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

STATE OF NEW MEXICO, *ex rel* HECTOR BALDERAS, ATTORNEY GENERAL, and the NEW MEXICO ENVIRONMENT DEPARTMENT,	**Case No. 1:19-cv-00178 MV-JFR**
Plaintiffs,	
v.	
UNITED STATES OF AMERICA, and the UNITED STATES DEPARTMENT OF THE AIR FORCE,	
Defendants.	

BRIEF OF STATE LEGISLATORS
AS *AMICI CURIAE* IN SUPPORT OF THE STATE OF NEW MEXICO'S
RESPONSE IN OPPOSITION TO THE CROSS MOTION TO DISMISS

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BRIEF OF STATE LEGISLATORS AS *AMICI CURIAE* IN SUPPORT OF THE STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE CROSS MOTION TO DISMISS

Three State Legislators, Senator Mimi Stewart, Senator Antoinette Sedillo Lopez, and Representative Andrés Romero hereby respectfully submit this brief as *amici curiae* in support of plaintiffs, the State of New Mexico, *ex rel* New Mexico Attorney General Hector Balderas, and the New Mexico Environment Department. Specifically, the *Amici Curiae* are supporting the State of New Mexico in opposing the United States' Cross Motion to Dismiss (Doc. 31) filed on September 7, 2019. The *Amici* are addressing two of the issues in the Motion to Dismiss, both of which are arguably jurisdictional: (1) whether the United States has waived its sovereign immunity as to the State law claim; and (2) whether the Federal and State law claims are barred because the United States Air Force is conducting a remedial or removal action. The *Amici* do not address the issue of whether the criteria for a preliminary injunction have been met and adopt the position of the State of New Mexico.

Contemporaneous with the filing of this brief, the *Amici* are filing a Motion for Leave to File a Brief as *Amici Curiae*. Pursuant to D.N.M. LR-Civ. 7.1, counsel for the *Amici* has communicated with counsel for the State of New Mexico and counsel for the United States. The State of New Mexico does not object to the motion. The United States does not take a position on the motion.

I. INTRODUCTION

This case involves a legal action by the New Mexico Attorney General and the New Mexico Environment Department to compel the United States Air Force to conduct expeditious investigation and cleanup of toxic pollutants in soil, groundwater, and surface water at Cannon Air Force Base near Clovis, New Mexico, and Holloman Air Force Base near Alamogordo, New Mexico.

Regrettably, the Air Force has been slow in responding to the contamination, and the cleanup process is now stalled. The Air Force has answered the State's action by arguing – incorrectly – that this Court is without subject matter jurisdiction over the action.

A. STATEMENT OF THE CASE

The State of New Mexico brought this action to compel the Air Force expeditiously to clean up soil, groundwater, and surface water that has become contaminated with per- and polyfluoroalkyl substances (PFAS). PFAS are a group of man-made chemicals that include perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS), perfluorononanoic acid (PFNA), perfluoro-2-propoxypropanorc acid (GenX), perfluorohexanesulphonic acid (PFHxS), perfluoroheptanoic acid (PFHpA), among other compounds. PFAS have been used in a variety of industries world-wide beginning in the 1940s. PFAS contamination in the environment is typically from releases at manufacturing and other industrial facilities, fire and crash training areas, and industrial waste sites where products containing PFAS have been used. Certification of Mark Laska, Ph.D., In Support of Plaintiffs' Motion for Preliminary Injunction (July 23, 2019) (Doc. 13) at p. 3, ¶ 8. There is substantial evidence documented in peer-reviewed, scientific journals indicating that PFAS pose significant human health and ecological risks which include developmental problems, low birth weight, decreased fertility, hormone disruption, immune system damage, and increased cancer risk. *Id.* at p. 5, ¶ 15.

Although the United States Environmental Protection Agency (EPA) has not set enforceable regulatory drinking water standards for PFAS, Cross Motion to Dismiss at 7-8, the New Mexico Water Quality Control Commission has listed PFHxS, PFOS, and PFOA as "toxic pollutants" under the New Mexico Water Quality Regulations. N.M. ADMIN. CODE § 20.6.2.7.T(2)(s).

The *Amici* adopt the discussion of the facts in this case set forth in sections I and II of the Plaintiffs' Motion for a Preliminary Injunction (Doc. 11) filed on July 24, 2019.

New Mexico brought this action under the analogous provisions of two statutes, one Federal and one State, both designed to address the problem of hazardous waste disposal and cleanup. The Federal statute is the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 to 6992k, which was signed into law in 1976. The State statute is the New Mexico Hazardous Waste Act, N.M. STAT. ANN. §§ 74-4-1 to 74-4-3, enacted in 1983. Both statutes contain "imminent hazard" provisions, which provide for injunctive relief to mitigate an endangerment to the public health or the environment.

