IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-01913-REB-NRN

UNITED STATES OF AMERICA

Plaintiff,

vs.

THE DURANGO & SILVERTON NARROW GAUGE RAILROAD COMPANY, a Colorado Corporation, and
AMERICAN HERITAGE RAILWAYS, INC., a Florida Corporation,

Defendants.

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. PRO. 12(B)(6)

COME NOW the Defendants, The Durango & Silverton Narrow Gauge Railroad Company and American Heritage Railways, Inc. (hereinafter collectively referred to as the "Defendants"), by and through their attorneys, Richard A. Waltz and Barbara J. Stauch of Waltz|Reeves, and hereby move this Court to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and as grounds therefor state as follows:

INTRODUCTION & BACKGROUND

This case arises from a forest fire that ignited on June 1, 2018 in an area of the San Juan National Forest approximately 10 miles north Durango, Colorado. The fire, which burned approximately 54,000 acres of forest, is commonly referred to as the 416 Fire (hereinafter the "416 Fire").

What is known today as the Durango and Silverton Narrow Gauge Railroad ("D&SNGR") first began operations 137 years ago, when it was used to transport mined materials, freight and passengers through the San Juan Mountains. It has since become a major tourist attraction that transports passengers over 45.2 miles of narrow gauge track from Durango to Silverton, via authentic vintage steam engine trains. It is directly responsible for the City of Durango coming into existence in 1880, and is a federally designated National Historic Landmark, as well as a Historic Civil Engineering Landmark. The D&SNGR is a cornerstone of the Durango community and is essential to its tourism economy. In 2018, it was one of nine national winners of the Wildfire Mitigation Awards sponsored by the National Association of State Foresters, International Association of Fire Chiefs, National Fire Protection Association and the USDA Forest Service.

The Fire's point of origin has been reported by the U.S. Forest Service to be in an area approximately 30 feet west of the narrow gauge railroad tracks near mile marker 466. Although the 416 Fire is reported to have burned approximately 54,000 acres, there were **no reports of burned structures, personal injuries or deaths**, and the fire was fully contained as of July 31, 2018. The cause of the 416 Fire has been under investigation by the U.S. Forest Service since June 1, 2018 and as of the date of filing of this Motion, no written report or other documentation of the Plaintiff's investigation has been produced or published providing the results of the investigation or the cause of the fire as alleged in Plaintiff's Complaint, despite FOIA requests for the same.

Plaintiff, the United States of America, has brought suit against the Defendants to recover suppression costs for the 416 Fire. Plaintiff alleges that the 416 Fire was started

by a locomotive operated by the Defendants[1]. Plaintiff's lawsuit seeks reimbursement from the Defendants for fire suppression costs it claims to have spent in fighting the 416 Fire.

Defendants deny the allegations made throughout Plaintiff's First Complaint, but note the Plaintiff's knowledge of extreme drought conditions and "explosive" fire risks, and Plaintiff's lack of action which is included to provide context[2]; however, for purposes of this Motion to Dismiss, all allegations in Plaintiff's Complaint are accepted as fact for the arguments made herein. Nothing in this Motion shall be construed to be either an admission or denial of any of Plaintiff's averments in the Complaint.

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[1] Defendants deny that Defendant American Heritage Railways, Inc. is a proper defendant in this case, and deny that it owned the subject locomotive or that it was responsible for operation of the subject locomotive.

[2] As narrated in the Scheduling Order, the Plaintiff had the knowledge and means to control activities on its lands and prevent the events that unfolded on June 1, 2018. The Plaintiff knew of the "explosive conditions" and "extreme" danger of a potential forest fire as early as May 1, 2018. The Plaintiff and La Plata County officials implemented Stage 1 and Stage 2 Fire Restrictions. Richard Bustamante from the San Juan Public Lands stated, "2018 was being compared to the dry conditions that were experienced during the Missionary Ridge Fire in 2002…. 2002 was used as the baseline for the worst case scenario" and that "fuel moistures were indicative that a fire could and **would** start, and that the possibility for a large fire was underway". (Emphasis added.) Plaintiff knew of this probable risk of fire up to a month prior to the start of the 416 Fire, which Plaintiff now alleges the Defendants caused. Even though there was a high danger of a wildfire, federal officials focused on the concern of the potential economic impact of shutting down the San Juan National Forest when Mr. Bustamante stated that a complete [forest] closure "had negative impacts on the economy as well as the community". Knowing all of these dangers, no U.S. Government official contacted the Railroad regarding the increased dry conditions and extreme risk of fires the current conditions posed. After the fire, as well as after this suit was filed, Defendants have repeatedly requested a copy of the federal report required by law to be completed for every human caused fire; however, none has been produced. In addition, upon information and belief from FOIA requests submitted by Defendants, no mitigation has occurred in the 416 Fire area over the last 25 years despite federal law mandates.

