No. 220147, Original

In the Supreme Court of the United States

STATE OF NEW MEXICO,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

On Motion for Leave to File Bill of Complaint in Original Action

COLORADO'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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GLOSSARY OF ABBREVIATIONS

CERCLA:	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
CWA:	Clean Water Act
DRMS:	Colorado Division of Reclamation, Mining and Safety
EPA:	United States Environmental Protection Agency
RCRA:	Resource Conservation and Recovery Act of 1976
WQCD:	Water Quality Control Division of the Colorado Department of Public Health and Environment

INTRODUCTION

This case arises out of a federal contractor's breach of a collapsed mine portal at the Gold King Mine in the mountains near Silverton, Colorado, during environmental response efforts in August 2015. The breach released roughly three million gallons of acidic mine water into the Animas River, which flows south from Colorado through the northwest corner of New Mexico, joining the San Juan River and eventually emptying into Lake Powell in Utah. In May of this year, the State of New Mexico sued the federal Environmental Protection Agency (EPA), the EPA contractor that caused the breach, and two private mining companies in federal district court in New Mexico, seeking to recover "all costs" it allegedly incurred in response to the breach. *See* Compl. at 48, *New Mexico v. EPA*, No. 16-cv-465 (D.N.M. May 23, 2016) ("D.N.M. Compl."). In this Court, New Mexico now seeks to hold Colorado liable for those same costs because two Colorado agencies have regulatory authority over abandoned and inactive mines within the State.

New Mexico's proposed Bill of Complaint is unprecedented. Never before has one State attempted to sue another in this Court under the intricate provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) or the Resource Conservation and Recovery Act of 1976 (RCRA). But the novelty of this case is no accident: Congress did not authorize this Court to hear State-versus-State actions under these statutes. To the contrary, Congress vested *exclusive* jurisdiction over CERCLA and RCRA claims in the district courts, and

never contemplated that States would be liable for engaging in regulatory activities to reclaim abandoned and inactive mines and protect water quality. Nor can New Mexico circumvent these statutes by reframing its statutory causes of action as federal common-law claims.

To allow New Mexico to file its Bill of Complaint would be to convert this Court's original docket into a forum for interstate disputes regarding regulation of the countless number of potential sources of water pollution across the country. And taking this unprecedented step here would be particularly inappropriate, given that New Mexico has filed an action in federal district court encompassing the same facts and issues, and seeking the same relief, as the proposed Bill of Complaint. Accordingly, this Court should exercise its discretion to decline jurisdiction over this case.

Even if the Court were inclined to grant leave to file the Bill of Complaint, it should first allow Colorado to file a threshold dispositive motion to address the novel legal theories New Mexico asserts here. Neither Colorado nor this Court should undertake the tremendous commitment in time and resources necessary to proceed to discovery and a potential trial without first evaluating the legal merits of New Mexico's novel claims. And in no event should this Court grant New Mexico's request to assign this case to a Special Master in the United States District Court for the District of New Mexico. To refer this action to a court in New Mexico would not only be unprecedented; it would also defeat the purpose of this Court serving

as a neutral, independent forum to adjudicate State-versus-State litigation.

STATEMENT

Within the contiguous United States, Colorado is the paradigmatic headwaters State. Many river systems originate in the mountains of Colorado and flow elsewhere, but very few originate elsewhere and flow into the State's borders. Colorado is obligated by 9 interstate compacts and 2 equitable apportionment decrees to apportion use of water originating in Colorado to 18 downstream States and the Republic of Mexico.[1]

Like many western States, Colorado has a long history of hard rock mining. This is due in large part to federal laws enacted in the 1800s, which sought to encourage mineral production by facilitating the transfer of public mineral lands to private owners. *See, e.g.*, John F. Seymour, *Hardrock Mining and the Environment: Issues of Federal Enforcement and Liability*, 31 ECOLOGY L. Q. 795, 824–25 (2004). But comparatively few Colorado hard rock mines remain active today, and many private owners and operators have abandoned their mine lands. While it is difficult to determine the precise number of abandoned and inactive mines, the federal Bureau of Land Management estimates that there may be as many as half a million nationwide, and there are an estimated

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[1] *See, e.g.*, Colorado River Compact, Colo. Rev. Stat. § 37-61-101; Rio Grande River Compact, Colo. Rev. Stat. § 37-66-101; Arkansas River Compact, Colo. Rev. Stat. § 37-69-101; *see also Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

23,000 in Colorado alone—including the two mines at issue here, the Sunnyside and Gold King Mines. *See Abandoned Mine Lands*, Bureau of Land Mgmt., http://tinyurl.com/jxgc4kk (last updated Jan. 6, 2015); *Inactive Mine Reclamation Program*, Colo. Div. of Reclamation, Mining & Safety, http://tinyurl.com/z3emnkn (last visited Oct. 19, 2016). Many abandoned or inactive mine sites pose environmental or safety risks, and Colorado mitigates those risks through various regulatory programs implemented by state agencies. Two of Colorado's agencies are implicated here.

Colorado's Division of Reclamation, Mining and Safety (DRMS) is the successor to state agencies first established in 1976. Part of its responsibility is to safeguard and reclaim abandoned and inactive mines. DRMS is nationally recognized for its expertise in this area, which it has developed through its involvement at thousands of mine sites. *See, e.g.*, *Abandoned Mine Land Awards*, Nat'l Ass'n of Abandoned Mine Land Programs, http://tinyurl.com/huuperc (last visited Oct. 19, 2016) (listing Colorado awards in 2007, 2008, 2009, 2013, 2014, and 2015).

