claims saw little development after 1910. But in 1989, Gold King Mines Corp. entered into an operating agreement with San Juan County Mining Venture (whose members included Echo Bay, Sunnyside Gold, and several other corporations) to further

explore the Gold King Mine. These companies attempted to revive mining operations at the Sunnyside Mine and parts of the Gold King Mine. Sunnyside Gold developed the "Gold King Extension" and the Gold King Extensions Nos. 1 – 5, pushing the mine works of the Sunnyside Mine to within a few hundred feet of the Gold King Mine workings. But faced with decreasing ore reserves and depressed gold and base metal prices, Sunnyside Gold decided to decommission the Sunnyside Mine in 1991. Gold King Mines Corp. stopped mining the Gold King Mine in 1992, but kept its state mining and reclamation permits active.

Closing of the Sunnyside Mine (1991 to 2003)

23. When Sunnyside Gold decided to close the Sunnyside Mine, the American Tunnel was discharging about 1,700 gallons of acidic water with high concentrations of metals, particularly zinc and iron, each minute. The American Tunnel was several hundred feet below the Sunnyside Mine and served as a huge drainage feature for the Sunnyside. Sunnyside Gold captured and treated the discharges at the Gladstone treatment facility to comply with federal Clean Water Act regulations and Colorado-issued discharge permits.

24. Because the treatment facility was expensive to maintain and operate, Sunnyside Gold searched for ways to end perpetual treatment of the American Tunnel's discharges. To do so, Sunnyside Gold needed to terminate the discharge permit for the facility issued by the Colorado Department of

Public Health and Environment Water Quality Control Division ("WQCD").

25. Sunnyside Gold could not shut down the treatment facility without addressing the discharges from the American Tunnel. Therefore, Sunnyside Gold developed a plan to install underground hydraulic seals—called "bulkheads"—in the American Tunnel and several other mine workings to block the drainage through the workings. Sunnyside Gold submitted this plan to the Colorado Division of Minerals and Geology[5] and told the Division that installing the first bulkhead would create a vast pool of impounded water. Sunnyside Gold claimed that the Sunnyside Mine would continue to fill with water until the pool reached a "physical equilibrium"—the point when the amount of water flowing into the mine workings would equal the amount leaving the workings through natural fracture and fissures in the mountain. If all went according to Sunnyside Gold's plan, the discharges from the American Tunnel would cease, while any new springs or seeps that emerged after Sunnyside Gold installed the bulkheads would have the same acidity and metal loading as "background" groundwater.

26. WQCD raised several objections to Sunnyside Gold's plan. First, WQCD noted that the treatment facility had significantly improved water quality in Cement Creek and believed that the plan would reverse this progress and degrade the

[5] The Colorado Division of Minerals and Geology is the predecessor to DRMS.

watershed. Second, WQCD doubted Sunnyside Gold's prediction that the mine pool behind the American Tunnel bulkhead would return to natural background pH and metal loading. Third, and most importantly, WQCD issued a finding that any new or increased flows to the surface caused by flooding the Sunnyside Mine would constitute "point sources" requiring discharge permits.

27. Because Sunnyside Gold's goal was to eliminate its discharge permit obligations, it pushed back against the agency. When the two sides could not agree on the permitting issue, Sunnyside Gold filed a lawsuit against WQCD in Colorado district court and sought a declaratory judgment on whether future seeps and springs would require permits from WQCD. Before the court could rule, however, Sunnyside Gold and WQCD settled the lawsuit and signed a consent decree in May 1996.

28. The consent decree divided Sunnyside Gold's work obligations into three parts:

> i. By the end of 1996, Sunnyside Gold would install bulkheads in the American and Terry Tunnels. Then, Sunnyside Gold would monitor the rising mine pool until it reached "physical equilibrium" (determined by Sunnyside Gold and the Division of Minerals and Geology according to terms in Sunnyside Gold's mining and reclamation permit). Sunnyside Gold had to monitor the height of pool for two more years and

then grout the valves and pipes in the bulkheads. Then, Sunnyside Gold could install more bulkheads in the American Tunnel. If the bulkheads eliminated the discharges from the American Tunnel (and other conditions in the consent decree were met), then WQCD would agree to terminate Sunnyside Gold's discharge permit for the treatment facility. However, Sunnyside Gold was given the option to transfer its permit to a third party who would assume responsibility for operating the facility and treating any lingering discharges from the American Tunnel.

ii. Besides installing the bulkheads, Sunnyside Gold was required to remediate an "A" list of legacy mining and milling sites in the area. Sunnyside Gold would remove sources of zinc and iron loading at these sites in an amount roughly equal to what was discharging from the American Tunnel before treatment. Sunnyside Gold had to monitor dissolved zinc concentrations at a station known as A-72 on the Animas River about 1.6 miles downstream from Silverton, in an attempt to ensure that the water quality of the watershed would be protected. If water quality did not improve, Sunnyside Gold would commence additional mitigation projects on a "B" list. Ultimately,

> Sunnyside had to demonstrate to WQCD that zinc levels would remain below a baseline for five consecutive years.
>
> iii. While carrying out the off-site mitigation projects, Sunnyside Gold would divert the main stem of Cement Creek to the treatment facility. After completing all the mitigation projects on the "A" list, Sunnyside Gold could reduce or eliminate the treatment of Cement Creek.

29. The consent decree also contained a financial surety provision. Within 30 days after entry of the decree, Sunnyside Gold was required to provide a financial surety for $5,000,000 in the form of an irrevocable letter of credit. WQCD could draw on the letter of credit if Sunnyside Gold filed for bankruptcy and discontinued treatment necessary to maintain water quality in the Animas River. In that event, WQCD could enter and operate the treatment facility itself and dispose of treatment residues at Sunnyside Gold's tailings pond.

30. WQCD agreed to terminate Sunnyside Gold's discharge permit for the American Tunnel if all of the following criteria were achieved:

- Five years elapsed from the date of the valve closure at the first American Tunnel bulkhead.

- Two years elapsed since Sunnyside Gold gave WQCD notice that the mine pool had reached equilibrium.

- Valves and pipes in the seals in the American and Terry Tunnels had been grouted.

- Hydrological controls and seals eliminating flows from the lower American Tunnel had been completed, or another party or parties had accepted the permit for water treatment at the American Tunnel.

- All of the "A" list mitigation projects were completed.

- Treatment of Cement Creek had ended.

- Sunnyside Gold demonstrated that water quality at the A-72 reference point could be maintained without the need for active treatment.

31. In the summer of 1996, Sunnyside Gold started work on the "A" list mitigation projects. By September, it had installed the first bulkhead in the American Tunnel and closed the valve. Sunnyside Gold diverted the stream flow of Cement Creek into the treatment facility and began monitoring zinc levels at A-72. It also injected an alkaline solution into the mine pool to reduce its acidity.

32. In 1999, Sunnyside Gold told WQCD that the mine pool behind the American Tunnel bulkhead had reached physical equilibrium.

However, by this time, the pool within the Sunnyside Mine was filling Bonita Peak and flooding into adjacent mine workings, including the Mogul Mine. Colorado and Sunnyside Gold knew that the mine pool was unstable: millions of gallons of water were filling miles of workings and forming additional sources of acid mine drainage.

33. In May 2001, Sunnyside Gold took a final sample of the water behind the bulkhead and then installed more bulkheads downstream in the American Tunnel. By the end of August 2001, Sunnyside Gold installed a second bulkhead and closed its valve. At this point, the acidic drainage from the Sunnyside Mine had already made its way to the Mogul Mine. Moreover, the water quality at A-72 did not improve, so Sunnyside Gold undertook more mitigation projects at the "B" list sites.

34. In 2003, WQCD and Sunnyside Gold notified the Colorado court overseeing the consent decree that Sunnyside Gold had purportedly satisfied all of the consent decree's conditions. Meanwhile, Sunnyside was quietly settling litigation alleging that the Sunnyside Mine was flooding the Mogul Mine.

35. Based on WQCD's and Sunnyside Gold's representations, the court terminated the consent decree. The termination of the consent decree released Sunnyside Gold from its discharge permit for the American Tunnel and from the $5,000,000 financial surety.

36. Water quality in the Animas River was improving when the treatment facility at Gladstone was in operation. But, as explained below, the treatment facility shut down in 2005 and water quality in the Animas River dropped dramatically. Fish population surveys conducted by Colorado Parks and Wildlife observed sharp declines in trout and other species for many miles below the confluence of Cement Creek and the Animas. Sunnyside Gold and Colorado regulators witnessed the decline in water quality and aquatic life in the Animas for more than a decade, but did nothing to alert downstream communities in New Mexico that pollutants from the Sunnyside Mine pool were entering the waters of New Mexico.

Kinross Acquires Sunnyside Gold and Strands its Lingering Environmental Liabilities

37. In June 2002, Kinross, Echo Bay, and TVX Gold Inc. entered into a "combination agreement" under the Canada Business Corporations Act. This agreement, effective January 31, 2003, consolidated ownership of the businesses. Through this merger, Kinross acquired all of Echo Bay's subsidiaries (*e.g.*, Sunnyside Gold) and its assets (*e.g.*, the Sunnyside Mine).

38. On March 21, 2003, Kinross Gold U.S.A., Inc. filed an Application for Authority to Transact Business in Colorado. In its application, Kinross Gold U.S.A. stated that it began transacting business in Colorado on January 31, 2003. Kinross Gold U.S.A. was and continues to be a wholly-owned subsidiary of Kinross.

39. Since 2003, Kinross has directed and controlled Sunnyside Gold's remediation activities near Silverton. As explained below, shortly after acquiring Sunnyside Gold, Kinross transferred ownership and operational responsibility for the treatment facility to Gold King Mines Corp. and its President, Mr. Stephen Fearn, an inexperienced operator who quickly proved to be incapable of managing the facility. Colorado, which approved the transfer as part of an amendment to the consent decree, knew or should have known that Kinross's decision to divest itself and its subsidiaries from the treatment facility and to transfer operations to Mr. Fearn would impair the water quality of the Animas River, injure the riverine ecosystem, and imperil the health and livelihood of downstream communities in Colorado and New Mexico.