LEGAL STANDARD

The Federal Rules of Civil Procedure Rule 12(b)(6) allows for dismissal of a complaint where the non-moving party has failed to state a claim upon which relief can be granted. Rule 12(b)(6) provides that a defense of failure to state a claim upon which relief can be granted may be raised by motion before a responsive pleading is filed. Fed.R.Civ.P. 12(b). To survive a motion to dismiss, a plaintiff "must plead facts sufficient 'to state a claim to relief that is plausible on its face.' " *Id.* (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). At the motion to dismiss stage, the Court must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff. *Cressman v. Thompson,* 719 F.3d 1139, 1152 (10th Cir.2013).

The U.S. Supreme Court has stated, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do… Factual allegations must be enough to raise a right to relief above the speculative level…." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

To survive dismissal, the plaintiff must offer sufficient factual allegations to make the asserted claim plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. at 663. "[T]he mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)(quoting *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

MATERIAL ALLEGATIONS IN PLAINTIFF'S COMPLAINT

1. Plaintiff alleges that "[f]ederal fire investigators have determined that the 416 Fire was ignited by particles emitted from an exhaust stack on a coal-burning, steam train engine owned and operated by Defendants." Plaintiff's Complaint, ¶ 1.

2. Plaintiff asserts that it suffered "significant damages" including expenses related to its efforts to suppress the 416 Fire and expenses related to rehabilitation of public lands damaged by the fire. *Id.*

3. Plaintiff asserts that the Defendants have been "granted the right to conduct its railroad operations on public lands pursuant to a right-of-way…." *Id.* at ¶ 10. Plaintiff further asserts that the Defendants (through its predecessors) right-of-way from Durango to Silverton was perfected in 1882. *Id.* at ¶ 10b.

4. Plaintiff alleges that the right-of-way crosses the San Juan National Forest for about 21 miles. *Id.* at ¶ 11.

5. Plaintiff asserts that Defendants' coal-burning steam engines pose an "extremely high risk of fire" due to burning cinders and other hot materials that can exit the exhaust stack of the steam engines. *Id.* at ¶¶ 14-15.

6. Plaintiff claims that the 416 Fire began at approximately 9:53 a.m. when one of Defendants' trains passed through the San Juan National Forest lands. *Id.* at ¶ 19.

7. Plaintiff alleges that "[f]ire investigators" placed the origin of the fire next to the railroad track, and that "[f]ederal fire investigators found a collection of numerous, extinguished embers, cinders and ash particles on the ground adjacent to the railroad track, including at the specific point of fire origin." *Id.* at ¶¶ 21-22. Plaintiff also alleges

that "[m]ultiple eyewitness statements verify" that the fire ignited next to the track "immediately" after one of Defendants' trains passed by. *Id.* at ¶ 23.

8. Plaintiff asserts that the fire was not declared extinguished until November 29, 2018. *Id.* at ¶ 26.

9. The United States have alleged that they are seeking, amongst other things, "fire suppression and rehabilitation costs." *Id.* at ¶¶ 30-31.

10. The Complaint alleges a right to recovery of these costs under C.R.S. § 40-30-103 for strict liability. *Id.* at ¶¶ 28-31.

SUMMARY OF ARGUMENT

Based upon C.R.S. § 40-30-103, the Plaintiff cannot maintain a claim for fire suppression costs as courts have only allowed recovery for damages related to direct damages by fire.[3] The claim under C.R.S. § 40-30-103 is the only avenue of recovery for the United States government, as it has been held that this statute is the exclusive means by which to bring a claim against a railroad when a fire is allegedly started by a railroad. *Denver and Rio Grande Railroad Co. v. United States*, 241 F. 614, 620 (8th Cir. 1917). In order for the government to maintain its sole claim for relief against the Defendants, it must show that it suffered damages that are unrelated to suppression costs, and only those damages might be recoverable.