The Water Quality Control Division (WQCD) of Colorado's Department of Public Health and Environment regulates pollutant discharges from certain abandoned or inactive mines through permits issued to mine owners and operators. These permits regulate discharges into the State's river systems and ensure that pollutant levels in those rivers remain within regulatory limits. But WQCD's work is not limited to mine discharges. Like every other state water quality agency across the country, WQCD also

regulates numerous other sources of water pollution, including those from industrial, commercial, agricultural, and other activities. Regulating surface water pollution "point sources" is the backbone of the federal Clean Water Act (CWA).[2]

I. Colorado's role at the Sunnyside and Gold King Mines was entirely regulatory.

Colorado's work at the Sunnyside and Gold King Mines—like its work at thousands of other mines and other pollutant point sources across the State—has always been regulatory. Colorado never owned the mines, never had "day-to-day" control over mine operations, and never profited from mining activity at the mines. The Bill of Complaint does not allege otherwise.[3] Colorado's regulatory work at the mines proceeded in four phases:

First, Colorado regulators approved the private owners' and operators' proposed remediation activities at the mines. After mining operations at the Sunnyside and Gold King Mines ceased in the early 1990s, Sunnyside Gold Company, the operator of the Sunnyside Mine, proposed to install three bulkheads in the "American Tunnel" that drained the mines in order

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[2] Colorado has been delegated permitting, monitoring, and enforcement authority to implement CWA requirements within Colorado, subject to federal oversight. *See* 33 U.S.C. § 1342(b).

[3] Many of the allegations in the Bill of Complaint are false. But as explained in this Brief in Opposition, even putting aside the inaccuracy of New Mexico's factual assertions, the Bill of Complaint fails to allege a claim that is either cognizable under relevant law or appropriate for this Court's original jurisdiction.

to manage the flow of water from the mines. Bill of Compl. ¶¶ 24–25. Use of bulkheads is a common remediation step, and bulkheads have been installed at dozens of mines in the western United States. Sunnyside eventually filed a state court declaratory judgment action against the WQCD seeking judicial approval of its plan. *Id.* ¶ 27. After months of litigation, the parties settled the case and memorialized their agreement in a 1996 judicial consent decree that required Sunnyside to install the bulkheads, conduct other reclamation activities, and comply with monitoring and water treatment obligations. *Id.* ¶¶ 27–28.

In 2003, Sunnyside presented evidence that it had satisfied its obligations. Sunnyside's CWA discharge permit was therefore terminated in accordance with the court-ordered consent decree. *Id.* ¶ 34.

Second, Colorado took a series of administrative actions related to the Gold King Mine and associated mine features. This included: (1) approving the transfer of ownership of a water treatment facility—used to treat water discharges from the Gold King Mine—from the prior private owner to another private entity, Gold King Mines Corp., *id.* ¶ 39; (2) issuing a CWA discharge permit in 2001 for one of the portals to the Gold King Mine, the "Level 7 portal," *id.* ¶ 42; and (3) prosecuting a notice of violation in 2004 when the permitted discharge limits were exceeded, *id.* ¶ 47.

Third, Colorado conducted bond forfeiture reclamation work at Gold King Mine in 2008 and 2009. The mining permit that allowed operations at Gold King Mine, issued and enforced by DRMS, imposed a bond to ensure that Gold King Mines Corp. met its

mine closure and reclamation obligations. When Gold King Mines Corp. defaulted on its permit obligations, DRMS revoked the permit and used the forfeited bond amount (totaling around $50,000) to finance reclamation work required by the mine plan. *Id.* ¶¶ 49, 54.

In 2008, this work involved redirecting existing water flow from the Gold King Mine into a drainage ditch and away from a waste rock dump in front of the Level 7 portal. *Id.* ¶ 54. By redirecting the flow of water, DRMS ensured that it would not saturate the waste rock pile, causing slope failure, or flow through the waste rock pile, collecting pollutants on the way to Colorado's river systems. The Bill of Complaint does not allege that this work increased the flow of water from Gold King Mine or increased the level of pollutants in Colorado's surface water.

In 2009, DRMS secured and safeguarded several portals at the Gold King Mine, including by installing a grated closure at the Level 7 portal.[4] In addition, DRMS inserted an observation pipe and a drainage pipe into the Level 7 portal to evaluate and mitigate water buildup. *Id.* ¶¶ 55–56. At the time the pipes were inserted, the portal was already partially collapsed internally, and it collapsed further during filling around the pipes. *Id.* ¶ 56. Despite the collapse, the

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[4] New Mexico incorrectly asserts that some of this activity took place in 2008 instead of 2009. *See* Bill of Compl. ¶ 54. *But see Project Summary*, Colo. Div. of Reclamation, Mining & Safety (2008), *available at* http://tinyurl.com/hfy6atd; *Project Summary*, Colo. Div. of Reclamation, Mining & Safety (2009), *available at* http://tinyurl.com/hw566xp.

portal continued draining at approximately 200 gallons per minute both before and after the DRMS insertion of the observation and drainage pipes. *Id.* ¶ 58. DRMS then inserted a "stinger" drainage pipe into the collapsed material to relieve potential water pressure. *Id.* ¶¶ 57–58. To facilitate flow monitoring, DRMS constructed a flume and a concrete channel at the end of the drainage ditch that DRMS had installed in 2008. *Id.* ¶ 59.

Fourth, following the conclusion of its bond forfeiture work at Gold King Mine, DRMS requested that EPA investigate the drainage from the mine. *Id.* ¶ 64. New Mexico alleges that DRMS was involved in EPA's remediation activity in various ways at the mine site in 2014 and 2015, and many of these allegations are inaccurate. But the Bill of Complaint acknowledges that EPA led the remediation activity that preceded the August 2015 spill, and it further acknowledges that the alleged actions that actually caused the spill were taken by "the EPA crew." *See id.* ¶¶ 75–76.