40. Colorado and Kinross also knew or should have known that the plan to bulkhead the Sunnyside Mine and allow acid mine drainage from the Sunnyside Mine to build within Bonita Peak had created a real and substantial danger of a future, catastrophic blowout. Given the many examples of past mine adit plug and bulkhead failures in Colorado and elsewhere, Colorado and Kinross either knew or should have known that the decision to plug the American Tunnel was fundamentally flawed. That increased discharges of acid mine waste water from other hydraulically connected mine portals, including the Mogul Mine and the Gold King Mine, were evident as early as 2001 should have been the canary in the mine shaft, signaling that something was very much amiss.

Discharges from Gold King Mine and Neighboring Mines Increase and the Wastewater Treatment Facility Is Shut Down (1999 to 2005)

41. Before Sunnyside Gold plugged the Sunnyside Mine, the Gold King Mine was virtually dry. In 1996, the Division of Minerals and Geology inspected the Gold King Mine and found that it drained just one or two gallons of acidic, metal-laden water per minute—a mere trickle. Conditions changed significantly soon after Sunnyside Gold installed the first bulkhead in the American Tunnel. In late 1999, Colorado officials received reports of new discharges from the Gold King Mine, and increased discharges from the neighboring Mogul Mine. Between 1999 and 2001, the discharge rate from the Mogul Mine increased from roughly 30 to 165 gallons per minute; between 1999 and 2005, the Gold King Mine's discharge rate rose from 7 to 40 gallons per minute. As a result, Colorado regulators declared that the Gold King Mine and the Mogul Mine had become two of the worst polluting mines in the state.

42. In 2000, Stephen Fearn, the President of Gold King Mines Corp., bought the Gold King Mine from the trustee for Pitchfork "M" Corporation. In May 2001, WQCD issued a discharge permit to Gold King Mines Corp. for the Level 7 portal. In a 2002 letter to the state, Mr. Fearn noted that discharges from the Level 7 portal had increased to about 60 gallons per minute, corresponding to the installation of a second bulkhead in the American Tunnel.

43. When the discharges from the Mogul Mine surged after the sealing of the American Tunnel, its owner, Mr. Todd Hennis, sued Sunnyside Gold in 2002. Mr. Hennis alleged that water from the Sunnyside Mine pool had found a pathway into the Mogul Mine workings and was trespassing on his property. Mr. Hennis ultimately dropped the lawsuit, and was included in a byzantine agreement with Mr. Fearn and Sunnyside Gold. The heart of the agreement was the transfer of Sunnyside Gold's water treatment plant and its discharge permit to Mr. Fearn. Mr. Hennis received title to most of the land at Gladstone, which contained buildings, equipment, and settling ponds associated with the treatment facility. Sunnyside Gold also agreed to bulkhead the Mogul Mine and the neighboring Koehler Mine as part of the deal.

44. In autumn 2002, Gold King Mines Corp. and Mr. Fearn purchased the Mogul Mine from San Juan Corporation ("San Juan Corp.") and its President, Mr. Hennis, for a note. As additional surety to secure the note, Gold King Mines Corp. gave San Juan Corp. a second mortgage on the Anglo Saxon and Harrison Mill Site claims, which included the water treatment facilities and settling ponds respectively at Gladstone. San Juan Corp. also leased another property, the Herbert Placer, to Gold King Mines Corp., which contained settling ponds that Mr. Fearn intended to use for water treatment.

45. In January 2003, with full knowledge of the rising water level in Bonita Peak, Sunnyside Gold formally transferred ownership of its treatment facility and its discharge permit for the American

Tunnel to Gold King Mines Corp. As a result, Mr. Fearn became the operator responsible for the facility.

46. Less than a year into the lease, the relationship between Mr. Hennis and Mr. Fearn broke down. In the fall of 2003, Mr. Hennis sought to evict Mr. Fearn from the Herbert Placer for failing to maintain adequate liability insurance and neglecting to remove sludge from the settling ponds. Eventually, Mr. Hennis and Mr. Fearn reached a compromise giving Mr. Fearn more time to remove the sludge and devise an alternative method to treat mine drainage.

47. Over the next year, Gold King Mines Corp. and Mr. Fearn suffered a series of setbacks, culminating in the closure of the treatment facility. First, in March 2004, one of the surety bonds covering the Gold King Mine was canceled. The Division of Minerals and Geology ordered Mr. Fearn to replace the canceled bond, though he never did. Then, in September, WQCD issued a notice of violation to Gold King Mines Corp. for exceeding the Gold King Mine Level 7 portal's permitted discharge limits for zinc, copper, and pH. Finally, in October, Mr. Hennis returned to court, again complaining that Mr. Fearn was in breach of the lease.

48. The court ruled in favor of San Juan Corp. and Mr. Hennis, and ordered Mr. Fearn to cease discharging wastewater into the Herbert Placer settling ponds and to remove residual sludge. Now evicted and without a way to treat the acidic discharges from the American Tunnel and the Gold

King Level 7 portal, Mr. Fearn diverted the untreated discharges into Cement Creek and, ultimately, the Animas River.

49. Gold King Mines Corp. filed for bankruptcy the next year. Colorado's Mined Land Reclamation Board ordered the forfeiture of Gold King Mines Corp.'s reclamation bonds for the Gold King Mine. As the second mortgage holder, San Juan Corp. acquired the Gold King Mine through a foreclosure action. It has owned the Gold King Mine ever since.

DRMS's Actions at the Gold King Mine (2007 to 2009)

50. Acid mine drainage from the Level 7 adit continued to grow after San Juan Corp. and Mr. Hennis acquired the Gold King Mine. The adit had collapsed during the winter of 2004, which accelerated the drainage and saturated part of the waste rock dump in front of the adit. By 2007, the discharges had surged to between 150 to 200 gallons per minute, based on the season. In response, DRMS prepared to re-direct the discharges away from the slope of the waste rock dump and re-rout the water into Cement Creek.

51. When DRMS notified Mr. Hennis of the situation and its plan, Mr. Hennis installed a lined channel on top of the waste rock dump to redirect the mine drainage from the Gold King Mine into Cement Creek. Later, on August 28, 2007, Mr. Hennis met with DRMS officials and an EPA official

named Steve Way to discuss his own plan to address the Level 7 adit discharges.

52. At the 2007 meeting, Mr. Hennis voiced his concerns about a potential blowout of the portal at Level 7. In fact, Mr. Hennis requested EPA's help in entering the mine to investigate potential blockages of the portal that could cause a hazardous blowout. Public documents show that Mr. Hennis told Colorado and EPA officials that the investigation would confirm that the Sunnyside Mine pool was the source of the Gold King Mine's discharges.

53. In public interviews, Mr. Hennis repeatedly stated that he presented water quality data to EPA, Colorado, Kinross, and Sunnyside Gold, which demonstrated that water from the Sunnyside Mine pool had flooded the Gold King Mine. On information and belief, Colorado officials were told many times over many years to re-open the bulkheads in the American Tunnel, lower the mine pool to prevent further flooding of the Gold King Mine and neighboring mines, and restore the water table within Bonita Peak to the level that existed before the plugging of the American Tunnel.

54. In 2008, DRMS started partial reclamation work at the Gold King Mine site using Gold King Mine Corp.'s forfeited reclamation bonds. That year, DRMS secured all four portals and installed a grated closure at the Level 7 adit to facilitate drainage. DRMS also redirected the flow into a "diversion structure"—essentially a half pipe set into a graded ditch—that conveyed drainage

away from the front portal and the waste rock dump. Presaging the August 5, 2015 event, in DRMS's 2008 project summary describing these actions, DRMS admitted that it closed the Level 7 adit in a way that allowed the potential for a blowout.

55. In September 2009, DRMS returned to the Gold King Mine site and backfilled the Level 7 adit. DRMS planned to install a drainage pipe (24-inch diameter, 30 feet long) at the floor of the adit to drain the mine and prevent an increase in hydraulic pressure. DRMS's plans emphasized that the pipe should be set at a slight slope to the outside to facilitate drainage.

56. When DRMS started work, its employees observed a collapse about 30 feet inside the adit. To view the collapse and monitor the unstable conditions, DRMS decided to insert an observation pipe (30-inch diameter, 20 feet long) about 12 inches above the top of the drainage pipe. When DRMS began inserting the pipes and backfilling around them, timbers that supported the portal collapsed and loose material completely covered the observation and drainage pipes.

57. DRMS voiced concerns that this collapse would raise the water pressure within the Gold King Mine workings, making a blowout even more likely than before. To relieve this concern, DRMS drove a steel pipe "stinger" through the drainage pipe and into the collapsed material. The stinger was six inches in diameter and 44 feet long.

58. DRMS records are unclear about precisely how far the stinger extended into the mine. A contemporaneous DRMS record said the stinger extended 14 feet past the end of the 30-foot drainage pipe, while the 2009 DRMS project summary said it penetrated at least some of the 12 feet of collapsed material. Regardless, the 2009 DRMS project summary also observed that the stinger "was unable to penetrate through any of the original collapse in the tunnel" and stated that the adit continued to drain about 200 gallons per minute, similar to the rate before DRMS backfilled the adit and installed the two pipes and stinger. DRMS knew or should have known that it failed to adequately address the collapse and the resulting build up of water pressure that it caused by inserting the observation pipes into the adit.

59. Besides backfilling the adit, DRMS constructed a concrete channel and installed a flume on the surface of the waste dump. The flume and channel were located in front of the adit and connected to the drainage ditch that DRMS had installed in 2008.

EPA's Actions at the Red and Bonita Mine (2011 to 2015)

60. In 2011, EPA began reclaiming the Red and Bonita Mine, where debris covered a collapsed historical adit. Since 2009, acid mine drainage had been discharging through the debris and entering Cement Creek at rates from 181 to 336 gallons per minute, apparently also affected by the Sunnyside Mine pool.

61. EPA intended to excavate the portal and capture the water in a treatment pond built below the waste rock dump. Before proceeding, however, EPA contacted the Department of Interior's Bureau of Reclamation ("BOR") and explained its work plans. BOR warned EPA about the potential for a blowout at the Red and Bonita Mine and told EPA to review maps of the mine and reconsider its plan with the assumption that the mine was full of water. BOR also asked how EPA would respond to a sudden release of that much water (*i.e.*, potentially millions of gallons).

