

# LEGAL MEMORANDUM

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## Agencies Not Coming Clean About the EPA's Responsibility For Poisoning the Animas River

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### Abstract

*On August 5, 2015, EPA contractors and officials caused a spill of 3 million gallons of water containing toxic heavy metals into the Animas River in Colorado, which serves as a drinking water source for thousands of residents in Colorado and other states. The agency took full responsibility for the disaster and later commissioned an independent analysis of the spill and its cause. The resulting report from the Interior Department's Bureau of Reclamation contains abundant technical information, but clearly fails to identify the EPA personnel whose negligence caused the spill. Private citizens accused of similar negligence have faced criminal prosecution. The EPA and the Justice Department should be asked why the federal government discriminates in favor of government employees and against private parties.*

Several months ago contractors and officials from the Environmental Protection Agency (EPA) caused millions of gallons of water contaminated with toxic metals to spill into a river that supplies drinking water to thousands of residents in three states. Three factors captured the media's attention: (1) the dramatic nature of the catastrophe (the poisoning of a region's drinking water supply), (2) the responsible entity (the EPA, the agency entrusted with the regulation of the very toxic materials that it released into the river), and (3) a slow news period (Congress was in recess and most of the Washington, D.C., area was on vacation). Since then, new tragedies have occupied the public, but the Animas River spill has not gone away.

In an earlier publication, Heritage Foundation scholars criticized the government's response to the spill.<sup>1</sup> The reason for that censure was not that the government had made no effort to contain

### KEY POINTS

- On August 5, 2015, EPA contractors and officials caused a spill of 3 million gallons of water contaminated with toxic metals into the Animas River in Colorado.
- The EPA promptly took full responsibility and later commissioned an independent analysis of the spill and its cause.
- The lengthy report from the Interior Department's Bureau of Reclamation leaves important questions unanswered.
- In particular, the report does not identify the EPA personnel whose actions caused the spill. Similar mishaps by private parties have prompted federal criminal investigations.
- The EPA and the Justice Department should be asked why the federal government discriminates in favor of government employees and against private parties.

This paper, in its entirety, can be found at <http://report.heritage.org/lm170>

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the spread of the toxic water—it had—but that the government had failed to take one step that it assuredly would have pursued had a private party caused the spill: open a criminal investigation. On a number of prior occasions, the federal government had pursued criminal charges against private parties who were responsible for similar mishaps. One case in particular seemed to be directly on point: *United States v. Hanousek*.<sup>2</sup> The point of the earlier Heritage paper was that the federal government should stop discriminating against private parties.

An employee of a railway company working as a railroad roadmaster, Edward Hanousek supervised a rock quarry project at a site on an embankment above an Alaskan river. One day, while Hanousek was off duty and at home, a backhoe operator, employed by an independent contractor retained before Hanousek was even hired, accidentally struck a petroleum pipeline near the railroad tracks, ruptured the pipeline, and spilled 1,000 to 1,500 gallons of oil into the river. The federal government charged Hanousek with violating the Clean Water Act (CWA) by negligently polluting the river without a permit.<sup>3</sup> The jury found him guilty, the court of appeals upheld his conviction over his objection that he should not be criminally prosecuted for mere negligence, and the Supreme Court, over two dissents, declined to review his conviction.<sup>4</sup>

### **The Animas River Spill**

On August 5, 2015, EPA contractors and officials caused a spill of 3 million gallons of water containing toxic heavy metals—arsenic, lead, mercury, and others—into the Animas River in Colorado, an upstream tributary of the Colorado River that serves as a drinking water source for thousands of downstream residents in Colorado and other states. The contaminated water came from the Gold King Mine, one of the thousands of abandoned mines sprinkled across the Western states. The EPA was on the site to identify and stanch an ongoing leak of contaminated water collected within the mine. Early media reports indicated that the EPA officials dislodged a plug of material that restrained the toxic water, leading to a deluge of chemical-laced water.<sup>5</sup>

Senior EPA officials, such as Dave Ostrander, EPA regional director of emergency preparedness, and Gina McCarthy, the EPA Administrator, wasted no time stating that the agency took full responsibility for the disaster. Someone within the EPA later

commissioned the Bureau of Reclamation (BOR), a component of the U.S. Department of the Interior (DOI), to conduct an independent analysis of the spill and its cause. On October 15, 2015, the BOR issued its report. That report provides an opportunity to re-examine the question of the EPA's responsibility for this spill.<sup>6</sup>