II. The Bonita Peak Mining District is listed as a priority cleanup site by the Federal Government.

On September 9, 2016, with Colorado's support, the "Bonita Peak Mining District"—which includes the Sunnyside and Gold King Mines—was added to the National Priorities List. *See* National Priorities List, 81 Fed. Reg. 62,397, 62,401 (Sept. 9, 2016); *see also Bonita Peak Mining District*, U.S. EPA, http://tinyurl.com/zchpyoq (last updated Sept. 17, 2016) (Superfund website for the District). This listing authorizes the Federal Government and Colorado to begin remedial action under the "national contingency plan"

established by CERCLA and its implementing regulations. *See* 42 U.S.C. § 9604(a)(1); 40 C.F.R. pt. 300. This multi-step regulatory process includes assessing the nature and extent of contamination through a "remedial investigation," evaluating alternatives for remediation through a "feasibility study," and seeking public comment on a proposed remediation plan. *See* 40 C.F.R. § 300.430(d)–(f). For the Bonita Peak Mining District, this process is fully underway, and EPA commenced work on a remedial investigation even before the site was included on the National Priorities List. *See* U.S. EPA, *Bonita Peak Mining District Update* (Jul.–Aug. 2016), *available at* http://tinyurl.com/h7n8a7j.

The initiation of a CERCLA remedial action forecloses the ability to bring citizen suits under RCRA: no such claim may be brought if the Federal Government has incurred costs to initiate a remedial investigation or feasibility study. 42 U.S.C. § 6972(b)(2)(B)(iii). Likewise, RCRA bars citizen suits when EPA begins a "removal action" at a site. 42 U.S.C. § 6972(b)(2)(B)(ii). Both the Gold King Mine and the adjacent Red and Bonita mine within the Bonita Peak Mining District site have been the subject of ongoing removal actions since 2014. *See* U.S. EPA Region 8, *Action Memorandum: Approval and Funding for a Removal Action* (Sept. 24, 2014), *available at* http://tinyurl.com/h57hshw; U.S. EPA, *Action Memorandum: Documentation of an Emergency Removal Action* (Jan. 13, 2016), *available at* http://tinyurl.com/zccypbc.

III. In May 2016, New Mexico filed a nearly identical action against EPA and private parties in federal district court in New Mexico.

On May 23, 2016, New Mexico filed a lawsuit in federal district court in New Mexico stemming from the August 2015 release from the Gold King Mine. *New Mexico v. EPA*, No. 16-cv-465 (D.N.M. May 23, 2016). The complaint named as defendants EPA; EPA's contractor; and the private companies that own the Sunnyside Mine and neighboring properties near Silverton, Colorado. D.N.M. Compl. ¶¶ 14–18. The factual allegations in the district court case are nearly word-for-word identical to the allegations in the proposed Bill of Complaint, *compare* D.N.M. Compl. ¶¶ 19–94 *with* Bill of Compl. ¶¶ 14–85, and New Mexico's claims in the district court include CERCLA claims, a RCRA claim, a federal Clean Water Act claim, and common-law claims for public nuisance, trespass, and negligence/gross negligence, D.N.M. Compl. ¶¶ 96–178. Although various district court defendants have filed motions to dismiss, the court has not yet ruled on the motions.

ARGUMENT

I. The Court should decline to exercise original jurisdiction over this dispute.

This Court has emphasized that its original jurisdiction "should be exercised sparingly." *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (quotation omitted). "[Original] jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was

absolute ...." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). Consequently, original jurisdiction is inappropriate where, as here, a plaintiff State asserts novel claims which Congress "could hardly have foreseen" would be raised in "disputes between two or more states." 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4053 at 231–32 & n.16 (3d ed. 2008) (referring specifically to "[i]nterstate pollution disputes").

Two factors govern the Court's discretion to hear original proceedings. First, the Court considers the claims at issue, focusing on "the nature of the interest of the complaining State, [and] the seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (quotations and citations omitted). Second, the Court considers "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* Here, both factors counsel against the Court accepting jurisdiction.

A. The claims in this case are inappropriate for this Court's original jurisdiction.

Through the proposed Bill of Complaint, New Mexico asks the Court to "exert its extraordinary power to control the conduct of one State at the suit of another." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931). That is not a power this Court exerts lightly. The Court has consistently held that its original jurisdiction should be exercised only in the "most serious of circumstances." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995).

Thus, to justify exercise of this Court's original jurisdiction, a complaining State must carry a burden significantly heavier than that normally imposed in litigation between private parties. *See Alabama v. Arizona*, 291 U.S. 286, 292 (1934); *cf. North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) ("[T]he burden of the complainant State of sustaining the allegations of its [original] complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties."). Whereas federal district courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), this Court exercises "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum," *Texas v. New Mexico*, 462 U.S. 554, 570 (1983), "even as to actions between States where [its] jurisdiction is exclusive," *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992). In the exercise of this discretion, the Court often denies motions for leave to file an original complaint.[5]

As explained below, the legal claims at issue here do not present "the most serious of circumstances," *Nebraska*, 515 U.S. at 8, because they rest on flawed legal theories. By definition, a legally unsupportable claim does not rise to a level of sufficient "seriousness"

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[5] *See, e.g.*, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016); *Michigan v. Illinois*, 559 U.S. 1091 (2010); *Mississippi v. City of Memphis*, 559 U.S. 901 (2010); *Texas v. Leavitt*, 547 U.S. 1204 (2006); *Arkansas v. Oklahoma*, 546 U.S. 1166 (2006); *Arkansas v. Oklahoma*, 488 U.S. 1000 (1989); *South Dakota v. Nebraska*, 475 U.S. 1093 (1986); *United States v. Nevada*, 412 U.S. 534, 537–38 (1973) (per curiam).

or "dignity" to warrant the exercise of this Court's original jurisdiction. This Court must play a careful gatekeeping role to prevent "a quandary whereby [the Court] must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of [its] energies to such matters." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 504 (1971). And this is especially true in an "interstate pollution case" involving a "multiplicity of governmental agencies," a type of dispute that this Court has held to be inappropriate for its original jurisdiction. *Id.* at 504–05. Because New Mexico's proposed causes of action under CERCLA, RCRA, and federal interstate common law are fraught with legal errors, this Court should decline the exercise of original jurisdiction in this case.