62. After this discussion, EPA apparently understood these risks and changed its approach. EPA's contractors drilled a well about 30 feet upslope from the mine opening to determine the volume of water inside the mine. Measurements of the water level indicated that the mine in fact contained much more water than EPA originally assumed. EPA then expanded the treatment pond and devised a plan to insert a stinger pipe through the top of the collapsed debris blocking the entrance. EPA planned to pump down the water through the stinger pipe to its treatment ponds. This technique is commonly used to prevent blowouts at flooded mines, and following this procedure, EPA successfully and safely opened the Red and Bonita Mine adit in October 2011.

DRMS's and EPA's Actions at the Gold King Mine in 2014

63. EPA obtained access to the Gold King Mine in 2008 through an agreement with San Juan

Corp. and Mr. Hennis. The agreement allowed EPA, the U.S. Bureau of Land Management, and DRMS to enter the Gold King Mine and Mogul Mine sites and other properties owned by San Juan Corp.

64. In 2014, DRMS asked EPA to re-open the Gold King Mine Level 7 adit and investigate the drainage situation. In June, EPA issued a "Task Order Statement of Work" that set forth its general work plan for the Gold King Mine. EPA began work at the Gold King Mine in September under the direction of On-Scene Coordinator ("OSC") Steven Way, who had met with Mr. Hennis and DRMS six years earlier when Mr. Hennis warned that plugging the American Tunnel had flooded the Gold King Mine and surrounding mines.

65. On September 11, 2014, EPA's contractors started excavating and removing the metal grating and portions of the two pipes that DRMS had installed in 2009 earlier at the Level 7 adit. After just two hours of excavation on the blockage, the crew abruptly stopped work. EPA postponed the remaining work until 2015.

66. Following EPA's abrupt decision to halt work at the Gold King Mine, Mr. Way, as the project leader, drafted a report for his EPA Region 8 superiors. In the report, Mr. Way documented the EPA crew's conclusions about the location of the pipes installed by DRMS and the elevation of the adit floor, specifically, that the pipes were adjacent to the adit roof. Inexplicably, those conclusions directly conflicted with DRMS records available at the time. DRMS's records of its 2009 reclamation

work indicate that the drainage pipe was installed on the *floor* of the adit at a slight slope to encourage drainage from the mine. Further, the observation pipe was installed just above the drainage pipe.

67. In the report to Region 8, however, Mr. Way wrote that shortly after excavation began, "the work on [the] blockage was stopped when it was determined the elevation of the adit floor was estimated to be 6 feet below the waste-dump surface elevation." EPA apparently assumed that the floor was six feet below the level of the waste dump surface because it concluded—contrary to DRMS's own records—that DRMS had installed the two drainage pipes immediately *below* the roof of the adit. When EPA was at the site in 2014, the two pipes were stacked on top of each other (together about 48 inches tall) and the bottom of the lower pipe was nearly level with the waste rock dump. Because the original height of the adit was 10 feet, EPA concluded that the adit floor was actually six feet beneath the surface of the waste dump.

68. EPA compounded this error by failing to test and confirm the amount of water behind the adit by using a drill rig to bore into the mine from above and inserting a stinger pipe, just as it had done at the Red and Bonita Mine in 2011. Had EPA simply followed this common practice—and its own precedent—it would have discovered the Level 7 adit contained a vast quantity of highly pressurized water. A hydraulic pressure test would have left no doubt that it was unsafe to remove the backfill and that EPA needed to take additional precautions to prevent an "excavation-induced failure."

69. On information and belief, before EPA left the site that year, the construction crew pushed large quantities of earthen material and debris in front of the DRMS-installed pipes, forming an earthen plug that prevented the mine from draining and caused a head of water to further build up behind the blockage.

The Final Events Before the Blowout of the Gold King Mine

70. In January and May 2015, DRMS and EPA presented their plans for reopening and investigating the Gold King Level 7 portal at public meetings held by the Animas River Stakeholders Group in Silverton. Then, in July, DRMS and EPA returned to the Gold King Mine. They collected water samples and measured the flow from the adit, graded the surface of the waste dump, and started building a water management and treatment system to handle an anticipated increase in discharges from the mine. During three months of site preparation, however, no one bothered to test the hydrostatic pressure behind the blocked portal.

71. According to the BOR's technical evaluation of the blowout, Mr. Way called a BOR engineer named Michael J. Gobla "[o]n or about July 23" to discuss the situation at the Gold King Mine site. Mr. Way was about to leave for vacation and would return to the site on August 14. During the conversation, Mr. Way asked Mr. Gobla to visit the site and evaluate EPA's excavation plans. Because Mr. Way was "'unsure about the plans for the Gold King Mine" and wanted an outside independent

review of the plans by BOR, they agreed that Mr. Gobla would conduct an on-site review of the plans on August 14—after Mr. Way returned.

72. In late July or early August 2015, Mr. Way left for vacation and another EPA employee, Mr. Hays Griswold, took over in his absence. On July 29, 2015, Mr. Way emailed specific instructions about work at the site during the week of August 3 to individuals from DRMS, EPA, and EPA's contractors. Photographs of EPA's work at the site on August 4 and 5 reveal that Mr. Griswold and the crew did not follow Mr. Way's written instructions. Nor, for that matter, did they follow the contractor's existing work plan. For example, the EPA crew, under Mr. Griswold's direction, excavated toward the adit floor at the level of the drainage pipe. Yet Mr. Way told the on-site crew to have a pump, hose, and stinger pipe on hand before removing *any* material at the level of the two pipes. Photographs taken on August 4 and 5 confirm that the excavation team was excavating at the level of the drainage pipes, toward the adit floor, without a pump, hose, or stinger on hand. The combination of EPA's decision not to test for hydrostatic pressure and Mr. Griswold's failure to follow Mr. Way's directive was a recipe for disaster. In direct violation of Mr. Way's written instructions, the crew dug directly toward the earthen material holding back millions of gallons of acid mine drainage and waste.

73. On August 4, at about 8:45 am, Mr. Griswold arrived at the site. An unknown DRMS employee arrived an hour later. With an incomplete safety plan, an inadequate site evaluation, and

lacking necessary equipment on hand, the crew began digging at the adit around 10:30 a.m. By the end of the day, the crew had excavated all but a small portion of the drainage pipe that DRMS installed in 2009. Contemporaneous photographs of the excavated adit show what appears to be wooden debris from the portal structure embedded in the earthen plug that held back the water within the mine.[6]

74. The following day, August 5, 2015, more personnel from DRMS joined EPA and the crew at the Level 7 adit to continue excavating. That morning, EPA excavated and removed the last remnants of the DRMS-installed pipes. Because, at this point, the pipes were visibly well below the plug, the EPA crew should have recognized they were removing material at least several feet below the roof of the adit.

75. Next, the EPA crew backfilled the excavated area in front of the plug and built a large earthen berm. Apparently having decided to drain the mine—again without testing the pressure, having an adequate safety plan, receiving BOR's input, or following other directives—the crew dug a channel on the right side of the berm and positioned planks so that slow-flowing water from the adit could be directed to the drainage channel that DRMS had previously installed.

---

[6] This "plug" (*i.e.*, blockage) was a combination of collapsed debris within the mine, backfill placed by dumping from the bucket of an excavator, and material from the surficial slope failure at the mine portal.

76. After the EPA crew resumed digging at the mouth of the adit, the operator soon reported hitting a "spring." Surprisingly, the crew did not attempt to backfill the adit or plug the "spring." Within minutes, the "spring" became a surge, culminating in the massive blowout that contaminated the Animas River, the San Juan River, and Lake Powell with over three million gallons of acid mine drainage and sludge, and 880,000 pounds of metals.

New Mexico's Environmental and Economic Injuries from the Gold King Mine Release

77. For at least a decade, Colorado knowingly allowed contamination from the Upper Animas Mining District to increasingly poison the waters of the Animas River. Following Colorado's agreement to shutter the Gladstone Water Treatment facility in 2005, hundreds of millions of gallons of metals-laden acidic wastewater have poured into the Animas River and flowed directly into New Mexico. Since 2005, water quality has plummeted and the trout that were once abundant in the Animas have largely disappeared. The acid mine drainage emanating from the Upper Animas was some of the worst in the country, prompting EPA to repeatedly attempt to list the area on the National Priorities List. However, Colorado and local governments opposed that listing for years, in an apparent effort to protect the tourism economy in and around Durango and Silverton, at the expense of New Mexico and downstream communities. Since 2005, the Animas and San Juan Rivers in New Mexico have been polluted by the Sunnyside Mine

Pool, Colorado's agreement to close the Gladstone Treatment Plant, and Colorado's failure to address the ever-worsening conditions.

78. The Secretary of Environment is the Natural Resources Trustee for the State of New Mexico. NMSA 1978, §§ 75-7-1 et seq.

79. After New Mexico received notice of the Gold King Mine release on August 6, 2015, the New Mexico Environment Department ("NMED") immediately contacted public water systems and recommended that they consider shutting off the intake of water along the Animas River until more information about the contamination was known. The next day, NMED contacted Arizona, Utah, and the Navajo Nation to coordinate and share information. On August 8, the plume of contamination passed the confluence of the Animas and San Juan Rivers. On August 10, Governor Susana Martinez declared a state of emergency in New Mexico.

80. New Mexico incurred millions of dollars in immediate emergency response costs because of the Gold King Mine release. New Mexico's initial response and monitoring costs involved 14 different New Mexico state agencies, academic organizations, and communities. State and local emergency response staff, engineers, scientists, public servants, academics, and private citizens came together to monitor the plume of contamination as it meandered downstream. Those response and monitoring activities included advance, crisis, and post-crisis water sampling and testing, sediment testing,

agricultural ditch inventories and testing, public outreach, hundreds of private well tests, providing potable water, supporting drinking water systems, supplying showering stations, and offering monitoring equipment.