Section 7002(a)(1)(B) of RCRA – part of the RCRA "citizen suit" provision – provides that "any person may commence a civil action on his own behalf":

> against any person, including the United States and any other governmental instrumentality or agency, . . . and including any past or present generator, past or present transporter, past or present owner or operator of a treatment, storage, or disposal facility 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).[1] In any such action, section 7002(a) further provides, "the district court shall have jurisdiction . . . to restrain any person who has contributed to or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste." 42 U.S.C. § 6972(a).

Section 13(A) of the New Mexico Hazardous Waste Act similarly provides:

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1 RCRA contains a second imminent hazard provision, in section 7003(a), which allows the Administrator of EPA to bring an action for injunctive relief. 42 U.S.C. § 6973(a).

> Whenever the [Environment Department Secretary] is in receipt of evidence that the past or current handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . may present an imminent and substantial endangerment to health or the environment, he may bring suit in the appropriate district court to immediately restrain any person, including any past or present generator, past or present transporter, past or present owner or operator of a treatment, storage, or disposal facility who has contributed or who is contributing to such activity, to take such other action as may be necessary, or both.

N.M. STAT. ANN. § 74-4-13(A).[2]

B. INTERESTS OF THE *AMICI CURIAE*

The *Amici* are elected members of the New Mexico Legislature. They thus have a strong interest in the effective implementation and enforcement of State environmental laws enacted to protect the health and welfare of New Mexicans and the environment of New Mexico, particularly the State's precious groundwater resources. They also have an interest in the effective implementation and enforcement of Federal environmental laws within the State of New Mexico. Given the many Federal facilities in New Mexico – including three U.S. Air Force bases, a U.S. Army missile range, two U.S. Department of Energy national laboratories, and a National Aeronautics and Space Administration rocket engine test facility – the *Amici* have a strong interest in ensuring that the Federal government complies with State and Federal environmental laws. Of particular importance are those State and Federal environmental laws designed to clean up and mitigate pollutants, contaminants, and hazardous wastes that have moved, leaked, spilled, or otherwise escaped into the environment. As the U.S. Congress recognized in 1985, Federal facilities "may be some of the worst [hazardous waste] sites in the Nation." H.R. REP. NO. 99-253, pt. 1, at 58

2 Because section 13(A) of the N.M. Hazardous Waste Act authorizes the Secretary of the New Mexico Environment Department to bring an action, it is more closely analogous to section 7003(a) of RCRA (EPA action) than to 7002(a)(1)(B) of RCRA (citizen action).

(1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2840. Other Federal facilities in the State, most notably Los Alamos National Laboratory and Kirtland Air Force Base, have created serious environmental pollution problems. The jurisdictional issues in this case could set important precedent, which could adversely affect the cleanups at other Federal facilities.

The *Amici* represent districts and communities that have suffered the effects of pollution from Federal facilities. Specifically, they all represent districts in Albuquerque that partially overlie a plume of groundwater pollution from the bulk fuel storage facility at Kirtland Air Force Base. They want to ensure that the Air Force is accountable under the law for pollution from Air Force facilities that threatens public health and the environment.

C. Attorney Statement

Consistent with Rule 29(c)(5) of the Federal Rules of Appellate Procedure,[3] the undersigned attorney states that: (1) the undersigned attorney for the *Amici* authored this brief in its entirety; (2) no party or party's counsel contributed money or any other compensation to fund the preparation or submittal of this brief; and (3) no other person – other than the New Mexico Environmental Law Center and its members – contributed money or any other compensation to fund the preparation or submittal of this brief.

II. ARGUMENT

In its Cross Motion to Dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Air Force makes two arguments to support its contention that this court lacks subject matter jurisdiction. First, the Air Force argues that the United Sates has not waived its sovereign immunity

3 Although the Federal Rules of Appellate Procedure of course do not strictly apply in this proceeding, following this rule nevertheless serves a worthwhile purpose. *See United States v. Bd. of Cnty Comm'rs*, 184 F. Supp. 3d 1097, 1115 (D.N.M. 2015) (District courts often look to Rule 29 Fed. R. App. P. for guidance on amicus briefs.).

from actions for injunctive relief under state law. Second, the Air Force argues that it is conducting a remedial or removal action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 to 9675, and that the New Mexico action is consequently barred under section 113(h) of CERCLA, 42 U.S.C. § 9613(h). Both of these arguments are wrong. If this Court were to adopt these arguments, however, it could set a problematic precedent for cleanup of environmental pollution at other Federal facilities in New Mexico.