1. The exclusive jurisdictional provisions of CERCLA and RCRA preclude State-versus-State claims.

Both CERCLA and RCRA, by their plain terms, specify that "the United States district courts shall have *exclusive* original jurisdiction over all controversies arising under [those statutes]." 42 U.S.C. § 9613(b) (emphasis added) (CERCLA);[6] 42 U.S.C. § 6972(a)(2) (providing that actions under RCRA "shall be brought in the district court for the district in which the alleged violation occurred"); *see also, e.g.*, *Litgo N.J., Inc. v. Comm'r N.J. Dep't of Envtl. Prot.*, 725 F.3d

[6] An exception to CERCLA's jurisdictional provision, not applicable here, is for review of challenges to EPA's rule-making, which must be brought in the U.S. Court of Appeals for the D.C. Circuit. *See* 42 U.S.C. § 9613(a).

369, 394 (3d Cir. 2013) (holding that RCRA provides for exclusive jurisdiction in the federal district courts).

When it enacted those exclusive jurisdictional provisions in the 1970s and 80s, Congress legislated against the decades-old backdrop of laws separately granting this Court exclusive original jurisdiction over interstate disputes. 28 U.S.C. § 1251(a); *see also* Pub. L. No. 61-475, § 233, 36 Stat. 1087, 1156 (1911) ("The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party ...."). If Congress had intended to transform this Court into a forum for interstate controversies regarding the cleanup of hazardous substances, it would not have enacted mutually exclusive jurisdictional provisions. It would have instead created an exception to one or the other.[7] That it did not do. *Cf.*

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[7] In asking this Court to ignore the exclusive jurisdictional provisions in CERCLA and RCRA, New Mexico violates a fundamental presumption of statutory interpretation. "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quotation omitted). CERCLA creates expansive liability far beyond the limits of traditional common-law causes of action. It provides for strict joint-and-several liability, *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613–14 (2009), and permits liability divorced from the common-law requirement of causation, *see* 42 U.S.C. § 9607(a)(4)(A). It can also require defendants to pay an excess share of liability if other liable parties settle for less than their apportioned amount. *See United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85–87 (1st Cir. 1990). It defies belief that Congress would have intended to allow States to apply those extraordinary remedies against each other without saying so directly. *Cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (holding that Congress must "unequivocally

Voisine v. United States, 136 S. Ct. 2272, 2280 (2016) ("Congress must be presumed to have legislated under th[e] known state of the laws.") (quotation omitted). Thus, Congress' grant of exclusive jurisdiction to the district courts precludes States from bringing CERCLA and RCRA claims directly against each other in this Court. *Cf. Tarrant v. United States*, 71 Fed. Cl. 554, 556–57 (2006) (concluding that CERCLA's "complete and exclusive assignment of original jurisdiction" to district courts displaced the Court of Claims' "generally applicable jurisdictional power to hear monetary claims against the government").

New Mexico argues that Congress "cannot deprive this Court of its exclusive jurisdiction over state-versus-state controversies." Br. in Supp. at 26. But that argument begs the question. Congress created both CERCLA and RCRA in the first place, and is entitled to specify their scope. The issue here is not whether Congress "deprived" this Court of jurisdiction over these statutory claims, but whether it gave this Court jurisdiction over those claims in the first place. The explicit and unambiguous text of the jurisdictional provisions of those statutes shows that it did not.[8]

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express" an intention to abrogate state sovereign immunity under the Fourteenth Amendment). Indeed, New Mexico's reading of CERCLA raises a significant constitutional question, namely, whether Congress' Article I powers allow it to create a statutory scheme under which States can impose such unusual liability on each other despite principles of sovereign immunity.

[8] New Mexico's citation to *California v. Arizona*, 440 U.S. 59, 63 (1979), is inapposite. Br. in Supp. at 25–26. The question there was whether, as to a common-law quiet title claim, Congress could limit its waiver of federal sovereign immunity to claims brought in

2. New Mexico's CERCLA claims do not establish that Colorado is a "covered person" for purposes of CERCLA liability.

New Mexico's CERCLA claims against Colorado also fail as a matter of law because Colorado does not qualify as a "covered person" under 42 U.S.C. § 9607 for the actions it is alleged to have taken here. Although the definition of "person" in CERCLA includes States and their political subdivisions, 42 U.S.C. § 9601(21), CERCLA imposes liability only upon persons who fall into one of three specific categories: (1) owners or operators of hazardous substance facilities, (2) arrangers of hazardous substance disposal, or (3) transporters of hazardous substances. 42 U.S.C. § 9607(a). New Mexico alleges that Colorado is liable as both an "operator" and an "arranger." Bill of Compl. ¶¶ 91, 93. Both assertions are incorrect as a matter of law.

Colorado is not liable as an "operator." "The phrase 'owner or operator' [in CERCLA] is defined only by tautology ... as 'any person owning or operating' a facility." *United States v. Bestfoods*, 524 U.S. 51, 56 (1998) (quoting 42 U.S.C. § 9601(20)(A)(ii)). Therefore, the term "operator" is properly defined using its "ordinary or natural meaning" as "someone who directs the workings of, manages, or conducts the affairs of a facility." *Id.* at 66 (quotation omitted). In the CERCLA context, "an operator must manage, direct, or conduct

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certain courts. 440 U.S. at 65. Nothing in that case suggests that Congress cannot specify against whom, and in what forum, a federal statutory cause of action may be brought.

operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66–67.