81. New Mexico will incur further costs in implementing its Long-Term Monitoring Plan and a Spring Run-Off Preparedness Plan. These plans address the imminent and ongoing melting of the spring snowpack that will increase surface water turbidity, re-suspend, and re-mobilize metals deposited throughout the Animas and San Juan Rivers, as demonstrated by recent sampling. For example, NMED recently took samples north of Durango, Colorado, where yellow discolored sediment was visible at residential properties along the Animas River. NMED received lab results of these samples on May 3, 2016, which EPA received on the same day. The sediment sample contained 3,100 ug/g (equal to 3,100 mg/kg or "parts per million") of lead. This lead concentration far exceeds the risk level of 400 mg/kg developed by EPA for lead in residential soil—a level specifically calculated for non-carcinogenic effects in children. A lead concentration of 500 mg/kg has been used as a cleanup target for contaminated sediments at numerous Superfund sites in New Mexico and elsewhere. A 500 mg/kg target would be appropriate for sediments affected by the Gold King Mine release, an event that by EPA's own estimation discharged 880,000 pounds of metals into the Animas River.

82. New Mexico is especially concerned about the further migration of these metals from the Animas River, the continuing discharges of the Sunnyside Mine pool, and the concomitant long-term impacts to New Mexico's waterways. It is now clear that releases from those mines occurred before, during, and after the Gold King Mine blowout. Those releases will continue until a more comprehensive control strategy is implemented at the mining sites, and the contamination in the sediments of the Animas and San Juan Rivers is fully addressed. New Mexico, its counties, and its local governments will continue to incur additional costs to monitor the residual effects of these pollutants for an indefinite future period.

83. New Mexico has and will suffer significant economic losses from reduced business activity and lost tax revenue as a direct and proximate result of the Gold King Mine blowout. Many businesses in northern New Mexico rely on the Animas and San Juan Rivers for recreational rafting and fishing services, as well as irrigation, farming, and ranching activities. Because of the uncertainty and anxiety generated by widely-circulated images of the sickly yellow river, recreational and agricultural uses stopped or slowed to a crawl, while many anglers and tourists avoided visiting San Juan County altogether. The reduced economic activity and related reduction in GDP caused by the spill have directly affected New Mexico's tax base. Simply put, the Gold King Mine release has already cost the State of New Mexico millions of dollars in taxes, fees, and other income from regional economic activities.

84. The discharged wastewater and sludge from the Gold King Mine was highly acidic and contained arsenic, lead, mercury, cadmium, copper, zinc, and other dangerous metals. Many of these pollutants have now fallen out of the water column and settled in the sediments of the Animas and San Juan Rivers, as well as in Lake Powell. These pollutants present imminent and substantial human health and environmental risks. 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. Similar depositional areas containing hot spots of metals and contaminated metals likely exist throughout the Animas and San Juan Rivers and in Lake Powell. Public health officials have discovered metal-laden sediment in affected irrigation ditches in New Mexico, both immediately after the spill and in recent months. High flow events, storms, and the annual spring runoff will re-suspend and re-mobilize these contaminants, distribute them throughout the Animas and San Juan Rivers, and push them into Lake Powell for years to come.

85. Additionally, the Animas and San Juan Rivers have been stigmatized by the metals, acidic rock waste, and contamination from the Gold King Mine release. The indelible images of a mustard-tinged toxic plume meandering downstream into the habitat of several endangered species and superb sport fishing and recreational grounds will linger long after the visible impacts of the release have vanished. Stigma from the Gold King Mine release will reduce the economic benefits of New Mexico's

natural resources until its lands and waterways are fully restored, and very likely beyond. The direct and tangible effects of this lingering stigma include lost economic activity and associated taxes, fees, and income because of reduced tourism, fishing, and land uses. Besides the tax revenue and income losses that New Mexico has already suffered, the State estimates that the contamination and stigma from the Gold King Mine release will cause additional direct economic losses and damages for years to come, far surpassing the economic damages the State has already suffered.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION: COST RECOVERY UNDER CERCLA 42 U.S.C. § 9607(a)

86. New Mexico incorporates the allegations in all preceding paragraphs.

87. Colorado is a "person" under CERCLA. 42 U.S.C. § 9601(22).

88. The Gold King Mine and Sunnyside Mine are "facilities" under CERCLA. 42 U.S.C. § 9601(9). Downstream "sinks" in the Animas River where metals and waste from the mines and the Sunnyside Mine pool have been deposited are separate "facilities" under CERCLA.

89. "Releases" of "hazardous substances"—including arsenic, lead, mercury, cadmium, copper, and zinc—from these facilities have occurred and are

still occurring. 42 U.S.C. §§ 9601(22) and (14). These releases include the August 5, 2015 Gold King Mine release, as well as past and present releases from the Sunnyside Mine pool through the Gold King Mine, the Sunnyside Mine, and surrounding areas operated by Colorado. These hazardous substances have settled into the sediment of the Animas and San Juan Rivers in New Mexico.

90. Because of these "releases" and the substantial threat of future releases, the State of New Mexico incurred response costs that were both "necessary" and "not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4), (a)(4)(B).

91. By extensively managing, directing, and implementing reclamation activities at the Gold King Mine site, Colorado was an "operator" of the site when the August 5, 2015 release occurred and for many years before. Colorado had authority to control reclamation and remediation activities at the site, and its decisions and actions caused the release that contaminated the Animas and San Juan Rivers in New Mexico.

92. Colorado, by contract, agreement, or otherwise, arranged for the disposal, treatment, and transport of hazardous substances released from the Sunnyside Mine pool through the Gold King Mine, the Sunnyside Mine, and surrounding areas. Colorado accepted hazardous substances from the mines for transport and disposal, including to settling ponds and other treatment facilities, and releases from those facilities occurred.

93. By taking intentional steps to dispose, treat, and transport of hazardous substances at the Gold King Mine site—both before and on August 5, 2015—Colorado was an "arranger" under CERCLA. 42 U.S.C. § 9607(a)(3). Colorado had authority to dispose, treat, and transport of hazardous substances at the site, and mining or waste disposal could not occur without its approval.

94. Under CERCLA § 9607(d)(1), any person is liable for costs and damages if that person negligently renders care or advice in a manner that is inconsistent with the National Contingency Plan.

95. Colorado's actions substantially caused and contributed to the contamination of the Animas and San Juan Rivers in New Mexico, and it is liable for the resulting indivisible harms and contamination.

96. New Mexico has incurred costs responding to the release and the substantial threat of releases of hazardous substances from the Gold King Mine. These costs are not inconsistent with 42 U.S.C. § 9607(a)(4) and the National Contingency Plan requirements found in 40 C.F.R. Part 300. New Mexico continues to incur response costs to address contamination in the Animas and San Juan Rivers from the August 5 release, as well as past and ongoing releases from the Gold King Mine, the Sunnyside Mine, the Sunnyside Mine pool, and surrounding areas.

97. New Mexico is a "State" authorized to recover costs to assess damages to natural resources

under CERCLA. 42 U.S.C. § 9607(a). Section 9607(a) provides that New Mexico may also recover interest on response costs incurred.

98. Colorado is liable to New Mexico for all response costs incurred and costs that New Mexico will incur to clean up the Animas and San Juan Rivers, including enforcement costs and prejudgment interest on those costs.

SECOND CAUSE OF ACTION: DECLARATORY JUDGMENT UNDER CERCLA 42 U.S.C. § 9613(g)(2)

99. New Mexico incorporates the allegations in all preceding paragraphs.

100. CERCLA specifies that in any action for recovery of costs under 42 U.S.C. § 9607, "the court shall enter a declaratory judgment on liability for response costs . . . that will be binding on any subsequent action or actions to recover further response costs . . . ." 42 U.S.C. § 9613(g)(2).

101. New Mexico will continue to incur response costs to address the contamination of the Animas and San Juan Rivers.

102. New Mexico is entitled to entry of a declaratory judgment that Colorado is liable for future response costs and natural resource damages assessment costs based on the contamination of the Animas and San Juan Rivers to the extent that those costs are not inconsistent with the National Contingency Plan.

THIRD CAUSE OF ACTION: INJUNCTIVE RELIEF UNDER RCRA 42 U.S.C. § 6972(a)(1)(B)

103. New Mexico incorporates the allegations in all preceding paragraphs.

104. RCRA authorizes citizen suits 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). Under RCRA, a court may order any person referred to in paragraph (1)(B) "to take such . . . action as may be necessary" to eliminate endangerment to health or the environment. 42 U.S.C. § 6972(a).

105. RCRA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3).

106. New Mexico is a "person" under RCRA, 42 U.S.C. § 6903(15), and is entitled to commence a civil action under RCRA's citizen suit provision.

107. Colorado is a "person" under RCRA. 42 U.S.C. § 6903(15).

108. The Gold King Mine release discharged arsenic, lead, mercury, cadmium, copper, and zinc into the Animas and San Juan Rivers. These substances are "hazardous wastes" and/or "solid wastes" under RCRA. 42 U.S.C. § 6903(5)(B).

109. By directly causing the Gold King Mine release, Colorado has contributed and is contributing to the disposal of solid and/or hazardous wastes, which present an imminent and substantial endangerment to the health and the environment in the Animas and San Juan Rivers both above and below the Colorado-New Mexico state line.

110. By letter dated January 14, 2016, NMED notified Colorado of its intent to file suit to restrain or abate the conditions that present or may present an imminent and substantial endangerment to health or the environment in New Mexico. *See* Appendix A-3. New Mexico's letter followed the notice requirements found in 42 U.S.C. § 6972(b).

111. More than ninety days have passed since NMED sent Colorado its notice of intent to file suit under RCRA, 42 U.S.C. § 6972(a)(1)(B). The imminent and substantial threats described in that letter are continuing or are reasonably likely to continue. Therefore, New Mexico is entitled to entry of an injunction that may require, among other things, a full investigation and remediation of segments of the Animas River downstream of Silverton, Colorado, where vast amounts of hazardous substances from the Gold King Mine and neighboring mines now sit.

FOURTH CAUSE OF ACTION:
PUBLIC NUISANCE

112. New Mexico incorporates the allegations in all preceding paragraphs.

113. The use and enjoyment of the Animas and San Juan Rivers in New Mexico are rights common to, and belonging to, all members of the public.

114. Colorado authorized and allowed Kinross, Kinross Gold U.S.A., and Sunnyside Gold to abandon the water treatment facility in Gladstone and to plug the Sunnyside Mine's American Tunnel and its other workings.

115. Colorado knew or should have known that authorizing and allowing the plugging of the American Tunnel and the other drainage features of the Sunnyside Mine would increase the pressure of acidic water within the mine's workings. Colorado also knew or should have known that the Sunnyside Mine pool would rise to a level above the portals of neighboring mines and create new discharges from neighboring mine portals that would offset any reduction in pollutant loading from the American Tunnel bulkhead.