A. THE UNITED STATES HAS CLEARLY AND UNEQUIVOCALLY WAIVED ITS SOVEREIGN IMMUNITY

The Air Force's first argument is based on the sovereign immunity of the Federal government. Under the doctrine of sovereign immunity, the United States cannot be sued without its consent. *United States v. Lee*, 106 U.S. 196, 204 (1882). That consent must take the form of a statutory waiver of sovereign immunity enacted by Congress. The doctrine of sovereign immunity derives, incredibly, from the ancient English common law maxim that "the King can do no wrong." Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).[4] As one critic of the doctrine has observed, "[s]overeign immunity is inconsistent with a central maxim of American government: no one, not even the government, is above the law." *Id.*

Nevertheless, as the Air Force correctly points out, the courts have construed waivers of sovereign immunity narrowly. Cross Motion to Dismiss at 25. A statutory waiver of sovereign immunity must be clear and unequivocal. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992). It must be construed strictly in favor of the sovereign. *Lane v. Peña*, 518 U.S. 187, 192 (1996). And

4 "That the king can do no wrong is a necessary and fundamental principle of the English constitution." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND * 17 (1765-1770).

it must not be enlarged beyond what the statutory language requires. *Nordic Vill.* at 34. On the other hand, congressional "intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Bd. v. U.S. Postal Serv.*, 467 U.S. 512, 521 (1984).

Contrary to the Air Force's contention, the United States has clearly and unequivocally waived its sovereign immunity from the State of New Mexico action in two federal statutes: RCRA and CERCLA.

1. *RCRA Contains an Applicable Waiver of Federal Sovereign Immunity*

RCRA contains an express waiver of the sovereign immunity of the United States that is clear and unequivocal. The waiver covers state actions to mitigate environmental contamination, such as the State action here. Moreover, Congress has, repeatedly, manifested its underlying policy in enacting the RCRA immunity waiver.

To understand the congressional policy underlying the RCRA waiver of federal sovereign immunity, it is useful to review briefly the history of the waiver. When Congress enacted RCRA in 1976 as an amendment to the Solid Waste Disposal Act, it included an express waiver of federal sovereign immunity. Pub. L. No. 94-580 § 2, 90 Stat. 2795, 2821 (1976) (amended 1992). The original waiver provided that each department agency and instrumentality of the federal government "shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural . . . respecting control or abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements." *Id.* Since then, Congress found it necessary to expand and reaffirm that waiver.

The Supreme Court reviewed the original RCRA waiver of sovereign immunity in *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992). In that case, the State of Ohio had sued the Department of Energy under the citizen suit provisions of RCRA[5] and the Clean Water Act[6] seeking civil penalties for past violations of both State and federal hazardous waste and water quality laws. *Id.* at 612. The Court held that neither the RCRA waiver, nor the RCRA citizen suit provision, was sufficient to waive federal sovereign immunity from the claims for "punitive" sanctions for past violations of RCRA and analogous State law. *Id.* at 615-20, 627-28.

Congress responded with the Federal Facility Compliance Act of 1992, P.L. No. 102-386, 106 Stat.1505 (1992). The Federal Facility Compliance Act, among other things, amended the RCRA waiver of sovereign immunity to clarify that it waives immunity from penalties for past violations. It also revised the general definition of "person" in RCRA to include the United States and departments and agencies thereof. The conference report accompanying the legislation stated that:

> [The amendment] makes clear that sovereign immunity is expressly waived with respect to any substantive or procedural provision of law respecting control, abatement, or management of solid waste or hazardous waste. In doing so, the conferees reaffirm the original intent of Congress that each department, agency, and instrumentality of the United States be subject to all of the provisions of federal, state, interstate, and local solid waste and hazardous waste laws and regulations. . . . [T]his amendment overrules the Supreme Court holding in *U.S. Department of Energy v. Ohio*, 503 U.S. [607] (1992).

H.R. REP. NO. 102-886, at 18 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.AN. 1317, 1318.

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5 Section 7002(a)(1)(A) of RCRA allows any person to commence a civil action against any person, including the United States, "who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A).

