

**IN 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	: : : : : :	MULTI-DISTRICT LITIGATION 1:18-MD-2824-WJ
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*This Document Relates to:
No. 1:18-cv-319-WJ*

**PLAINTIFF THE STATE OF UTAH'S OPPOSITION TO DEFENDANT HARRISON
WESTERN CONSTRUCTION CORPORATION'S MOTION TO DISMISS**

I. INTRODUCTION

Harrison Western ("Harrison") files this motion to dismiss for a third time under Federal Rule of Civil Procedure ("FRCP") 12(b)(2). This motion should be denied because it has the same defects as the prior attempts. Despite the Court's guidance to Harrison, it has not followed the proper procedures or resolved the disputed issues of fact that are fatal to its motion.

On procedural grounds, Harrison did not follow the Court's directions, delaying for over a year before filing this motion and failing to seek an evidentiary hearing by the Court-ordered deadline. Consequently, Utah need only make a *prima facie* showing that jurisdiction exists, and all factual disputes shall be resolved in Utah's favor Utah when determining the sufficiency of this showing. *Rusakiewicz v. Lowe*, 556 F.3d 1095, 1100 (10th Cir. 2009). The Court held in denying the prior motions to dismiss that Utah has made the necessary *prima facie* showing of personal jurisdiction over Harrison, *see* Court Order dated March 26, 2019 (Dkt. 167). That ruling is law of the case, and the genuine issues of material fact remain at issue in this case.

On substantive grounds, the courts have uniformly held that a defendant who causes pollution in a river that damages a downstream state is subject to the specific jurisdiction of that

state. Utah has found no case supporting Harrison's contrary argument, and Harrison cites none. Even if it was considered, Harrison's extrinsic evidence on a FRCP 12 motion further establishes Utah's specific and general jurisdiction over Harrison. This motion should be denied for each of these separate and independent reasons.

II. PROCEDURAL BACKGROUND

A. Harrison's Two Prior FRCP 12 Motions are Denied

Utah and Environmental Restoration ("ER") filed claims against Harrison for its role in causing the Gold King Mine Blowout. (Harrison Exhibit ("Exh.") A; Dkt. 218-1 at 31-34.) Harrison filed its first FRCP 12 motion to dismiss Utah's First Amended Complaint and ER's claims on July 25, 2018 (Dkt. 41). Before the hearing and without leave of Court, Harrison filed a second FRCP 12 motion on August 3, 2018 (Dkt. 48). On March 26, 2019, the Court denied both motions (Dkt. 167). In relevant part, the Court held:

Although the statements in the declarations appear to support Harrison Western's contentions that the Court does not have jurisdiction and that Utah cannot state a claim on which relief may be granted, there has been no evidentiary hearing. Consequently, the Court must resolve all factual disputes in favor of Plaintiff Utah. The allegations in Utah's First Amended Complaint, which in many cases refer only to the "Contractor Defendants" (ER, Weston Solutions, and Harrison Western), make a prima facie showing that jurisdiction exists and state claims upon which relief may be granted.

After an opportunity for discovery, Special Master Hon. Alan C. Torgerson shall hold an evidentiary hearing and file proposed findings of fact

regarding the Court's personal jurisdiction over Harrison Western. After the Court rules on any objections to the Special Master's proposed findings of fact, Harrison Western may file another motion to dismiss.

B. Harrison Fails to Comply with the Court's March 26, 2019 Order

Harrison did not comply with the Court's Order as to Utah. On July 1, 2019, Harrison filed its Answer to Utah's first amended complaint (Dkt. 201). The parties then negotiated case deadlines that were considered and ordered by Judge Torgerson on June 19, 2020, including a deadline of October 13, 2020 for the filing of any motions regarding personal jurisdiction (Dkt. 641). On October 13, 2020, Harrison filed the instant motion under FRCP 12(b)(2) repeating that Utah had no personal jurisdiction over Harrison (Dkt. 865). Harrison did not seek or obtain an evidentiary hearing before filing this motion. Harrison stipulated with ER, but not Utah, to a different procedure allowing Harrison to assert its personal jurisdiction arguments by affirmative defense (Dkt. 269). Harrison has not filed a dispositive motion to resolve the factual issues raised by Utah's and ER's pleadings, leaving genuine disputed issues of material facts at issue.