116. Colorado knew or should have known that ending the treatment of the acid mine drainage from the Sunnyside mine pool would send vast amounts of contamination into New Mexico's waters. In fact, immediately after the shuttering of the treatment facility in 2005, the water quality of the

Animas and San Juan Rivers declined, and trout all but disappeared in the Animas above Durango, Colorado. Since 2005, pollution emanating from the Sunnyside Mine pool has flowed into New Mexico and beyond, degrading New Mexico's waters and riverbeds for more than a decade. Colorado has known of the contamination pouring into New Mexico, the Navajo lands, Utah and Lake Powell, but has done nothing to address it.

117. Colorado knew that it had created a hazardous condition by authorizing and allowing the plugging of the American Tunnel and other drainage features, but disregarded multiple warnings about the potential consequences of that decision.

118. Colorado knew or should have known that discharges from the Gold King Mine and surrounding areas had increased dramatically because of the plugging of the American Tunnel and other features that once drained the Sunnyside's workings. And it knew or should have known that the Gold King Mine had been flooded with acid mine drainage that formed in the Sunnyside Mine pool.

119. Colorado knew or should have known that its reclamation activities at the Gold King Mine, including digging out the debris and blockage at Gold King Mine Level 7 adit, could cause a blowout of the water impounded in the mine.

120. The contamination of the Animas River and San Juan River and surrounding environs that resulted from releases of hazardous substances caused by Colorado constitutes a physical invasion of

public and private property in New Mexico. The contamination is also an unreasonable and substantial interference, both actual and potential, with the exercise of New Mexico's right and the common right of the public to the use and enjoyment of the rivers, including the biota, lands, waters, and sediments therein.

121. These releases have interfered with and continue to interfere with New Mexico's and the public's use and enjoyment of the rivers and surrounding areas. These releases also present an unreasonable and substantial danger to the public's health and safety. New Mexico has suffered special injuries, which the public as a whole does not share. New Mexico has and will continue to suffer lost economic activity, tax revenues, and stigmatic damages arising from these releases.

122. Colorado's past, present and ongoing conduct, and the contamination caused by its conduct, constitutes a public nuisance. Colorado has caused continuing and substantial injuries, which threaten irreparable harm to New Mexico's public and its environment. This public nuisance will continue as long as the Animas and San Juan Rivers and surrounding areas are contaminated with hazardous substances from the Gold King Mine and Sunnyside Mine pool.

123. Unless and until Colorado abates this public nuisance in the Animas and San Juan Rivers and surrounding areas, it will remain liable for the creation and continued maintenance of a public nuisance.

124. New Mexico is entitled to recover damages from Colorado.

125. New Mexico is entitled to entry of an order compelling Colorado to abate the public nuisance.

FIFTH CAUSE OF ACTION: NEGLIGENCE AND GROSS NEGLIGENCE

126. The State of New Mexico incorporates the allegations in all preceding paragraphs.

127. Colorado had a duty to oversee, manage, maintain, and regulate the Gold King Mine and Sunnyside Mine with reasonable care. Colorado also had a duty to conduct its investigations and work activities at the mines with reasonable care. It was foreseeable that Colorado's failure to use reasonable care in performing these activities would cause injuries and damages to New Mexico and other states, local communities, and individuals downstream of the mines.

128. As further alleged below, the Colorado's actions were grossly negligent, meaning their actions constituted reckless, wanton, and willful misconduct.

129. Colorado was negligent or grossly negligent by authorizing and allowing the plugging the American Tunnel and surrounding mine portals, thereby creating a highly hazardous condition within the Gold King Mine.

130. Colorado was negligent or grossly negligent by failing to ensure that the discharges

from the American Tunnel and surrounding mine portals were permitted, treated, and remediated.

131. Colorado was negligent or grossly negligent by, among other things:

- Failing to investigate or test the hydraulic pressure within Gold King Mine Level 7 adit, despite knowing that the mine was holding back significant quantities of water;

- Relying on flawed assumptions that contradicted publicly available records and substantially underestimated the amount of water within the mine;

- Excavating the Level 7 portal's drainage pipes and the earthen plug without using a stinger pipe, a pump, and other equipment necessary to dewater the mine in a safe and controlled manner;

- Conducting operations using a health and safety plan that contained no contingency plan for an uncontrolled release of water from the mine;

- Ignoring the lead EPA OSC's specific written instructions on the timing, scope, and method of excavating the collapsed portal; and

- Carrying out excavation work on August 4 and 5, 2015, without the presence of the lead OSC and without the inspection and

input from BOR's supervisory engineer, again, in violation of the lead OSC's unequivocal instructions.

132. Colorado's conduct caused direct and identifiable harms to New Mexico and its citizens.

133. New Mexico is entitled to recover compensatory and punitive damages from Colorado.

PRAYER FOR RELIEF

WHEREFORE, New Mexico, prays that the Court:

1. Declares that Colorado is liable under CERCLA, 42 U.S.C. § 9607(a) and common law, for all costs, including prejudgment interest, incurred by New Mexico in responding to releases or threatened releases of hazardous substances from the Gold King Mine, the Sunnyside Mine, or the American Tunnel to the date of judgment;

2. Declares that Colorado is liable under CERCLA, 42 U.S.C. § 9613(g)(2) and common law, for all response costs that will be incurred by New Mexico in responding to releases or threatened releases of hazardous substances from the Gold King Mine, the Sunnyside Mine, or the American Tunnel;

3. Declares that Colorado is in violation of RCRA's imminent and substantial endangerment provision, 42 U.S.C. § 6972(a)(1)(B), until it ceases the disposal of hazardous substances from the Gold King Mine and the Sunnyside Mine,

including, but not limited to, acid wastewater, mine sludge, mine-dump runoff, and metals into the Animas River watershed;

4. Declares that Colorado has negligently, recklessly and willfully authorized and allowed the discharge of toxic mine waste directly into the Animas River in a manner that has injured and continues to threaten the health, safety, and comfort of downstream New Mexico residents;

5. Awards New Mexico compensatory, consequential, and punitive damages caused by Colorado's negligent, reckless and willful conduct, including, but not limited to, investigation, clean-up, and remedial costs, economic loss, diminution in value, and stigma damages;

6. Orders Colorado to abate the ongoing public nuisance in the Upper Animas Mining District and the Animas River within Colorado;

7. Declares that Colorado is liable for all costs incurred and costs that may be incurred by New Mexico to abate the nuisance in the Animas and San Juan Rivers within New Mexico;

8. Awards New Mexico its costs of this action, including attorneys' fees; and

9. Grants any further relief, at law or in equity, that this Court deems just and proper.

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
JACKSON GILMOUR &
DOBBS, PC
3900 ESSEX, SUITE 700
HOUSTON, TX 77027
TEL. (713) 355-5005
FAX. (713) 355-5001
(FAX)
EMAIL:
BJACKSON@JGDPC.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*

No. _____, Original

IN THE
Supreme Court of the United States

STATE OF NEW MEXICO,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Sources

No. _____, Original

IN THE
Supreme Court of the United States

STATE OF NEW MEXICO,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

The State of New Mexico moves this Court for leave to file a Bill of Complaint against the State of Colorado pursuant to this Court's exclusive original jurisdiction and would respectfully show as follows.

STATEMENT OF JURISDICTION

This Court has exclusive and original jurisdiction pursuant to Article III, § 2, cl. 2 of the United States Constitution and 28 U.S.C. § 1251(a).

INTRODUCTION

"A river," as Justice Holmes once observed, "is more than an amenity, it is a treasure." *New Jersey v. New York*, 283 U.S. 336, 342 (1931). For New Mexico, the Animas and San Juan River systems are

a unique and precious cultural, economic, and natural resource. Beginning high in the ruddy San Juan Mountains in southwestern Colorado, the Animas River runs south through Durango, and arrives in New Mexico as a full-fledged river. The river then flows south through the city of Aztec, New Mexico, past ancestral tribal lands, before joining the San Juan River near Farmington. The San Juan drains an arid region, and is often the only significant source of fresh water along its length. The San Juan's muddy, winding waters provide prime fishing grounds: the "Miracle Mile"—a four-mile stretch below the Navajo Dam in northwest New Mexico— has been deemed "Quality Waters" by the State of New Mexico and is one of North America's most hallowed fishing areas. These rich waters spawn abundant flora, creating a fertile habitat for insects and invertebrates that supports prolific trout populations. The economy and way of life of northern New Mexico has always depended on the health and integrity of the Animas and San Juan River systems.

Today, however, the communities, environment, and economy of northwestern New Mexico are at serious risk from upstream pollution generated in Colorado. Large and ever-increasing amounts of metals and toxic wastes from hundreds of historic mines surrounding the Animas headwaters have contaminated—and are still contaminating—the Animas and San Juan Rivers. The Gold King Mine release alone dumped more than three million gallons of acid mine drainage containing over 880,000 pounds of toxic metals into the Animas and San Juan River systems. Colorado

has authorized and allowed the generation and discharge of this pollution into New Mexico's waterways for years, to the detriment of New Mexico's people, natural resources, and prosperity.

New Mexico's claims against Colorado fall within this Court's exclusive original jurisdiction over controversies between two sovereign states. Here, there is an actual, existing, and ongoing dispute over Colorado's responsibility for polluting the Animas and San Juan River systems, as well as the nature and scope of the risk to human health, safety, and the environment from that pollution. Colorado's actions have caused—and if not remedied, will continue to cause—direct, immediate, and potentially irreparable injuries to New Mexico and its inhabitants.

No other forum is fit to resolve the issues presented in New Mexico's Bill of Complaint. All efforts to resolve this controversy outside of litigation have proven unsuccessful. The exercise of exclusive original jurisdiction by this Court is the only available means to resolve this conflict between two sovereign states. New Mexico therefore calls upon this Court to ensure that it is compensated for its injuries, and that its citizens, environment, and natural resources are protected from continuing mine waste pollution emanating from Colorado.