### **The BOR Report**

The BOR Report states that the EPA requested that the DOI provide technical assistance to conduct an independent review of the spill and offer remedial steps to prevent another such occurrence.<sup>7</sup> The DOI assigned the BOR with that task and coordinated with the U.S. Army Corps of Engineers (Army Corps) and the U.S. Geological Survey (USGS) for the latter two organizations to perform a peer review of the BOR's work product. In October 2015, two months after the incident, the BOR produced a report (BOR Report) analyzing the Animas River spill. Including a glossary and list of references, the report is 89 pages long, with three appendices totaling an additional 26 pages.

### **Irrelevant Site Photographs, Depictions, Maps, and Tables Included Within the Narrative Discussion of the Spill**

The report contains more than 60 photographs and 60 engineering depictions of the site spread out over the 89-page analysis, along with figures, maps, and tables, designed to give the reader a picture of the site and what happened. That is a good feature of the report for readers who cannot visualize the site. At the same time, the considerable amount of non-narrative material included within the body of the report does little for the lay reader but distract from the question of who is responsible for this spill and whether or not he or they will be held accountable.

First, that material does little to inform readers exactly how the incident happened. There is no photograph of the actual blowout, only simple illustrations of the excavation plan, and the report makes no mention of the incident having been filmed. When federal law enforcement officers execute a search warrant at a site like the Gold King Mine, they videotape the scene before and after the search is completed in order to have a record of how the site appeared before the agents arrived and after they left, in case the owner claims that the agents damaged the property during the search. It is possible that there is a

videotape of the spill, but the BOR Report does not indicate whether someone—and if so, who—videotaped the occurrence of the spill and its aftermath.

Second, the considerable amount of non-textual material in the BOR Report detracts from the impression that an 89-page report might give a reader. More than 50 pages of the report contain a photograph, an engineering depiction, a map, or a table that take up a goodly portion or the entirety of a page. Including that material in the report rather than in an appendix lengthens the report without explaining how the spill occurred or who is responsible. In other words, just as counting every copy of every piece of paper enables a lawyer to claim that he disclosed to his adversary a mountainous amount of discovery materials (“We disclosed 30,000 pages of material to the other side.”), including the nontextual material within the narrative discussion of the event inflates the length of the BOR Report’s treatment of that vital issue.

To be sure, a 39-page report may be more than adequate to identify the cause(s) of the spill and the responsible parties (although the BOR Report does not accomplish the latter purpose). But there is always a risk that the public—the vast majority of which will not read a report like this one—would conclude from its length alone that the government conducted a meticulous and thorough analysis of the event. If so, a report that is more than 50 percent longer than it needed to be could give the average person a misimpression of the value of the report.

### **Irrelevant Historical and Scientific Information Included Within the Narrative Discussion of the Spill**

A factor that contributes to this concern is the inclusion within the BOR Report of a copious amount of irrelevant material. For example, an early section, “Geology at the Gold King Site,” discusses the site geology going back to “the Tertiary Period (25 to 35 million years ago),” and extending forward to “mineralizing events” that occurred “11 million years ago.”<sup>8</sup> Later comes the “Mining History,” which began when “[g]old was discovered in the San Juan Mountains in 1860,” continued through the remainder of the century once “the Denver and Rio Grande Railroad was extended to Silverton and began operations,” and survived “a notorious blowout in 1978” of the Sunnyside Mine “that drained lake Emma and required two years to repair.”<sup>9</sup>

All of that is very interesting, perhaps especially to geologists and engineers, but it has little bearing on what happened at the Gold King Mine and, more importantly, who is responsible. The portion of the report devoted to discussion of the August 5, 2015, events is *only nine pages long*, and *seven of those nine pages consist of photographs or figures, rather than a narrative of the events*.<sup>10</sup> The BOR’s “Executive Summary” and “Findings” are each only three pages long.<sup>11</sup> For all practical purposes, therefore, the 89-page BOR report contains only eight pages of discussion of the critical issue of how the Animas River Spill happened. An eight-page report may have been all that was necessary to explain that event, and those pages may do that job well, but the effect on the public of the release of an 89-page report (115 pages if you count the appendices) would be markedly different than the publication of an eight-page report. The former is far more likely to serve a public relations goal than the latter, even though the difference between the lengths of the two reports consists of immaterial discussion.