States do not typically engage in those types of activities, and a State's regulatory conduct does not fit the *Bestfoods* definition of an operator. States are therefore generally not liable as operators. *See, e.g.*, *United States v. Twp. of Brighton*, 153 F.3d 307, 316 (6th Cir. 1998) (concluding that "mere regulation does not suffice to render a government entity liable" and that "actual operation (or 'macromanagement')" is required); *see also United States v. New Castle Cty.*, 727 F. Supp. 854, 870 (D. Del. 1989) (holding that to be liable as an operator, a State must engage in "active, voluntary, 'hands on' participation in the day-to-day management and operations" of the site) (quotation omitted). This holds true even when a plaintiff claims that a State "inadequately enforced [relevant] state environmental regulations." *United States v. Dart Indus., Inc.*, 847 F.2d 144, 146 (4th Cir. 1988).[9]

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[9] Circuit courts that have addressed the issue agree that States and other governmental entities are not "operators" when they engage in regulatory conduct within their traditional governmental capacity. *See AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 443–44 (2d Cir. 2009) (holding that a municipality was not an operator of an industrial facility based on the fire department's fighting a fire on the property); *E. Bay Mun. Util. Dist. v. U.S. Dep't of Commerce*, 142 F.3d 479, 484–87 (D.C. Cir. 1998) (holding that the United States was not an operator of a zinc mine despite its extensive regulatory activities, including financial incentives and labor controls); *Twp. of Brighton*, 153 F.3d at 316 (holding that a governmental entity was not liable for regulation of a waste disposal site); *United States v. Vertac Chem.*

Only where a State's involvement extends beyond "mere regulation" and amounts to "substantial control" over a facility's "disposal of hazardous waste, or decisions about compliance with environmental regulations" can the State become an operator under CERCLA. *See Twp. of Brighton*, 153 F.3d at 325–26 (quotations omitted, collecting cases); *see also United States v. Am. Color & Chem. Corp.*, 858 F. Supp. 445 (M.D. Pa. 1994) (concluding the CERCLA liability "can be imposed only when the government acts as the operator of a business concern, not when it is acting in a governmental or regulatory capacity"). But this type of "unfettered control" is rare. *See Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 299 F.3d 1019, 1026 (9th Cir. 2002).[10]

Corp., 46 F.3d 803, 808 (8th Cir. 1995) (holding that the United States was not liable as an operator where it required compliance with regulations and conducted inspections of the facility, but never "managed or supervised" personnel and "did not exercise actual or substantial control over the operations"); *Dart Indus.*, 847 F.2d at 144 (holding that a governmental entity was not liable for permitting of a waste disposal site); *see also Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 145 (D.D.C. 2014) (concluding that the government was not an operator because there was no "control [of] the day-to-day disposal of hazardous wastes").

[10] In *FMC Corp. v. U.S. Department of Commerce*, for example, the United States was found liable as an operator where its wartime regulation of a facility was so pervasive that it amounted to "determin[ing] what product the facility would produce." 29 F.3d 833, 843 (3d Cir. 1994). However, even there the Third Circuit noted that a governmental entity should not be liable under CERCLA where its involvement at a site is limited to remediation of waste caused by others. *Id.* at 841.

Here, New Mexico has failed to plead facts to establish such an unusual claim. Colorado's primary "on the ground" activity—DRMS's reclamation work in 2008 and 2009, *see* Bill of Compl. ¶¶ 54–59—does not qualify Colorado as an operator under CERCLA. That remediation work, performed years before the spill that led to this litigation, was limited in scope and duration and was conducted specifically for mining reclamation purposes under a bond forfeiture. *See Project Summary*, Colo. Div. of Reclamation, Mining & Safety (2008), *available at* http://tinyurl.com/hfy6atd; *Project Summary*, Colo. Div. of Reclamation, Mining & Safety (2009), *available at* http://tinyurl.com/hw566xp. Colorado did not receive any commercial or contractual income from the site that might establish operator status, nor was it present at the mine "day to day." And because Colorado's actions were regulatory and remedial, and conducted under a preexisting mine permit reclamation requirement, they did not constitute "manag[ing], direct[ing], or conduct[ing] ... operations having to do with the leakage or disposal of hazardous waste." *Bestfoods*, 524 U.S. at 66–67; *see also AMW Materials*, 584 F.3d at 444.

Colorado's other alleged on-the-ground actions, in 2014 and 2015, were in conjunction with what New Mexico acknowledges were EPA-led investigation and cleanup activities under CERCLA. *See* Bill of Compl. ¶¶ 63–64, 70, 73–74. Those activities do not make Colorado a mine "operator" and, even if they did, CERCLA provides Colorado liability protection whenever it renders "care, assistance, or advice" at the direction of an EPA on-scene coordinator. 42 U.S.C. § 9607(d)(1). And New Mexico's remaining allegations all involve Colorado acting purely as a regulator

without any hands-on, day-to-day management work. *See* Bill of Compl. ¶¶ 23–35, 39. New Mexico has not, and cannot, establish that Colorado "conduct[ed] the affairs" of the Sunnyside or Gold King Mines. *Bestfoods*, 524 U.S. at 66. The facts, even as inaccurately alleged in the Bill of Complaint, do not establish that Colorado can be made liable under an operator theory.

Colorado is not liable as an "arranger." Liability as an "arranger" requires that a person both "own[ ]" or "possess[ ]" a hazardous substance and "take[ ] intentional steps to dispose of" it. 42 U.S.C. § 9607(a)(3); *Burlington*, 556 U.S. at 611. "[A] governmental entity may not be found to have owned or possessed hazardous substances ... merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances." *Vertac*, 46 F.3d at 810; *see also United States v. Shell Oil Co.*, 294 F.3d 1045, 1059 (9th Cir. 2002). In contrast, where the government itself owns hazardous materials and exercises actual control over the disposal, the government may be liable as an arranger. *See Nu-West Mining, Inc. v. United States*, 768 F. Supp. 2d 1082, 1088 (D. Idaho 2011).