STATEMENT OF THE CASE

On August 5, 2015, the United States Environmental Protection Agency ("EPA"), the Colorado Division of Reclamation, Mining and Safety

("DRMS"), and EPA's contractor, Environmental Restoration LLC, breached the portal of the Gold King Mine, releasing over three million gallons of toxic mine wastewater and over 880,000 pounds of metals into Cement Creek, a tributary of the Animas River in southwestern Colorado. The garish yellow plume flowed down the Animas River through Colorado and into New Mexico, where the Animas joins the San Juan. The plume then coursed hundreds of miles through the San Juan River in northern New Mexico, the Navajo Nation, and into Utah, depositing contaminants in its wake. One week after the blowout, the contamination reached Lake Powell in Utah.

The plume of contamination from the Gold King Mine carried environmentally toxic metals like arsenic, lead, cadmium, copper, mercury, and zinc throughout the river systems. When the plume entered New Mexico's waters, it caused a staggering spike in metal concentrations, far exceeding federal and state drinking water standards. As the contamination flowed downstream, a substantial amount of these metals fell out of the water column and settled in the riverbeds of the Animas and San Juan. Many segments of the Animas River contain "sinks" that temporarily capture these metals. But rainfall, snowmelt, and other high flow events re-suspend these metals and push them further downstream into and throughout New Mexico. Contamination from the Gold King Mine release thus presents imminent and long-term health and safety risks to New Mexico's residents, farmers, ranchers, and recreational users of the Animas and San Juan Rivers. The contamination also threatens

fish, invertebrates, plants, and the broader riverine ecosystem.

Contamination from the Gold King Mine release wrought environmental and economic damage throughout the Animas and San Juan River riparian systems and severely strained New Mexico's already stressed economic and water resources. The shocking sight of the bright yellow plume of contamination eroded the public's confidence in the health of New Mexico's waters. Many businesses along the riverfront lost customers; others were forced to close. Agricultural uses ground to a halt. Potable water was hauled in by truck for humans and livestock. Tens of thousands of local residents, farmers, anglers, and tourists were denied access to the rivers. The reputation of New Mexico's prized sport fishing and recreational waters was tarnished.

The immediate cause and parties responsible for the Gold King Mine blowout are not disputed. On August 5, 2015, an Environmental Restoration work crew, supervised by Colorado DRMS and EPA employees, used an excavator to dig away tons of rock and debris in front of the Gold King Mine's portal entrance. With Colorado's approval, water had been building within the mine and seeping out of the portal for years, and Colorado and EPA officials knew the water was highly acidic and laced with toxic metals. DRMS's records and EPA's work plan not only recognized that the mine was filled with water, but also highlighted the risk of a significant blowout, especially if workers attempted to dig away the blockage. What is more, Colorado and EPA employees had been given specific

instructions by EPA's lead official at the Gold King Mine not to excavate the earthen debris blocking the portal and not to drain the mine without first performing precautionary testing and setting up equipment to contain the discharge. In fact, the lead EPA official told Colorado and EPA employees to postpone excavation until an engineer from the Department of Interior's Bureau of Reclamation could visit the site and evaluate the risks of excavating the portal. Despite the evident dangers and explicit directions from EPA's lead official, Colorado and EPA employees directed, authorized, and allowed the contractor to dig away the blockage without taking those reasonable precautions. The environmental and economic consequences of Colorado and EPA's reckless decisions have been catastrophic for New Mexico's people, environment, and economy.

Besides Colorado's direct role in the Gold King Mine release, Colorado is directly responsible for the hazardous conditions that preceded the catastrophe. In 1996, Colorado entered into a consent decree with Sunnyside Gold Corporation ("Sunnyside Gold"), the operator of the Sunnyside Mine, part of the same network of mines as the Gold King Mine. The consent decree allowed Sunnyside Gold to install concrete plugs—known as bulkheads—in two drainage tunnels below the Sunnyside Mine, and in the portals of several neighboring mines. Sunnyside Gold had permanently closed the mine five years earlier, but it was still operating a water treatment facility that processed wastewater from the drainage tunnels to comply with the Clean Water Act. Because the treatment facility was expensive to

operate and maintain, Sunnyside Gold devised a plan to end perpetual treatment of its wastewater discharges and terminate its Clean Water Act discharge permit. Sunnyside Gold's "solution" was to plug the drainage tunnels so that the mine's tunnels and workings would fill with potentially billions of gallons of water, essentially transforming the mine into an enormous wastewater storage facility.

In the autumn of 2002, six years after it placed the first bulkhead in the American Tunnel, Sunnyside Gold signed an agreement with Colorado and a cash-strapped local company named Gold King Mines Corporation that wanted to revive mining in the area. Gold King Mines Corporation would take title to the water treatment plant and treat lingering discharges from the Sunnyside Mine, as well as water that had started to discharge from nearby mines as a result of the American Tunnel's bulkheads. Meanwhile, Sunnyside Gold was quietly settling litigation alleging that the Sunnyside Mine was flooding another mine: the Mogul.

Colorado was fully aware that Sunnyside Gold's strategy carried substantial risks, but signed-off on the plan anyway. The stated intent of the consent decree was to ensure that water quality in the Animas River would not decline if the treatment plant was closed. But after six years, water quality was not being maintained and in some respects had gotten worse. Then, in 2003, Colorado inexplicably declared that Sunnyside Gold had met all of its obligations under the consent decree, terminated Sunnyside Gold's Clean Water Act discharge permit,

and released the company's multi-million dollar bond that was supposed to ensure the company would be held financially responsible if the plan degraded the Animas River watershed.

The consent decree failed in every respect. As anticipated, a vast pool of acidic and toxic water rapidly filled the Sunnyside Mine soon after the first bulkheads were placed in the drainage tunnels. But the bulkheads also caused water from the Sunnyside Mine to enter the workings of neighboring mines, including the Gold King Mine and the Mogul Mine. Mines that had been virtually dry for decades started discharging hundreds of gallons of acid mine drainage each minute into the river systems. Unsurprisingly, Gold King Mines Corporation went bankrupt in 2005 and the water treatment facility was swiftly shuttered and demolished. Thus, wastewater from the Sunnyside mine pool discharged directly into the Animas River watershed without any treatment.

Since 2005, water quality and aquatic life abundance in the Animas River have declined dramatically. By 2011, acid mine drainage from four abandoned mine sites at and above the former treatment plant—the American Tunnel, the Gold King, the Mogul, and the Red and Bonita—was pouring into Cement Creek at a rate of nearly 850 gallons per minute. Contamination from those mines compelled EPA to study the area for a potential Superfund cleanup. Although EPA considered the problem to be significant enough to warrant listing on the National Priorities List, local support and a sign-off from Colorado's governor was

also required. Unfortunately, Colorado and San Juan County would not support Superfund listing in 2011, choosing to protect the local tourism and skiing economy. Besides invoking Superfund, Colorado could have pursued other options: seeking to require Sunnyside and Kinross to treat the contamination flowing from their mine, reinstating water treatment at Gladstone, or any other measures to reverse the river's decade-long degradation. Instead, Colorado did nothing to achieve downstream water quality standards, at the expense of the entire watershed—from Durango, Colorado to Farmington, New Mexico, and ultimately Lake Powell. While Colorado refused to act, the volume of water and hydraulic pressure within the Gold King Mine continued to build, setting the stage for the catastrophic blowout on August 5, 2015.

Colorado's negligent and reckless actions have prejudiced New Mexico's economy, finances, and natural resources, and have injured the health, comfort, safety, and property of New Mexico's citizens. Colorado authorized and allowed Sunnyside Gold and its parent companies to evade their environmental responsibilities and create an enormous environmental and human health hazard by plugging the Sunnyside Mine and shuttering the Gladstone water treatment facility. When the ruinous results of Colorado's decisions became clear, Colorado did nothing to inform New Mexico of the dangers and took no action to mitigate the pollution from the mines. Then, Colorado—acting in concert with EPA and EPA's contractor—triggered the Gold King Mine release and grievously polluted an

interstate river that provides drinking and irrigation water for tens of thousands of people in New Mexico. New Mexico and its citizens are now paying the price for twenty years of disastrous environmental decision-making by Colorado.

On May 23, 2016, New Mexico filed suit against EPA, Environmental Restoration, and the owners of the Sunnyside Mine in the United States District Court for the District of New Mexico for claims related to the August 5, 2015 release and the events which led to it. *New Mexico v. EPA*, No. 1:16-cv-00465 (D.N.M., filed May 23, 2016). The lawsuit seeks relief under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., the Clean Water Act, 33 U.S.C. § 1251 et seq., and common law. Because this Court has exclusive original jurisdiction over controversies between two or more states, Colorado could not be named as a defendant in that action.

ARGUMENT

New Mexico's dispute with Colorado falls within this Court's exclusive original jurisdiction. The Constitution provides that "[i]n all Cases . . . in which a State shall be [a] Party, the Supreme Court shall have original jurisdiction." Art. III, § 2, cl. 2. Since the First Judiciary Act, Congress has seen fit to designate that this Court "shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a); *see* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80. To

constitute a proper controversy under this Court's original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the acceptable principles of common law or equity systems of jurisprudence." *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981) (quotation omitted). Because New Mexico's Bill of Complaint satisfies this test, this Court should grant New Mexico leave to file its Bill of Complaint—as it has done twelve of the previous fourteen times that a State has sought leave to file a bill of complaint against another State.[7]

This Court considers two factors in deciding whether to grant leave to file a bill of complaint in an original action. First, the Court considers "the nature of the interest of the complaining State, focusing on the 'seriousness and dignity of the claim." *Id.* at 77 (quotation omitted). Second, the

---

[7] *See Texas v. New Mexico*, 134 S. Ct. 1050 (2014); *Florida v. Georgia*, 135 S. Ct. 471 (2014); *Montana v. Wyoming*, 552 U.S. 1175 (2008); *South Carolina v. North Carolina*, 552 U.S. 804 (2007); *New Jersey v. Delaware*, 546 U.S. 1028 (2005); *Alabama v. North Carolina*, 539 U.S. 925 (2003); *New Hampshire v. Maine*, 530 U.S. 1272 (2000); *Virginia v. Maryland*, 530 U.S. 1201 (2000); *Kansas v. Nebraska*, 525 U.S. 1101 (1999); *New Jersey v. New York*, 511 U.S. 1080 (1994); *Louisiana v. Mississippi*, 510 U.S. 941 (1993); *Connecticut v. New Hampshire*, 502 U.S. 1069 (1992); *see also Arkansas v. Oklahoma*, 546 U.S. 1166 (2006) (denying motion for leave to file a bill of complaint); *Nebraska and Kansas v. Colorado*, 577 U.S. ___ (2016) (same).