LEGAL ANALYSIS & ARGUMENT

As a general rule, there is no federal common law. *Erie Railroad Co. v. Tompkins,*

[3] See generally § 40-30-103

304 U.S. 64, 78 (1938); *Denver & Rio Grande Railroad Co. v. United States Rio Grande Railroad*, supra, 241 F. at 616. There has been no legislation enacted by Congress providing a right of action to recover suppression costs in cases of this character; thus, if Plaintiff could recover, the right to do so must exist by reason of some statute of the state or by virtue of some common law adopted by the state or recognized by its courts authorizing a recovery in such cases. *Id.,* at 617. Within this general rule the federal courts have carved two narrow exceptions involving either judicial construction of federal statutes pursuant to Congressional authority or those rare instances in which a federal rule of decision is necessary to protect uniquely federal interests. *Texas Industries, Inc. v. Radcliff Materials. Inc.,* 451 U.S. 630, 640 (1981); *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 93-95 (1981). The Plaintiff's Complaint references no federal statute creating a right to recover costs incurred in suppressing a fire on national forest land; the exclusive remedies sought are under Colorado law, i.e. C.R.S. § 40-30-103. Thus, if this Court has the power to fashion an implied cause of action pursuant to the federal common law, that power must derive from a "uniquely federal interest"; Plaintiff makes no such claim herein.

The United States rests its only claim for relief upon a Colorado statute, C.R.S. § 40-30-103, which provides:

> Every railroad company operating its line of road, or any part thereof, within this state shall be liable for all damages by fires that are set out or caused by operating any such line of road, or any part thereof, in this state, whether negligently or otherwise. Such damages may be recovered by the party damaged by a proper action in any court of competent jurisdiction; but said action shall be brought by the party injured within two years next ensuing after it accrues. The liability imposed in this section shall inure solely in favor

> of the owner or mortgagee of the property so damaged or destroyed by fire, and the same shall not pass by assignment or subrogation to any insurance company that has written a policy thereon.

Defendants submit that there exists no "uniquely federal interest" available under the state statute; that such interests are few and restricted and do not exist in the present matter. See, e.g., *Texas Industries,* supra, at 640; see also, *Atherton v. Federal Deposit Insurance Corp.,* 519 U.S. 213, 218 (1997); *O'Melveny & Myers v. Federal Deposit Insurance Corp.,* 512 U.S. 79, 87 (1994). A "uniquely federal interest" generally concerns such national matters as the definition of rights or duties of the United States, the resolution of interstate disputes and matters concerning international relations and admiralty law. *Texas Industries,* supra, at 641. The present case obviously does not involve such matters. The only possible interests at issue here are (1) the protection of federal land (i.e., the national forest); and (2) the recovery of federal funds expended to protect federal land. Neither justifies the creation of an implied cause of action under the federal common law.

It is well-settled that suits by the United States government to protect its proprietary interest in real property are local in nature and as such, they are governed by the law of the state in which the real property is located. *United States v. Williams,* 441 F.2d 637, 643 (5th Cir. 1971); see also, *United States v. State of California,* 655 F. 2d 914, 917 and 919 (9th Cir. 1980) (noting "the local nature of federal suits instituted to protect the proprietary interests of the United States" and finding this to be "especially important when the suit is related to real property, in which case the state in which the land is located has a particular, although not determinative, interest in having its own law applied"). This rule

requiring application of local law to suits by the federal government regarding its land existed prior to the Court's holding in *Erie Railroad Co.,* supra, and remained unchanged by the restricting of federal common law as set forth in *Erie Railroad Co.* See, *United States v. Little Lake Misere Land Co.. Inc.,* 412 U.S. 580, 591 (1973).

Accordingly, the interest of the United States in protecting the national forest or in recovering suppression costs is not sufficient to justify the creation of an implied cause of action under the federal common law. The Supreme Court has cautioned that state laws "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States v. Yazell,* 382 U.S. 341, 352 (1966). Accordingly, the economic interest of the United States in recovering funds expended in fighting the 416 Fire is not sufficient to justify the creation of an implied cause of action under the federal common law and under the Colorado statute.