III. FACTS

The facts are alleged in Utah's First Amended Complaint ("FAC"), ER's third-party claims and in jurisdiction discovery responses by the parties. In 2014, Defendant EPA began a removal site evaluation to investigate the possibility of opening the collapsed portal at the Level 7 Adit at the Gold King Mine. (Case No. 1:18-cv-00319-WJ Dckt. 93, FAC ¶ 35.) EPA used the services of contractors under EPA Superfund Technical Assessment and Response Team ("START") and EPA Emergency and Rapid Response Service ("ERRS") contracts. (*Id.*) Defendant ER was the ERRS contractor at the Gold King Mine and Defendant Weston Solutions

was the START contractor. (*Id.* at ¶ 36.) Harrison is a Colorado corporation that served as a subcontractor to ER under its ERRS contract at the Gold King Mine. (*Id.* at ¶ 12.) Harrison performed excavation work at the Gold King Mine site in 2014 on the blockage that covered the mine portal. (ER Interrogatory Response No. 2 (“ER Response”), Hsiao Exhibit (“Exh.”) B). Harrison had independent authority and control to perform its duties and take necessary actions to work in a safe and proper manner, to avoid a blowout and resulting damages. (FAC at ¶ 36.)

Harrison created, in material respects, the plan to excavate and/or open the Gold King Mine portal while under contract with ER, when advised by ER that the conditions inside the Gold King Mine (vis-à-vis impacted water, water pressure, blockage, and similar factors that could trigger a potential release) were unknown. (ER Response No. 2, Hsiao Exh. B). When Harrison began the excavation work in 2014, it observed that seepage was emerging from the backfill at an elevation about six feet above the adit floor. (*Id.* at ¶ 39.) Harrison presumed that water had accumulated behind the blockage. (*Id.*) Harrison incorrectly concluded there were six feet of water impounded in the mine because seepage was not occurring higher up on the blockage. (*Id.* at ¶ 40.) Harrison suspended the work at the Gold King site until 2015 because it had uncovered conditions that required it to plan to treat a greater quantity of water potentially accumulated behind the blockage. (*Id.* at ¶ 41.) Harrison participated in planning for work to be performed at the Gold King Mine in 2015 and was scheduled to deploy to the mine later in August 2015. (*Id.* at ¶ 36.)

Based on its observations, Harrison incorrectly assumed that the contaminated water level was below the top of the adit. (*Id.* at ¶ 46.) Harrison also assumed that, because the mine was draining, it was not under pressure from the contaminated water behind it. (*Id.* at ¶ 47.) Thus,

Harrison believed it was not necessary to directly test for the level or volume of contaminated water behind the blockage. (*Id.* at ¶ 48.)

Harrison did not insert a measuring device from a location at a higher elevation from the blockage at the adit to determine the level of contaminated water behind it. (*Id.* at ¶ 49.) Harrison did not take a measurement to determine the pressure of the contaminated water against the blockage at the adit. (*Id.* at ¶ 50.) Harrison did not take precautions to design or install containment measures, including but not limited to a secondary containment system, such as a catch basin of proper size and capability, to prevent an accidental release of large quantities of toxic wastewater from reaching the Animas River. (*Id.* at ¶ 51.) Harrison also did not take the precaution of developing and implementing emergency response procedures in the event of an accidental release of large quantities of toxic wastewater, to prevent those toxic chemicals from reaching the Animas River. (*Id.* at ¶ 52.) Harrison did not provide advance warning to other agencies or municipalities of their work so that they could be prepared for an accident. (*Id.*)

Harrison was required to develop a Health and Safety Plan that complied with OSHA requirements for hazardous waste site operations in 29 C.F.R. § 1910.120 and with EPA regulations for response actions per 40 C.F.R. § 300.700(c)(5)(i). (FAC at ¶ 53.) Its Health and Safety Plan did not comply with these requirements. (*Id.*) Harrison was subject to various mandatory laws, regulations, and policies that removed or circumscribed their discretion in carrying out the work at the Gold King site, including but not limited to the Federal Mine Safety and Health Act of 1977 (U.S.C. § 877(b)) and Title 30, Code of Federal Regulations, Part 75 (30 C.F.R. §§ 75.372, 75.388(a)(2), 75.1200). (FAC at ¶ 54.) Harrison's conduct violated these laws, regulations, and policies.

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