

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

*In re: Gold King Mine Release in San Juan County,
Colorado on August 5, 2015*

This Document Relates to Case:
All Cases

No. 1:18-md-02824-WJ

**THE FEDERAL PARTIES' RESPONSE TO SOVEREIGN PLAINTIFFS' MOTION FOR
SANCTIONS BASED ON SPOILIATION OF EVIDENCE¹**

¹ Pursuant to Local Rule 10.5, the Federal Parties obtained agreement from all parties to submit 100 pages of exhibits.

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The Federal Parties respectfully oppose the Sovereign Plaintiffs’ Motion for Sanctions. As explained below, the motion is contrary to the factual record and should be denied. The Federal Parties took extensive and reasonable measures to preserve and produce electronically stored information (“ESI”)—placing over 1,000 custodians under a litigation hold and producing nearly 700,000 documents. The Sovereign Plaintiffs focus on a limited set of ESI, mainly from the iPads and iPhones of two employees created around the time of the Gold King Mine release in July and August 2015. But to address concerns about the loss of that limited ESI, the Federal Parties proactively offered to waive privileges for the documents of these two employees, even though much of the ESI has been produced from other sources and any ESI that was lost was likely duplicative or immaterial. The Court should reject the Sovereign Plaintiffs’ attempt to characterize a limited loss of ESI—a minor occurrence considering the volume of ESI within a major federal agency—as an alleged government conspiracy.

Based on their unsupported narrative, the Sovereign Plaintiffs seek sanctions to obtain a presumption that the U.S. Environmental Protection Agency (“EPA”) “intended to open the [Gold King] mine” on August 5, 2015, causing the Gold King Mine release as alleged in their complaints. Doc. 1179 at 27; Doc. 7 at ¶¶ 101-04; Doc. 339 at ¶¶ 95-98. But every witness who was at the mine that day consistently testified that there was no intent to open the mine; the goal was to assess next steps by removing loose material in front of and above the adit blockage. Exs. 1-6. Lacking evidence for their theory, the Sovereign Plaintiffs’ now attempt to preclude evidence contesting their allegations and seek to obtain, through sanctions, favorable rulings on their negligence claim and the government’s Federal Tort Claims Act immunity argument when they cannot prevail on the merits.

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