### **The BOR Report Findings Demonstrate that the EPA was Negligent**

The report’s findings state that the EPA’s project leader for the Gold King Mine excavation called BOR Supervisory Civil Engineer and co-author of the BOR report, Michael J. Gobla, “[o]n or about July 23, 2015,” just before the project leader was to leave for vacation.<sup>12</sup> He asked Mr. Gobla to visit the Gold King Mine site and assess the EPA’s excavation plans because he was “‘unsure about the plans for the Gold King Mine’ and wanted an outside independent review of the [ ] plans by BOR.”<sup>13</sup> They scheduled Mr. Gobla’s on-site review of the plans for August 14, when the project leader would be back from vacation.<sup>14</sup> But the report states that just six days later, on July 29, unidentified individuals began excavating debris “from the portal area.”<sup>15</sup> EPA personnel continued excavations on August 4 “to examine conditions close to the mine opening,” and discussed “a plan to open the adit” (a horizontal passage leading into a mine for the purpose of access or drainage) with contractors and representatives of the Colorado Division of Reclamation, Mining and Safety (DRMS).<sup>16</sup> Their plan was to dig into the mine “above the *assumed* top of the water inside,” which would “leave in place the fill holding back the water.”<sup>17</sup> They based their assumptions of the interior water levels

on visual observations of the site, including evidence of past and present water flow out of the mine, but did not wait to confirm their plans or even consult with the BOR as the project leader had scheduled.<sup>18</sup> The report states that DRMS personnel and the EPA project leader, who may have still been on vacation, agreed to the plan on August 5, and contractors began excavating based on those unchecked assumptions.<sup>19</sup>

On August 5, a backhoe operator hit a spring and “[w]ithin moments, the ‘spring’ began spurting upward,”<sup>20</sup> beginning the more than 3 million-gallon deluge of acid mine water into the Animas River.<sup>21</sup> According to the BOR report, “[i]t is important to note that . . . BOR’s interpretation of the water level inside the mine shows the adit full [of water], unlike the lower water levels” assumed by the EPA and DRMS.<sup>22</sup> The report offers no explanation for why EPA personnel did not wait for BOR’s independent review of their plans prior to excavation,<sup>23</sup> which might have led to a change in plans and prevented the blowout. Private parties have been held criminally liable for similar conduct of failing to discover a latent hazard that leads to a discharge.<sup>24</sup> If this were the end of their conduct, therefore, the government would still be treating the EPA officials differently from private parties.

EPA officials made another oversight regarding the water level inside the adit: They failed to use “a drill rig to bore into the mine from above to directly determine the level of the mine pool prior to excavating backfill at the portal,” a procedure used successfully in connection with a different mine.<sup>25</sup> Had that practice been used at the Gold King Mine, the BOR concluded, “the plan to open the mine would have been revised, and the blowout would not have occurred.”<sup>26</sup> Unfortunately, the BOR Report went on to say, this event “is somewhat emblematic of the current state of practice in abandoned mine remediation,” a practice that “appears to focus attention on environmental issues . . . with little appreciation for the engineering complexity of some abandoned mine projects that often require, but do not receive, a significant level of expertise.”<sup>27</sup> The BOR review states: “It is concluded that the failure mode was an excavation induced failure.”<sup>28</sup> It also concludes that “there was an absence of many essential things”—such as an “analysis of potential failure modes”<sup>29</sup>—that may have led to prevention of the EPA’s Animas River spill. Because the EPA failed to check the

actual water level inside the Gold King Mine as they had at previous excavations, employees incorrectly guessed the water level inside the mine.<sup>30</sup> “This error resulted in development of a plan to open the mine in a manner that appeared to guard against blowout but instead led directly to the failure”<sup>31</sup> caused by the backhoe.<sup>32</sup>

### **The BOR Report Buries the Cause(s) of the Spill**

A complementary problem with the BOR Report is what it does *not* contain. The BOR Report does not identify the following:

- The EPA supervisors, officials, or contractors who prepared the site assessment.
- The EPA supervisors, officials, or contractors who prepared the remediation plan.
- The EPA supervisors, officials, or contractors who were involved in the decision to proceed on August 5, 2015.
- The EPA supervisors, officials, or contractors who were present at the Gold King Mine on August 5, 2015.
- The EPA supervisors, officials, or contractors who were involved in the post-spill efforts to stanch the continued spill of toxic water into the Animas River.
- The specific reasons why the EPA On Scene Coordinator wanted the BOR to review the plan to open the mine.
- The specific reasons why the EPA did not await the return of the original EPA On Scene Coordinator and the recommendations from the BOR before opening the mine.