6 Clean Water Act § 505(a), 33 U.S.C. § 1365(a).

As amended by the Federal facility Compliance Act of 1992, the waiver of Federal sovereign immunity in section 6001(a) of RCRA now provides, in relevant part:

> In General. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, *State*, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or *any provisions for injunctive relief* and such sanctions as may be imposed by a court to enforce such relief), respecting control and *abatement* of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

42 U.S.C. § 6961(a) (emphasis added).

Thus, the RCRA waiver of sovereign immunity applies to State requirements for injunctive relief respecting the abatement of solid waste or hazardous waste, which precisely describes section 13(A) of the New Mexico Hazardous Waste Act. The RCRA waiver of Federal sovereign immunity is clear and unequivocal. Nothing more is required.

2. *CERCLA Contains an Applicable Waiver of Federal Sovereign Immunity*

CERCLA also contains a clear and unequivocal waiver of federal sovereign immunity from state environmental cleanup laws, such as section 13 of the Hazardous Waste Act. Section 120(a)(4) of CERCLA provides:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, and instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) of this section when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

42 U.S.C. § 9620(a)(4).

The key terms "removal" and "remedial action" are respectively short- and long-term response or cleanup actions defined broadly under CERCLA. A removal, as defined in section 101(23), is a short-term response to mitigate threats, such as installing security fencing, providing an alternative water supply, or relocating residents. 42 U.S.C. § 9601(23). A remedial action, defined in section 101(24), is a response action taken in addition to or instead of a removal to implement a permanent remedy, such as the cleanup of released hazardous substances. 42 U.S.C. § 9601(24).

The CERCLA waiver of federal sovereign immunity applies to the State's claim under section 13(A) of the Hazardous Waste Act. Section 13 is a "state law concerning removal and remedial action." It requires the abatement of an imminent hazard created by the past or current handling, storage, treatment, transportation, or disposal of a solid or hazardous waste. Here, the State action seeks "abatement of the conditions creating an imminent and substantial endangerment." Amended Complaint (Doc. 9) at 33. Such action is, by definition, a "removal" or a "remedial action." As one federal court explained in a case very similar to this one, "[t]he language of section 9620(a)(4) is sufficiently specific to waive the sovereign immunity of the United States to state laws like the [Pennsylvania Solid Waste Management Act] that deal with removal and remedial actions as defined in CERCLA. *United States v. Pa. Dep't of Envtl. Res.*, 778 F. Supp. 1328, 1331 (M.D. Pa. 1991). The CERCLA waiver of federal sovereign immunity is clear and unequivocal.

B. THE STATE IS NOT CHALLENGING AN ONGOING REMOVAL OR REMEDIAL ACTION

The Air Force's second argument is based on the so-called bar on pre-enforcement judicial review under CERCLA. Section 113(h) of CERCLA states in relevant part that "[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action

selected under section [104 of CERCLA, 42 U.S.C. § 9604] or to review any order issued under section [106(a) of CERCLA, 42 U.S.C. § 9606(a)], in any action except one of the following" CERCLA enforcement actions, none of which is applicable here. 42 U.S.C. § 9613(h). The purpose of this bar on judicial review is to expedite CERCLA cleanups. As the Tenth Circuit noted, by "enacting this jurisdictional bar, Congress intended to prevent time-consuming litigation which might interfere with CERCLA's overall goal of effecting the *prompt cleanup of hazardous waste sites*." *United States v. City & Cnty of Denver*, 100 F.3d 1509, 1514 (10th Cir. 1996) (emphasis added).

The Air Force argues that the action by the State of New Mexico is a challenge to a removal selected under section 104 of CERCLA, 42 U.S.C. § 9604, and that it is consequently barred under section 113(h). Cross Motion to Dismiss at 19-23. But that is not the case. The Air Force is not currently engaged in an ongoing removal or remedial action at either of the air bases. Rather, the Air Force has allowed the cleanup process to stall.

To understand the fallacy of the Air Force's argument, it is helpful to examine the CERCLA cleanup process. The core of the CERCLA cleanup program is the National Contingency Plan,[7] 40 C.F.R. Part 300 (2018), which establishes the procedures for responding to releases of hazardous substances into the environment, and for making cleanup decisions. *City & Cnty of Denver* 100 F.3d at 1511.