New Mexico does not allege that Colorado owned or possessed hazardous substances—only that it "accepted" hazardous substances from the mines. Bill of Compl. ¶ 92. Because those hazardous substances were privately owned (and, indeed, New Mexico has sued the private owners of the Sunnyside Mine in federal district court) this conclusory allegation cannot establish arranger liability. And even if the allegation

were sufficient to show that Colorado "owned" or "possessed" a hazardous substance, New Mexico has not alleged facts showing that Colorado took "intentional steps to dispose of [that] hazardous substance." *Burlington*, 556 U.S. at 611. Instead, Colorado's actions were limited to the exercise of "statutory or regulatory authority" regarding the mine area. *Vertac*, 46 F.3d at 810. As a matter of law, this falls short of establishing arranger liability.[11]

3. New Mexico's RCRA claims are expressly barred by CERCLA and RCRA.

Both CERCLA and RCRA make clear that a RCRA claim is barred if a CERCLA response action has been initiated to address the relevant hazardous substance release. *See* 42 U.S.C. § 9613(h) (CERCLA) ("No Federal court shall have jurisdiction ... to review any challenges to removal or remedial action ...."); 42 U.S.C. § 6972(b)(2)(B)(ii) and (iii) (RCRA) ("No action may be commenced under subsection (a)(1)(B) ... if the [EPA] Administrator ... is actually engaging in a removal action ... [or] has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of [CERCLA] and is diligently proceeding with a remedial action under that Act ...."). These prohibitions are intended to prevent "lawsuits that

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[11] New Mexico concedes that Colorado's remediation in 2008 and 2009 included diverting water *around* and *away from* the waste rock pile in front of the mine. Bill of Compl. ¶ 54. Thus, rather than "disposing of" hazardous substances, Colorado's remediation activity *reduced* the release of such substances by preventing existing mine drainage from coming into contact with an existing waste rock pile that contained potential pollutants.

might interfere with the expeditious cleanup effort." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995); *see also R.E. Goodson Constr. Co. v. Int'l Paper Co.*, No. 4:02-4184, 2005 U.S. Dist. LEXIS 42909, at *87 (D.S.C. Oct. 13, 2005) (stating that the RCRA restriction is intended to "ensure that citizen suits are not duplicative or disruptive of federal or state remediation efforts"). In particular, a request for "injunctive relief ordering the remediation of ... property" is impermissible. *Cannon v. Gates*, 538 F.3d 1328, 1335 (10th Cir. 2008).

New Mexico's RCRA claim falls squarely within these statutory bars. Beginning in 2014, EPA has initiated three separate removal and remedial actions for the Bonita Peak Mining District—including, most recently, listing the area as a Superfund site on EPA's National Priorities List. *See* U.S. EPA Region 8, *Action Memorandum: Approval and Funding for a Removal Action* (Sept. 24, 2014), *available at* http://tinyurl.com/h57hshw (initiating a removal action at the Red and Bonita Mine); U.S. EPA, *Action Memorandum: Documentation of an Emergency Removal Action* (Jan. 13, 2016), *available at* http://tinyurl.com/zccypbc (initiating a removal action at the Gold King Mine); National Priorities List, 81 Fed. Reg. 62,397, 62,401 (Sept. 9, 2016) (designating Bonita Peak Mining District on the National Priorities List and authorizing EPA to initiate a remedial action, including a remedial investigation and feasibility study). These removal and remedial actions, separately and in combination, bar New Mexico's RCRA claim, which seeks injunctive relief for alleged releases "from the Gold King Mine and neighboring mines," Bill of Compl. ¶ 111, and would therefore interfere with the ongoing response

actions. The Bill of Complaint explicitly requests "an injunction that may require ... a full investigation and remediation." *See id.* New Mexico's RCRA claim is therefore precluded. *See, e.g., OSI, Inc. v. United States*, 525 F.3d 1294, 1298 (11th Cir. 2008) (rejecting a RCRA claim because the plaintiff's request for "an injunction requiring removal of all contaminants from the site ... would 'interfere[ ] with the implementation of a CERCLA remedy'") (quoting *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1072 (11th Cir. 2002)).

4. Through the CWA, CERCLA, and RCRA, Congress displaced New Mexico's putative claims under federal interstate common law.

This Court should also deny original jurisdiction to hear New Mexico's two putative common-law claims: one for "public nuisance," and the other for "negligence and gross negligence." Bill of Compl. ¶¶ 112–33. Both claims have been displaced by the comprehensive federal statutory frameworks of the CWA, CERCLA, and RCRA.

The creation of federal interstate common law is "unusual," and whenever a federal statute "addresses a question previously governed by ... federal common law[,] the need for such an unusual exercise of lawmaking by federal courts disappears." *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (*Milwaukee II*). "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (*quoting Mobil Oil Corp. v. Higginbotham*, 436

U.S. 618, 625 (1978)). Here, the CWA, CERCLA, and RCRA all "speak directly" to the issues raised in New Mexico's Bill of Complaint.

The CWA. This Court has directly held that the CWA displaces federal interstate common-law claims. Before the 1970s, federal interstate common law provided a claim for "public nuisance by water pollution," although the Court recognized that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Illinois v. Milwaukee*, 406 U.S. 91, 107 (1972) (*Milwaukee I*). Nine years later, this Court held that Congress had done just that when it enacted the CWA. *Milwaukee II*, 451 U.S. at 317; *see also Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) ("[T]he federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [Clean Water Act] ....").[12]

The CWA "establish[ed] an all-encompassing program of water pollution regulation." *Milwaukee II*, 451 U.S. at 318. Thus, in *Milwaukee II*, the State of Illinois had "no federal common-law remedy" against municipal sewage facilities for allegedly discharging sewage into Lake Michigan. *Id.* at 332. Although a

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[12] The case law on the subject, including *Milwaukee I* and *Middlesex County Sewerage*, sometimes uses the terms "displacement" and "preemption" interchangeably. But the two concepts are distinct, and the former is much more expansive: "Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Am. Elec. Power Co.*, 564 U.S. at 423 (citation omitted).

neighbor State (Wisconsin) was responsible for regulating the sewage discharges—just as the Colorado WQCD was responsible for regulating the discharges at issue here—Illinois could not establish common-law liability based on its "disagree[ment] with the regulatory approach taken by the [state] agency with responsibility for issuing permits under the Act." *Id.* at 323. The CWA did not leave any "interstice" to be filled by federal interstate common law. *See id.* at 324 n.18.