The BOR Report justifies not identifying those personnel on the ground that the BOR Evaluation Team believed that it was hired to perform a technical evaluation of the causes of the incident.<sup>33</sup> The BOR Report also stated that the Evaluation Team “did not believe it was requested to perform an investigation into a ‘finding of fault,’ and that those separate investigative efforts would be performed by

others more suitable to that undertaking.”<sup>34</sup> The answers to these questions, however, could well be important to a proper analysis of this matter.

The reason is that there was a disagreement among the peer reviewers as to the adequacy of the BOR Report.

There were three peer reviewers, one each from the Army Corps of Engineers, the USGS, and the BOR. The BOR Report’s descriptions of the positions held by the BOR Evaluation Team members and the BOR peer reviewer give the appearance that the peer review mechanism may not have been as stringent as a reader might reasonably suppose.

The Army Corps reviewer concluded that the BOR Report “properly describes the technical causes of the failure,” but did not get to the bottom of why the spill occurred. The Army Corps reviewer “had serious reservations with the chronology of events internal to EPA from the day of the telephone call to BOR [viz., July 23, 2015] and up to the day of the mine failure [August 5, 2015].”<sup>35</sup> According to the BOR Report:

[The Army Corps reviewer] pointed out that the actual cause of failure is some combination of issues related to EPA internal communications, administrative authorities, and/or a break in the decision path, and that the [BOR] report was non-specific regarding the source of information in regard to EPA documents and interviews with EPA employees and the onsite contractor. The [Army Corps reviewer] believes that the investigation and report should have described what happened internal[ly] within EPA that resulted in the path forward and eventually caused the failure. The report discusses field observations by EPA (and why they continued digging), but does not describe why a change in EPA field coordinators caused the urgency to start digging out the plug rather than wait for BOR technical input as prescribed by the EPA project leader.<sup>36</sup>

### **The Federal Government Should Investigate the EPA’s Conduct or Abandon All Private Prosecutions for Negligent Violations of the Criminal Law**

If you read between the lines of the BOR Report, the BOR concluded that the EPA made a mistake in conducting the operations that it performed on

August 5, 2015, because it failed to consider the necessary engineering factors involved in the opening of the Gold King Mine and therefore was negligent by attempting to begin work before the BOR had the opportunity to advise the EPA how to do the job properly. In the past the federal government has criminally prosecuted private parties for conduct that was, at most, negligent, in quite similar circumstances.<sup>37</sup> Consider again the remarkably similar case of *United States v. Hanousek* mentioned at the outset of this *Legal Memorandum*. Here is how the prosecutor’s closing argument would look if he had made the same argument that proved successful there to the facts of this spill: “When [the backhoe operator] hit that unprotected [spring] and that [3 million gallons of toxic mine water] fired out of that [spring], sprayed up into the air, and got into that [Animas River], the[] defendants are guilty of negligent discharging [acid mine water] into the [Animas River].”<sup>38</sup>

### **Conclusion**

The EPA has taken responsibility for the Animas River Spill. That much is clear. What we do not yet know is whether the EPA was negligent in pressing forward with the opening of the mine before the BOR had an opportunity to review the site and discuss the project with the original EPA On Scene Coordinator. The decision to go forward on August 5 may or may not have been a prudent one. We do not yet know. Moreover, we do not know whether the spill would have occurred if the EPA had waited to receive the BOR’s input. The spill might have occurred regardless of whatever precautions the EPA had taken. Life is often unmanageable and is always unruly.

The BOR Evaluation Team Report, however, falls far short of what is necessary to determine who is responsible for the Animas River spill. There are far too many people left unidentified, and perhaps far too many not yet interviewed, to know that the BOR Report accurately represents all of the facts. The report itself—an eight-page report that ballooned into ten times that many pages by the inclusion of apparently irrelevant photographs and discussions—does not get to the bottom of this incident, let alone identify who was responsible. Finally, the BOR Report also quite clearly refrained from assigning blame for the spill.