Court considers "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* Each of these factors weighs in favor of this Court granting New Mexico leave to file its Bill of Complaint against Colorado.

I. New Mexico's Interests Are Serious, Dignified, and Similar to Interests in Actions Previously Accepted by this Court Under its Original Jurisdiction.

This Court has explained that "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal citation omitted). In this case, Colorado has directed, authorized, and allowed the generation and discharge of pollution into interstate waterways, which has caused, and continues to cause, injury to and in New Mexico. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Colorado's past and ongoing actions have impinged on New Mexico's sovereign interests in protecting its natural resources and the health of its citizens. If left unchecked, Colorado's actions will continue to cause direct, grave, and potentially irreparable injury to New Mexico and its inhabitants. Injuries inflicted by one State upon another State and its citizens necessarily implicate this Court's jurisdiction.

This Court has long authorized lawsuits by sovereign states seeking to address the problems

caused by interstate pollution.[8] Indeed, on three occasions, this Court has exercised its original jurisdiction over claims that an agent of one State was polluting the waters of another State.[9] In these cases, the Court recognized its original exclusive jurisdiction over controversies between States where the environmental and economic policy decisions of one State threatened "the health, comfort and prosperity" of the inhabitants of another state. *New York v. New Jersey*, 256 U.S. at 301-02.

In *New York v. New Jersey*, New York brought an original action against New Jersey and the Passaic Valley Sewerage Commission, seeking an injunction against the discharge of sewage into the Passaic River of Upper New York Bay. *Id.* at 298. New York alleged that the discharge "gravely menaced . . . [t]he health, comfort and prosperity of the people of the State." *Id.* at 301–02. This Court agreed, holding that New York was a "proper party to represent and defend such rights by resort to the remedy of an original suit in this court." *Id.* Likewise, in *Missouri v. Illinois*, Missouri sought an injunction against Illinois's discharge of sewage into

---

[8] *See, e.g., New Jersey v. City of New York*, 283 U.S. 473 (1931) (enjoining defendant from dumping garbage into the ocean and onto New Jersey's beaches); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (enjoining defendant from discharging noxious gases from their works in Tennessee over in Georgia's territory); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851) (enjoining defendant from obstructing trade and war ships by erecting a suspension bridge).

[9] *See Vermont v. New York*, 417 U.S. 270 (1974); *New York v. New Jersey*, 256 U.S. 296 (1921); *Missouri v. Illinois*, 180 U.S. 208 (1901).

the Mississippi River. 108 U.S. 242-43. This Court again invoked its original jurisdiction because the "health and comfort of the inhabitants of [Missouri were] threatened." *Id.* at 241. In *Vermont v. New York*, Vermont alleged that the International Paper Company and New York were both responsible for an upstream "sludge bed" that polluted Vermont's water and constituted a public nuisance. 417 U.S. 270. This Court granted Vermont leave to file its complaint even though the paper company was primarily responsible for discharging wastes into Lake Champlain and Ticonderoga Creek. *Id.*

This Court's precedents involving preemption of certain common law claims by the Clean Water Act, while not directly applicable to controversies between two states, indicate that New Mexico's interests protected at common law are not preempted by that statute. In *Illinois v. Milwaukee* (*Milwaukee I*), 406 U.S. 91 (1972), this Court unanimously held that it had original, but not exclusive, jurisdiction over a suit brought by Illinois against the City of Milwaukee, its Sewerage Commission, Milwaukee County's Metropolitan Sewerage Commission, and other Wisconsin cities for abatement of a nuisance caused by interstate pollution, but exercised its discretion to remit the plaintiff to federal district court. *Id.* at 108 The issue of potential preemption did not arise because the Federal Water Pollution Control Act specifically provided that there was no intent to displace state or interstate actions to abate water pollution with federal enforcement actions. *Id.* at 104. Thus, *Milwaukee I* affirmed the power of federal courts to

appraise the equities of suits alleging the creation of a public nuisance by water pollution.

Following the Supreme Court's direction, Illinois re-filed its federal common law nuisance abatement action in federal district court. Congress thereafter enacted the Federal Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act. The case returned to the Supreme Court nine years later. *City of Milwaukee v. Illinois* ("*Milwaukee II*") 451 U.S. 304 (1981). In *Milwaukee II*, this Court held that the Clean Water Act had displaced Illinois' federal common law nuisance abatement action based on the comprehensive nature of the Clean Water Act's regulatory scheme. *Id.* at 317. The decision thus eliminated the application of federal common law in some water pollution cases. Importantly, however, *Milwaukee II* was not a controversy between two or more states, and this Court has never applied its holding to such a dispute. Further, neither *Milwaukee I* nor *II* involved damages claims; in both, Illinois sought abatement of a nuisance and other injunctive relief.

Milwaukee II left unresolved whether the Clean Water Act also preempted state common law actions for monetary or injunctive relief. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court held that the Clean Water Act does not wholly displace state common law causes of action in suits brought by a citizen in one state against a citizen in another. Rather, the Court held that preserving common law remedies based on the law of the source (*i.e.*, polluting) state does not conflict with the Clean Water Act's statutory

scheme. While *Ouellette* was not a suit between states, it makes clear that some common law claims based on water pollution remain viable in the face of federal environmental regulation.

More recently, in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), this Court considered whether the Clean Water Act displaced the availability of punitive damages under federal maritime common law. This Court rejected the defendants' argument that the Clean Water Act's penalties for water pollution had preempted common law punitive damages remedies available under maritime law. *Id.* at 488-89. This Court saw "no clear indication of congressional intent to occupy the entire field of pollution remedies," and found that allowing punitive damages for private harms would not have "any frustrating effect on the CWA remedial scheme, which would point to preemption." *Id.* at 489. In reaching this conclusion, this Court specifically distinguished *Milwaukee II* on the basis that the plaintiff's common law nuisance claims in those cases "amounted to arguments for effluent-discharge standards different from those provided by the CWA." *Id.* at 489, n. 7.

So too here. New Mexico's common law claims based on environmental and economic injuries do not threaten any interference with federal regulatory goals for water quality. The plaintiff state in *Milwaukee II* complained of pollution from point source discharges that were fully covered by the permitting process under the Clean Water Act, and were subject to active permits. 451 U.S. 319-322. But the pollution at issue in this controversy

emanates from mining sites that Colorado has failed to permit under the Clean Water Act for years. Further, New Mexico's claim for abatement goes beyond a request to enjoin the continuing release of contaminated water into the Animas River. The request extends to the sinks of contaminated sediments within the Animas River that will re-suspend and pollute New Mexico's waters if left unabated, a situation the Clean Water Act does not address. And the August 5th release was not covered by any permit; even if it was, the volume of acid mine drainage and metals released from the Gold King Mine would have been an exceedance under any circumstance. Far from frustrating the Clean Water Act's remedial scheme, New Mexico's action against Colorado would vindicate the Act's stated objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Just as this Court has previously intervened when one state pollutes waters shared by another state with noxious wastes, this Court should now exercise its jurisdiction to prevent Colorado from authorizing and allowing discharges of toxic mine waste into upstream waters that flow through Colorado and directly into New Mexico, the Navajo Nation, Utah, and Lake Powell. This pollution has a direct and concrete impact on New Mexico because its inhabitants rely on the Animas and San Juan Rivers for drinking water, agriculture, economic and recreational uses. Without assurance that Colorado will abate the nuisance caused by the discharge of toxic mine waste, New Mexico water users will continue to suffer adverse and potentially

irreparable harms.[10] New Mexico has already spent millions of dollars on response and monitoring activities immediately following the August 5, 2015 spill. New Mexico will incur millions more to implement its Long-Term Water Monitoring Plan and Spring Run-Off Preparedness Plan to address ongoing discharges from the Colorado mines and the anticipated re-suspension of toxic mine waste and metals that have temporarily settled in the Animas and San Juan's riverbed sediments. The costs to address the degradation of the last twenty years will be millions more.

A. New Mexico Has Been and Continues to be Directly Injured by Colorado.

A plaintiff State must have suffered or be on the verge of suffering a direct injury or an injury to its citizenry. The direct injury requirement substantially overlaps with the Article III standing requirement that the injury must be fairly traceable to the defendant's actions. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (per curiam).

[10] As a result of the August 5, 2015 blowout, Colorado reversed course and finally supported EPA's request to list a portion of the mining district as a federal Superfund Site. However, even if some small percentage of the mines at issue is ultimately included within a Superfund listing, it will fail to adequately address the full breadth of the issue now before the Court.

i. Colorado's Actions Have Directly Injured New Mexico's Proprietary Interests as a Consumer in the Marketplace and as a Revenue Collector.

The injury requirement is satisfied if a State's proprietary interest is threatened or harmed. This Court has recognized as sufficient states' proprietary interests as consumers in the marketplace and as revenue collectors. *See Maryland v. Louisiana,* 451 U.S. 725, 736–37 (1981). This Court has held that a State is sufficiently injured if its tax receipts are reduced because of another state's actions. *Wyoming v. Oklahoma*, 502 U.S. 437, 438 (1992).

In *Wyoming v. Oklahoma*, Wyoming's severance tax receipts were reduced by an Oklahoma statute requiring coal-fired electricity generating plants to use a mixture of at least ten percent Oklahoma coal. *Id.* at 448-449. The Court held this "loss of specific tax revenues" was sufficient to invoke its original jurisdiction. *Id.* Here, Colorado's negligent, reckless and willful conduct—undertaken in its sovereign capacity—has impaired New Mexico's ability to collect revenue from gross tax receipts from the thousands of individuals and local businesses that directly and indirectly generate income from agriculture, tourism, and the public's recreational use of the Animas and San Juan Rivers. New Mexico has suffered and will continue to suffer lost economic activity, tax revenues, and stigmatic damages directly attributable to Colorado's past and ongoing misconduct, including its role in the Gold King Mine spill.

ii. Colorado's Actions Have Injured New Mexico as Parens Patriae of the State's Natural Resources.