New Mexico seeks to evade *Milwaukee II* through three arguments. None are sound.

First, New Mexico attempts to distinguish *Milwaukee II* because that case "was not a controversy between two or more states" and did not involve a claim for damages. Br. in Supp. at 15. But those differences are meaningless. Whether Congress has legislatively displaced federal interstate common law depends on the "establishment of a comprehensive regulatory program," *Milwaukee II*, 451 U.S. at 317, not on who the parties are or the nature of the requested remedy. *See Am. Elec. Power Co.*, 564 U.S. at 421 (explaining that the Clean Air Act displaced interstate federal common law, and citing both State-versus-State cases and a suit by Georgia against private companies). "The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 324.

Second, New Mexico implies that its common-law claims can be maintained under *state* law. Br. in Supp. at 15–16 (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987)). But a dispute between two States requires the application of federal, not state, law. *E.g., Texas v. New Jersey*, 379 U.S. 674, 677 (1965); *see also*

Milwaukee I, 406 U.S. at 108 n.9. Thus, it is irrelevant whether this Court has "left unresolved whether the Clean Water Act also preempted *state* common law actions." Br. in Supp. at 15 (emphasis added).

Finally, New Mexico cites *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), for the proposition that the present lawsuit will not "threaten any interference with federal regulatory goals." Br. in Supp. at 16. But *Exxon Shipping* involved an oil spill, and the CWA contains a specific saving clause that expressly preserves background law governing "damages ... resulting from a discharge of any oil." 554 U.S. at 488 (quoting 33 U.S.C. § 1321(o)). No such saving clause preserves the putative common-law claims asserted here. And *Exxon Shipping* was an admiralty case. "Admiralty law is judge-made law to a great extent," *id.* at 490 (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979)), and thus has traditionally been subject to this Court's authority to make federal common law. *See id.* In contrast, it is "primarily the office of Congress, not the federal courts" to make the Nation's laws governing water quality and environmental cleanup, and Congress in fact has done so. *See Am. Elec. Power Co.*, 564 U.S. at 423–24; *Milwaukee II*, 451 U.S. at 323–24.

CERCLA and RCRA. Even if there were some lingering ambiguity about the status of federal interstate common law in the wake of the CWA, CERCLA and RCRA separately displace any common-law claim that could apply here. Those comprehensive statutes "establish an elaborate system for dealing with the problem of environmental pollution, providing for enforcement of [their] terms by agency action and

citizen suits along with civil penalties." *Lykins v. Westinghouse Elec. Corp.*, Civ. No. 85-508, 1988 U.S. Dist. Lexis 3609, at *25 (E.D. Ky. Feb. 29, 1988). Because federal common-law claims would interfere with that system, they are precluded. *See id.* (concluding that CERCLA and RCRA "preclude[ ] this Court from maintaining a competing scheme of common law remedies"); *see also, e.g.*, *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 712 (7th Cir. 2014) (concluding that state common-law counterclaims were preempted by CERCLA because "[t]he two regimes cannot coexist while remaining faithful to Congress's explicit purposes"); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006) (holding that CERCLA preempted New Mexico's common-law claims seeking money damages because those claims were "designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource").

B. The issues presented in the Bill of Complaint—including Colorado's potential CERCLA liability, if any—will be resolved in the district courts.

If this Court declines to exercise its extraordinary original jurisdiction, doing so will not prevent New Mexico from receiving any relief to which it is entitled. Nor will it insulate Colorado from any liability that may be properly assigned to it. The pending district court case provides an alternative forum to litigate the issues raised here.

This Court has long recognized that denial of original jurisdiction is proper "if the *issues* offered for litigation are clearly subject to resolution in an

alternative forum and ensuing review by the Supreme Court." 17 Wright & Miller, § 4053, at 231 (emphasis added); *see also Mississippi*, 506 U.S. at 77. The alternative forum need not involve the same parties: denial of original jurisdiction is appropriate if the "issues ... can be resolved effectively by other litigation in other courts, *if need be by other parties*." 17 Wright & Miller, § 4053, at 232 (emphasis added); *see also Arizona v. New Mexico*, 425 U.S. 794, 796 (1976) (denying original jurisdiction in a case between two States because private parties "raise[d] the same constitutional issues" in a state district court proceeding).

The issues raised here will be resolved by the lower courts in the normal course of litigation. The pending district court action involves the same CERCLA, RCRA, and common-law claims as the proposed Bill of Complaint. *See* D.N.M. Compl. 32–39, 41–44, 47–48. The factual allegations are equivalent, and many of them are word-for-word identical. *Compare* D.N.M. Compl. ¶¶ 19–94 *with* Bill of Compl. ¶¶ 14–85. And both cases seek the same basic relief: reimbursement for "all" of New Mexico's past and future response costs. D.N.M. Compl. at 48–49; Bill of Compl. at 50.

A judgment in New Mexico's favor in the district court could even implicate Colorado, if necessary and appropriate, without the need for this Court's original jurisdiction (although, as explained above, Colorado is not properly liable under any of New Mexico's theories of recovery). Colorado's sovereign immunity prevents the private parties in the district court from suing the State, *Burnette v. Carothers*, 192 F.3d 52, 58–60 (2d. Cir. 1999), but EPA—which is a defendant in the

district court action—could seek contribution from Colorado for its permissible share of any CERCLA liability. *See* 42 U.S.C. § 9613(f); *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 167 (2004) (noting that CERCLA allows liable parties to bring contribution actions after a civil action to recover response costs or after a "judicially approved settlement that resolves liability to the United States or a State"). Indeed, that is precisely how CERCLA is supposed to work. *United States v. Colo. & E. R.R.*, 50 F.3d 1530, 1535 (10th Cir. 1995) ("A principal objective of [CERCLA's] contribution [provisions] was to 'clarif[y] and confirm[ ] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties ....'") (quoting S. Rep No. 11, 99th Cong., 1st Sess. 44 (1985)).