We also know this: After the spill occurred, EPA regional director Shaun McGrath held a public

comment session in a local high school auditorium at which he said that the EPA will “hold [itself] to the same standards that [it] would anyone that would have created this situation.”<sup>39</sup> So far, the executive branch has not displayed a serious effort to treat government officials in the same manner as it would have treated private parties responsible for the same conduct. The *Hanousek* case substantiates that point. Someone should ask the EPA and the Justice Department why the federal government discriminates in favor of government employees and against private parties.

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## Endnotes

1. See Paul J. Larkin, Jr. & John-Michael Seibler, “*Sauce for the Goose Should Be Sauce for the Gander*”: *Should EPA Officials Be Criminally Liable for the Negligent Discharge of Toxic Waste into the Animas River?*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 162, at 1-2 (Sept. 10, 2015), [http://thf\\_media.s3.amazonaws.com/2015/pdf/LM162.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/LM162.pdf). Heritage analysts had argued on several prior occasions that the criminal law should apply in a parallel manner to government officials and private parties alike. *Id.* at 5 n.25.
2. 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000) (Thomas & O’Connor, JJ., dissenting from the denial of cert.).
3. See 33 U.S.C. §1319(c)(1)(A) (2012).
4. *Hanousek* does not stand alone. In other cases the government has also persuaded the courts to adopt expansive interpretations of the criminal law to reach supervisory corporate officials. See Larkin & Seibler, *supra* note 1, at 3-4.
5. *Id.* at 2-3.
6. *Id.* at 2-3.
7. U.S. DEP’T OF THE INTERIOR, BUREAU OF RECLAMATION, TECHNICAL EVALUATION OF THE GOLD KING MINE INCIDENT 5, 6 (Oct. 2015) (noting that EPA asked DOI to independently identify “the cause of the sudden release from Gold King Mine and steps that could be taken to preclude similar incidents at other sites in the future.”).
8. BOR Report at 2. That history leads into a discussion explaining that “[m]ost of the bedrock in the vicinity of the Gold Mine is highly fractured and is reported as having extensive alteration with local zones of vein-related quartz-sericite-pyrite altered rock in the portal area,” alteration in part caused by “past hydrothermal activity,” natural and mine-induced “[a]cid-rock drainage,” the presence of “[f]erricrete, which consists of deposits of soil and rock particles cemented by iron-hydroxide,” which “occurs extensively along surface water flow pathways as a byproduct of acid drainage,” and the fact that “[t]he Gold King Mine workings are located in an area where northeast-trending faults of the Eureka Graben intersect the northwest-trending Bonita Fault.” *Id.* at 9. The “Groundwater System” section mentions that the local groundwater region “is dominated by interaction of extensive underground mine workings and a very complex system of fractures related to the various volcanic flows, tuffs, and breccias; formation of the Eureka Graben; and the Bonita Fault,” *id.* at 10, which is followed by a discussion of a 1993 report on a different mine reciting that, “[a]ssuming a static water elevation of 11,500 feet after installation of the American Tunnel bulkheads,” the “estimated travel time for water through bedrock from the Sunnyside Basin to Cement Creek of 150 years” (although that 1993 report also “theorized a diffused discharge of groundwater along Cement Creek between the Mogul Mine on north to the Silver Ledge Mine near Gladstone on the south”). *Id.* (emphasis added).<sup>9</sup>
9. *Id.* at 13 (emphasis added). Later still are sections devoted to “The Current State of Practice in Abandoned Mine Remediation,” “Establishment of Abandoned Mine Reclamation Programs,” and “Some General Observations Regarding the Current State of Practice.” *Id.* at 71-75.
10. *Id.* at 51-60.
11. *Id.* at 1-3, 77-79.
12. *Id.* at 44.
13. *Id.* at 44-45.
14. *Id.*
15. *Id.* The BOR Report does not say who authorized the initial excavation or why. See *id.*
16. *Id.* at 46.
17. *Id.* at 47 (emphasis added).
18. *Id.* at 51-52.
19. *Id.* at 52.
20. *Id.*
21. *Id.* at 1, 3.
22. *Id.* at 55.
23. *Id.* at 79 (“The report discusses field observations by EPA (and why they continued digging), but does not describe why a change in EPA field coordinators caused the urgency to start digging out the plug rather than wait for BOR technical input as prescribed by the EPA project leader.”).