Original jurisdiction may also be invoked "by the State as *parens patriae*, trustee, guardian or representative of all or a considerable portion of its citizens." *Kansas v. Colorado*, 185 U.S. 125, 142 (1902) (discussing *Missouri v. Illinois* where "the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution").[11] New Mexico, as *parens patriae*, trustee, guardian, and representative of the State's natural resources, has been, and continues to be, directly injured by Colorado's reckless and willful conduct. New Mexico seeks relief from the contamination and degradation of the waters of the Animas and San Juan Rivers which have damaged the property of its citizens and injured the public's health, safety, and welfare.

---

[11] *See also, e.g., New York v. New Jersey*, 256 U.S. 296, 301-302 (1921) (pollution of a body of water to the injury of State citizens gives rise to *parens patriae* standing); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (in addition to proprietary interests, States had *parens patriae* standing to represent the threats to the "health, comfort, and welfare" of its people posed by a reduction in the supply of natural gas); *Idaho v. Oregon*, 444 U.S. 380, 385 (1980) (Idaho properly invoked Court's jurisdiction to redress depletion of salmon returning to Idaho "to the detriment of Idaho fishermen").

iii. Colorado Confirmed and Authorized Actions of Other Parties That Have Inflicted Harms on New Mexico.

Where a plaintiff State alleges that the defendant state has "confirmed or authorized" the injury-inflicting action, as here, there is a controversy between the states appropriate for resolution by this Court. *See Missouri v. Illin*ois, 180 U.S. at 242. In this case, Colorado has recklessly confirmed or authorized numerous actions that have directly inflicted harm on New Mexico. Actions authorized by Colorado include, but are not limited to: (1) the plugging of Sunnyside Mine's American Tunnel and other mine workings by Sunnyside Gold Corp., which created an unstable reservoir of heavily acidic toxic mine waste; (2) the dissolution of the discharge permit leading to untreated releases of toxic acid mine waste by mining companies into the Animas River watershed and into New Mexico, while witnessing the precipitous decline in the river's water quality and aquatic abundance; (3) the failure to act to stop the releases of toxic waste water after the water treatment plant was shuttered in 2005; and (4) the onsite operations that triggered the Gold King Mine blowout and release on August 5, 2015.

iv. This Court's Decisions Authorize the Award of Damages in an Original Action

This Court's precedents confirm the propriety of damages awards in actions brought by a State

against another State. In *Kansas v. Colorado*, 533 U.S. 1, 7-9 (2001), the Court held that "a state may recover monetary damages from another State in an original action," and accepted the Special Master's recommendation that Kansas be awarded monetary damages against Colorado for violation of the Arkansas River Compact. *See also Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (permitting damages for violation of compact). Damages may include prejudgment interest. *West Virginia v. United States*, 479 U.S. 305, 310-11, n. 2 (1987).

II. There is No Alternative Forum Better Suited to Address New Mexico's Claims.

This Court has been "reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim," *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). As a corollary, it has repeatedly concluded that it is proper to entertain a case when it lacks "assurances . . . that a State's interests under the Constitution will find a forum for appropriate hearing and full relief." *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992). Here, New Mexico's only recourse against Colorado is through this Court.

As this Court explained in *Mississippi v. Louisiana*, the statutory "description of [this Court's] jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases [between two States] to any other . . . court." 506 U.S. at 77–78. "This follows from the plain meaning of 'exclusive,'" which means to "'debar from possession' . . . and has been remarked upon by opinions in our original

jurisdiction cases. *Id.* at 78 (internal citations omitted).

There is no other forum, judicial or otherwise, where New Mexico can pursue the relief it seeks. That fact alone weighs heavily in favor of granting New Mexico leave to file its Bill of Complaint.

A. New Mexico's Interests Are Not Being, and Cannot Be, Addressed in Private Actions in Other Courts

In select cases, this Court has declined jurisdiction over controversies between two states because of pending actions brought by private parties in other courts that addressed the same interests that the states had. *See, e.g., Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam). In *Arizona v. New Mexico*, the plaintiff state invoked this Court's original jurisdiction to challenge a New Mexico energy tax that Arizona argued was discriminatory against its citizens. *Id.* at 796. However, three Arizona utilities involved in the controversy had already sought a declaratory judgment in New Mexico state court that the tax was unconstitutional. *Id.* This Court declined jurisdiction, noting that the pending state court action raised the same constitutional issues as Arizona's complaint and "provide[d] an appropriate forum in which the issues tendered here may be litigated."

No analogous litigation exists here. Despite New Mexico's pending suit in the U.S. District Court for the District of New Mexico against EPA and

several private parties, resolution of that action will not resolve New Mexico's specific claims against Colorado, especially as to the vast mines and areas that are discharging into the Animas River but are not the subject of EPA action or New Mexico's District Court action. In its Bill of Complaint, New Mexico alleges that Colorado has negligently, recklessly and willfully disregarded its duties to New Mexico by authorizing and allowing discharges of acid mine waste and pollution directly into the Animas River. Even though some of New Mexico's claims focus on Colorado's involvement with EPA and EPA's contractor in the operations that caused the Gold King Mine release, the merits of New Mexico's claims against Colorado cannot be litigated in an action in which Colorado is not a party. Any relief obtained in District Court against EPA and other parties will not vindicate New Mexico's specific claims against Colorado. Moreover, New Mexico here seeks far broader relief, covering mines discharging into the waters of New Mexico that are not at issue in the District Court action.

Similarly, even if a private party from New Mexico had standing to challenge Colorado's conduct, he could not adequately represent New Mexico's sovereign interests. *See Wyoming v. Oklahoma*, 502 U.S. at 450, 452 (concluding that the case "was an appropriate one for the exercise of [the Court's] original jurisdiction," in part because "no pending action exists to which [the Court] could defer adjudication" and because "[e]ven if such action were proceeding, . . . Wyoming's interests would not be directly represented"); *see also Maryland v. Louisiana*, 451 U.S. at 743 (noting that the plaintiff

state's "interests" were not "actually being represented by . . . the named parties" in another ongoing suit raising issues similar to those included in the States' complaint).

B. Conflicting Grants of Exclusive Jurisdiction to District Courts in Environmental Statutes Cannot Override the Constitutional Role of this Court as the Exclusive Forum for Suits Between States

As noted above, the suit pending in District Court includes statutory claims brought pursuant to CERCLA and RCRA. These statutes' grants of exclusive jurisdiction, either expressly or impliedly, conflict with this Court's exclusive jurisdiction over controversies between states pursuant to 28 U.S.C. § 1251(a). Specifically, under 42 U.S.C. § 9613(b), the United States District Courts have exclusive jurisdiction in cases arising under CERCLA. Similarly, several federal appellate courts have held that RCRA claims also fall under the exclusive jurisdiction of United States District Courts. *See, e.g., Litgo N.J., Inc. v. N.J. Dep't of Envt'l Protection*, 725 F.3d 369 (3d Cir. 2013); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989).

Although this specific conflict of exclusive jurisdiction appears to be a matter of first impression for this Court, New Mexico believes this Court's exclusive original jurisdiction trumps. In *California v. Arizona*, 440 U.S. 59, 63 (1979), the Court faced a similar conflict in jurisdictional statutes. There, the issue was whether a statutory

provision purporting to grant the district courts exclusive jurisdiction over quiet title actions involving the United States could serve to divest the Supreme Court of its original jurisdiction. Noting that this raised a "grave constitutional question," the Court stated that it is "extremely doubtful" that Congress possesses "the power to limit in this manner the original jurisdiction conferred upon the court by the Constitution." *Id.* at 65, 66. The Court avoided deciding the Constitutional issue by finding, despite a sparse legislative history, that Congress "by vesting 'exclusive original jurisdiction' of quiet-title actions against the United States in the federal district courts, did no more than assure that such jurisdiction was not conferred upon the courts of any State." *Id.* at 68.

Here, the purported Congressional grant of "exclusive jurisdiction" to the district courts under CERCLA, much less the implied exclusive jurisdiction found by courts under RCRA, cannot deprive this Court of its exclusive jurisdiction over state-versus-state controversies. Therefore, this Court remains the only forum available for New Mexico's claims against Colorado under CERCLA and RCRA, as well as its other statutory and common law claims.[12]

---

[12] However, because New Mexico's claims against Colorado are intertwined with its claims against the defendants in the District Court case, and to avoid piecemeal litigation in multiple jurisdictions, this Court may consider referring this case to a Special Master in the United States District Court for the District of New Mexico for all discovery and pretrial proceedings. In effect, this would allow both of New Mexico's

C. Extrajudicial Relief is Unattainable

Finally, the importance of allowing New Mexico to proceed in this forum is heightened by the futility of New Mexico's pursuit of extrajudicial relief. For many years before the Gold King Mine blowout of August 5, 2015, EPA wanted to list the mining district at issue because it was discharging some of the most toxic acidic wastewater in the nation. Colorado and local governments opposed that listing, however, seeking to protect their own tourism-based economies. After the Gold King Mine blowout, New Mexico repeatedly asked Colorado to participate in a multi-state monitoring plan from the headwaters of the Animas to the bottom of Lake Powell to protect human health and the environment from the long-term effects of the Gold King Mine release. Since the release, New Mexico has been in communication with Colorado on many occasions, seeking to resolve this matter diplomatically outside of court. To date, Colorado has made no real efforts to remedy the injuries it has caused to New Mexico's sovereign interests. New Mexico's efforts to negotiate an amicable resolution have failed. Because New Mexico cannot force Colorado to abate the ongoing discharges of pollutants from the hundreds of abandoned and inactive mines that are polluting the Animas and San Juan Rivers, this Court is New Mexico's sole avenue of relief from Colorado's violations of its sovereign rights and interests.

---

cases to proceed on a more consolidated track, thus conserving judicial resources and ensuring consistent pretrial determinations in both suits.

CONCLUSION

New Mexico's Bill of Complaint, on its face, presents a "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 in which to seek relief for its claims against Colorado. When presented with such a controversy, this Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) (Marshall, C. J.). Accordingly, the State of New Mexico respectfully requests that this Court grant it leave to file its Bill of Complaint against Colorado and provide any other relief this Court deems just and proper.

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
JACKSON GILMOUR &
DOBBS, PC
3900 ESSEX, SUITE 700
HOUSTON, TX 77027
TEL. (713) 355-5005
FAX. (713) 355-5001
(FAX)
EMAIL:
BJACKSON@JGDPC.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*