New Mexico's assertion that the Bill of Complaint against Colorado "seeks far broader relief ... [than] the District Court action," Br. in Supp. at 24, is inaccurate, as shown by a simple comparison of the two prayers for relief. *Compare* D.N.M. Compl. at 48–50 *with* Bill of Compl. at 50–51. And, in any event, any differences in the factual allegations as to Colorado and the district court defendants are insufficient to distinguish the *issues* presented in a meaningful way. Rather, the proposed Bill of Complaint presents a near-complete—and therefore wasteful—overlap of issues with the pending district court action.

Because the district court litigation can provide New Mexico with all the relief to which it may be entitled, the district court presents an adequate alternative forum, with this Court having eventual appellate jurisdiction as necessary.

II. If it grants leave to file the Bill of Complaint, the Court should provide for direct resolution of dispositive legal issues.

In appropriate cases, before this Court refers an original jurisdiction case to a Special Master, it first directly decides controlling issues of law on either a motion to dismiss or a motion for summary judgment. *See, e.g.*, *New Hampshire v. Maine*, 530 U.S. 1272 (2000) (granting leave to file a bill of complaint), *subsequent ruling*, 532 U.S. 742, 756 (2001) (granting motion to dismiss); *United States v. Alaska*, 499 U.S. 946 (1991) (granting leave to file a bill of complaint), *subsequent ruling*, 503 U.S. 569, 592 (1992) (ruling on summary judgment motions). In particular, the Court will, "where feasible ... dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

If the Court grants New Mexico leave to file its Bill of Complaint, it should immediately confront the dispositive legal questions in this case. This Court can and should serve a "gatekeeping function," *Nebraska*, 515 U.S. at 8, to determine whether New Mexico can advance its unprecedented claims. As explained above, each of those claims suffers from significant legal flaws. And the CERCLA claim attempts to expand the definition of an "owner or operator" to include a State's regulatory activities, which would encompass a vast universe of state activity at countless pollution point sources across the country. Lower courts have long held that such an expansion of CERCLA would be inappropriate. *See* above at 17–21 & n.9. This Court

should not allow this case to proceed without first evaluating New Mexico's novel legal theories.

These questions should be decided on a motion to dismiss, before a Special Master is appointed and before the parties devote time and expense to conducting discovery. A fully litigated original jurisdiction case is burdensome for both the parties and the Court, involving hundreds of filings, thousands of attorney hours, and millions of dollars in litigation costs, including Special Master fees. *See, e.g.*, *Florida v. Georgia*, No. 142 Orig. (2014), *docket available at* http://tinyurl.com/jbcvyxh; *Montana v. Wyoming*, No. 137 Orig. (2007), *docket available at* http://tinyurl.com/hjm9u3n; *see also Wyandotte Chems. Corp.*, 401 U.S. at 504 ("[E]ntertaining this complaint not only would fail to serve those responsibilities we are principally charged with, but could well pave the way for putting this Court into a quandary whereby we must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of our energies to such matters."). That problem would be magnified in the extremely complex setting of CERCLA and RCRA. Cases brought under those statutes typically take years to litigate and involve multiple parties and numerous expert witnesses. "Few statutory schemes—environmental or otherwise—have generated such complex litigation." Ronald G. Aronovsky, *Foreword: CERCLA and the Future of Liability-Based Environmental Regulation*, 41 SW. L. REV. 581, 584 (2012). In light of the costs and burdens associated with a fully litigated original action, it makes sense for this Court to fulfill its gatekeeping function at the outset of this unprecedented case.

Colorado therefore respectfully requests, if the Court grants New Mexico leave to file the Bill of Complaint, that it set a schedule for Colorado to file a dispositive motion. The Court would retain the option of appointing a Special Master if, upon reviewing the motion and briefing, referral appears more appropriate. *See Montana v. Wyoming*, 552 U.S. 1175 (granting leave to file a motion to dismiss), *subsequent ruling*, 555 U.S. 968 (2008) (referring the motion to dismiss to a Special Master). Alternatively, Colorado requests that if the Court appoints a Special Master, it direct the Special Master to entertain Colorado's dispositive motion before allowing any further proceedings.

III. The Court should deny New Mexico's request to consolidate discovery and pretrial proceedings in the district court in New Mexico.

Although it argues that federal district court is not an adequate alternative forum in which to adjudicate the issues in this case, New Mexico requests that the Court refer this case to "a Special Master in the United States District Court for the District of New Mexico for all discovery and pretrial proceedings." Br. in Supp. at 26 n.12.[13] The Court should deny that novel suggestion, which is without any precedent and is both unfair to Colorado and contrary to the design of this Court's original jurisdiction.

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[13] The very assertion that this proposal would both "conserv[e] judicial resources" and "ensur[e] consistent pretrial determinations," Br. in Supp. at 26 n.12, suggests that the two cases raise the same issues, making the exercise of original jurisdiction inappropriate. *See* above at 27–29.

A Special Master must be appointed in a neutral forum, not in the Plaintiff State and within the same federal district that New Mexico has chosen to press its claims against the Federal Government and private parties. To grant New Mexico's request would contravene the "respect for sovereign dignity" that is demanded in original jurisdiction cases, where States are treated as "independent nations" seeking the most neutral and august tribunal in the country. *See South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010). Worse, under New Mexico's proposal, Colorado would effectively become a non-consenting participant in the district court proceedings, without the rights of a party—effectively seated at the table, but without a direct voice in the proceedings. At the same time, New Mexico would have this Court bind Colorado to the "pretrial determinations" made in those district court proceedings. Br. in Supp. at 26 n.12.

The Court should not indulge New Mexico's attempt to transform this Court's original jurisdiction into an exercise in forum shopping. Its proposal to appoint a Special Master in New Mexico should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion for Leave to File Complaint. Alternatively, the Court should set a schedule for filing dispositive motions and supporting briefs.

Respectfully submitted,

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October 21, 2016