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Pursuant to Federal Rule of Civil Procedure 37(b) and (e), Plaintiffs the Navajo Nation and the State of New Mexico (together, the “Sovereign Plaintiffs”), hereby move for sanctions against Defendants the United States of America and the United States Environmental Protection Agency (“EPA”) (together, the “Federal Parties”) for spoliating evidence in violation of a Court Order and with the intent to deprive the Sovereign Plaintiffs of information that should have been preserved. Pursuant to Local Rule 7.1(a), the Sovereign Plaintiffs determined the Federal Parties will oppose this Motion.

INTRODUCTION

This Motion concerns the Federal Parties’ spoliation of evidence from the two most important EPA witnesses in this case—On-Scene Coordinators (“OSCs”) Hays Griswold and Steve Way. The spoliation was repeated and wide-reaching, resulting in the loss of communications and documentation from both OSCs contemporaneous with and related to the Gold King Mine Blowout. The Federal Parties’ excuses for their spoliation are implausible and inconsistent. And though they destroyed or otherwise made inaccessible evidence from the OSCs’ EPA-issued devices by May 2016, the Federal Parties concealed their spoliation until October 23, 2020, only days after learning that depositions of both OSCs would go forward, and just two months before discovery was set to close. Indeed, the Federal Parties negotiated with the parties and presented to the Court a Preservation Order in December 2018 knowing that they could not comply with its terms, having already spoliated ESI from both OSCs. After the entry, and in direct violation of the Preservation Order, the Federal Parties rendered inaccessible or destroyed *more* evidence: nearly one thousand documents and photographs from Mr. Griswold’s files that the Federal Parties had identified for production, but which inexplicably went “missing” in August

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