Once a release of hazardous substances has been discovered, the first step in the CERCLA cleanup process under the NCP is a site evaluation. The response agency may conduct either a removal site evaluation, 40 C.F.R. § 300.410, or a remedial site evaluation, 40 C.F.R. § 300.420. A

7 Formally, the National Oil and Hazardous Substances Pollution Contingency Plan.

site evaluation includes a preliminary assessment of the site and, if warranted, a site inspection. 40 C.F.R. §§ 300.410(a), 300.420(a). Based on the site evaluation, the response agency determines whether further action – a removal, a remedial action, or both – is warranted. If a removal action is found to be warranted, the response agency may then proceed with a removal. 40 C.F.R. § 300.415. If a remedial action is found to be warranted, the next step in the process is a remedial investigation and feasibility study (RI/FS). 40 C.F.R. § 300.430. The purpose of a remedial investigation is to assess site conditions, and the purpose of a feasibility study is to evaluate a range of alternatives for a final remedy. 40 C.F.R. § 300.430(a)(2). Based on the RI/FS, the response agency selects the final remedy, which is set forth in a Record of Decision (ROD). 40 C.F.R. § 300.430(f)(4). The next step in the CERCLA process is the remedial design and remedial action (RD/RA). 40 C.F.R. § 300.435. The RD/RA is the design and actual implementation of the selected remedy. 40 C.F.R. § 300.435(a). A period of operation and maintenance may follow the RA. *Id.*

At both Cannon Air Force Base and Holloman Air Force Base, the Air Force has completed the initial step in the CERCLA cleanup process, but it has not begun the next step and does not intend to do so for years. At Cannon, according to the Air Force, a preliminary assessment was completed in 2015, and a site inspection was completed in 2018; an expanded site inspection was completed in March 2019. Cross Motion to Dismiss at 9-10. The Air Force prepared final reports for these actions. *Id.* The site evaluation phase for Cannon Air Force Base was thus completed six months ago. At Holloman, a preliminary assessment was completed in 2015, and a site inspection was completed in 2018. *Id.* at 11-12. The Air Force has prepared final reports for both these actions. *Id.* The site evaluation phase for Holloman Air Force Base was thus completed last year. Under the NCP, "[a] removal site evaluation shall be terminated when the [on-scene coordinator] or

lead agency determines . . . [t]he removal site evaluation is completed." 40 C.F.R. § 300.410(f)(7). According to the Air Force, "[t]he next CERCLA phase at both Bases will be to conduct a remedial investigation to further characterize the sites and evaluate possible remedial actions." Cross Motion to Dismiss at 23. The RI/FS for Cannon Air Force Base is scheduled to begin in fiscal year 2021. Cross Motion to Dismiss at 2; Declaration of Sheen Thomas Kottkamp (Sept. 5, 2019) (Doc. 31-3). The RI/FS for Holloman Air Force Base is "tentatively scheduled" to begin in fiscal year 2023. Cross Motion to Dismiss at 2; Declaration of Robin E. Paul (Sept. 5, 2019) (Doc. 31-4) at 8, ¶ 16.

Thus, currently there is no ongoing removal or remedial action for the State to "challenge" in contravention of the section 113(h) bar on judicial review. The site assessment phase at both air bases was completed. The RI/FS phase will not begin until 2021 or 2023, and no remedial action has been selected. In the words of Judge Parker, "it is clear that Congress intended that cleanups under section [104] go forward unchallenged *until completion of a discrete phase*." *Reynolds v. Lujan*, 785 F. Supp. 152, 154 (D.N.M. 1992) (emphasis added). Here, the first discrete phase has been completed, and the cleanup process is stalled until the Air Force begins the next phase – conducting an RI/FS – two to five years after completing the site evaluation.

The Air Force relies extensively on the decision in *Cannon v. Gates*, 538 F.3d 1328 (10th Cir. 2008). The facts of that case are quite different from the facts here, however. In *Gates*, the Department of Defense – the response agency – had conducted a preliminary assessment and prepared a draft report. 538 F.3d at at 1334. The Department was planning its site inspection while the litigation was pending. *Id.* Thus, the site evaluation had begun, but had not been completed. The court found that these efforts "qualify as an ongoing removal action." *Id.* Here, as we have

seen, the site evaluations for both air bases have been completed; there is no "ongoing removal action."

The purpose of the bar on judicial review in section 113(h) of CERCLA is to expedite cleanup of contaminated sites. Here, the Air Force is attempting to use section 113(h) to delay cleanup, contrary to the will of Congress. The State action should be allowed to proceed.

III. CONCLUSION

This Court has subject matter jurisdiction over the State action in this case. The United States has clearly and unequivocally waived its sovereign immunity from New Mexico's action in both RCRA and in CERCLA. The bar on judicial review does not apply because the Air Force is not engaged in an ongoing removal or remedial action. Thus, the Court should deny the Defendant's Cross Motion to Dismiss on jurisdictional grounds. A contrary ruling could set a problematic precedent, frustrating the State's efforts to compel cleanup of environmental pollution at other Federal facilities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September 2019, I filed the foregoing Brief of State Legislators as *Amicus Curiae* in Support of the State of New Mexico's Response in Opposition to the Cross Motion to Dismiss using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

Charles de Saillan