24. Compare this to the facts of the EPA's settlement with Temple Inland: "[A] Delaware Corporation located in Austin, Texas, was sentenced in federal district court for the Eastern District of Louisiana to two years probation and ordered to pay a total criminal penalty of \$3.3 million, for negligently causing the discharge of a pollutant from its Bogalusa Facility into the Pearl River and the taking of fish from the Bogue Chitto National Wildlife Refuge." U.S. ENVTL. PROTECTION AGENCY, *Delaware Corporation Located in Texas Given \$3.3 Million Fine and Restitution for Discharging Pollutants into River*, in ENVIRONMENTAL CRIMES CASE BULLETIN 7 (May 2013), available at [file:///C:/Users/seiblerj/Downloads/envcrimesbulletin-05-13%20\(1\).pdf](file:///C:/Users/seiblerj/Downloads/envcrimesbulletin-05-13%20(1).pdf). That penalty was distributed to several non-profit organizations and state agencies selected by EPA officials. See *Id.* The cause of the discharge was that "[i]n the early morning hours of August 9, 2011, and again late on August 9, 2011, a piece of equipment called an 'evaporator' became clogged" and eventually discharge reached and contaminated a River. See U.S. ENVTL. PROTECTION AGENCY, *Summary of Criminal Prosecutions*, available at [http://cfpub.epa.gov/compliance/criminal\\_prosecution/index.cfm?action=3&prosecution\\_summary\\_id=2446](http://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2446). In both the Temple Inland and Animas River discharges, individuals failed to check how full an object was—one an "evaporator," the other a mine—and a discharge occurred due to conduct based on that failure. Temple Inland was prosecuted and made to pay money to organizations of the EPA's choosing. The EPA employees, agents, and officials were not.
25. BOR Report at 78.
26. *Id.*
27. *Id.*
28. *Id.* at 69.
29. *Id.* at 78.
30. *Id.* at 2.
31. *Id.*
32. *Id.* at 51-54.
33. *Id.* at 1-3, 79.
34. *Id.*
35. *Id.*
36. *Id.* at 78-79. The BOR declined to investigate internal EPA communications on the spill because the BOR Evaluation Team concluded that it had not been tasked with making a "finding of fault" or conducting an inquiry into the EPA's internal deliberations. *Id.* at 79.  
  
Curiously, the Peer Review Team may have included one person who was from the same agency—BOR—as all three members of the Evaluation Team and who appears to have been subordinate to the Evaluation Team members. Compare *id.* at 6 (identifying the three Evaluation Team members as a "Supervisory Civil Engineer and Manager of Geotechnical Engineering Group 3," "Geotechnical Engineer, Geotechnical Engineering Group 3," and "P.G. Division Chief, Geotechnical Engineering Services Division, Group 3") with *id.* at 7 (describing the BOR Peer Reviewer as "Engineering Technical Specialist, Geotechnical Group 4"). The BOR peer reviewer appears to have been assigned to a different BOR "Group," but also appears to be situated further down the BOR food chain than the three Evaluation Team members. A second member of the Peer Review Team appears to have been from a different agency than BOR, the USGS, but that agency is also a component of the Department of the Interior. Thus, a question could be raised as to the independence of two of the three Peer Review Team members.
37. See *supra* note 28.
38. See *Hanousek*, 176 F.3d at 1123. ("[W]hen Shane Thoe hit that unprotected pipeline and that oil fired out of that pipeline, sprayed up into the air, and got into that Skagway River, these two defendants are guilty of negligent discharging [oil] into the Skagway River."). While a discharge must be made into a "water of the United States" for the federal government to exercise jurisdiction, courts have been willing to rule that alleged discharge into even a dry creek bed is sufficient, so this is not a meaningful bar to jurisdiction over the Animas River spill. See *Moses v. United States*, 496 F.3d 984 (9th Cir. 2007) (ruling that the "Teton Creek is a water of the United States whether or not there is water flowing through it."); *United States v. Vierstra*, 803 F. Supp. 2d 1166, 1172 (D. Idaho 2011), *aff'd*, 492 F. App'x 738 (9th Cir. 2012) (rejecting defendant's argument that discharges did not trigger federal jurisdiction "because there was no water flowing in the canal bed at that time and there is no evidence that the pollutants were carried downstream"). In any event, the Animas River travels interstate and therefore is a "water of the United States."
39. Julie Turkewitz, *Environmental Agency Uncorks Its Own Toxic Water Spill at Colorado Mine*, N.Y. TIMES, Aug. 11, 2015, <http://www.nytimes.com/2015/08/11/us/durango-colorado-mine-spill-environmental-protection-agency.html>.