In this action, the Plaintiff sues the DSNGRR to recover monetary damages incurred by the United States in suppressing the 416 Fire. Complaint, ¶¶ 1 and 31. The sole underlying item of damages sought are the "fire suppression costs". *Id.* The United States may not recover damages for "fire suppression costs" under C.R.S. § 40-30-103. Although C.R.S. § 40-30-103 imposes upon the offending railroad liability "for all damages by fire," the term "damages" is not defined. Nonetheless, the reference in the last sentence of this statute to "property so damaged or destroyed by fire" is compatible only with the concept of tangible property burned by fire. Recognizing that the same word used

twice in one statute should be given the same meaning, *Commissioner of Internal Revenue v. Keystone Consolidated Industries. Inc.,* 508 U.S. 152, 159 (1993); *Barnson v. United States,* 816 F.2d 549, 554 (10th Cir. 1987); *Stoorman v. Greenwood Trust Co.,* 909 P.2d 133, 135 (Colo. 1995), the phrase "all damages" in the first sentence must also refer exclusively to physical property lost through fire. The Defendants have found no Colorado case decided under C.R.S. § 40-30-103 which has allowed the recovery of costs incurred in fighting the fire.

Further, the Colorado Court of Appeals in *Spencer v. Murphy,* 6 Colo. App. 453, 41 P. 841 (1895), when deciding a case under a sister statute which imposes liability upon "any person [who] shall set on fire any woods or prairie so as to damage another person," held that this statute did not encompass costs incurred by a landowner to extinguish the fire. 41 P. at 841. The *Spencer* Court concluded that "[t]he damage must be confined to loss by fire, and could not include compensation for services." *Id.* From the trial court judgment, the Court of Appeals deducted the cost of labor involved to extinguish the fire and restricted compensation to the "actual loss by fire." *Id.* at 842. This case is particularly noteworthy here, since the phrase "so as to damage another person" could conceivably be construed to encompass the costs incurred in fighting a fire, whereas the phrase "property so damaged or destroyed by fire" as used in C.R.S. § 40-30-103 cannot. If the costs incurred in fighting a fire cannot be recovered as an item of damage under the sister statute construed in *Spencer v. Murphy,* supra, such costs certainly cannot be recovered under the more restrictive language of C.R.S. § 40-30-103.

While Colorado courts have not directly dealt with the issue of whether suppression costs can be recovered as an item of damages under C.R.S. § 40-30-103, it is fairly clear from the *Spencer* decision that such costs cannot be recovered. Given the court in *Spencer* held that only actual losses are recoverable, this Court should follow the same analysis and hold that damages incurred in fighting the fire, or suppression costs, are not recoverable.

The New Hampshire Supreme Court spoke directly to the issue of the government recovering suppression costs for fires started by railroads. *See State v. Boston & M. Railroad*, 99 N.H. 66 (NH. 1954). In *State v. Boston*, a train started a fire that was put out by fire fighters from the state, city, and town employees after it had burned for about six days. 99 N.H. 66, 67-68 (N.H. 1954). The Court noted that there is a difference in costs recovered in fighting a fire and property damaged or destroyed by fire and that the recovery "stands on a different footing." *Id* at 71. The New Hampshire Supreme Court held that suppression costs could be recovered only if a statute had been enacted permitting such recovery. *Id.*

In addition, other appellate courts have spoken directly to the point that because there is no common law basis for the government to recover suppression costs, in order for the government to recover suppression costs, there must be a statute that specifically allows for such recovery.[4] In *People v. Wilson*, 240 Cal.App.2d 574, 575 (Cal.App. 1966),

[4] *See Allenton Volunteer Fire Dep't v. Soo Line R.R.*, 372 F.Supp. 1974 (E.D. Wis. 1974); see also *Town of Freetown v. New Bedford Wholesale Tie, Inc.*, 384 Mass, 60 (Mass. 1981); *Town of Howard v. Soo Line RR Co.*, 63 Wis.2d 500 (Wis. 1974); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C.Cir. 1984); *People v. Wilson*, 240

the court dealt with a fire started by someone on his own land that spread to neighboring properties after he lost control of it. The Court stated, "[n]o case has been cited, and we have found none, which permits in the absence of a statute, the recovery of fire suppression expenses by one not protecting his own property. Thus, recovery for fire suppression expenses by a state or other public agency is a creature of statute." *Id.* at 576-77. In *Portsmouth v. Campanella & Cardi Const. Co.*, 100 N.H. 249, 250 (N.H. 1956), a company who did "clearing operations involving burning operations allowed a fire to burn out of control requiring the city to fight the fire. The *Portsmouth* Court held that the statute did not provide for recovery of expenses for the "use of the regular equipment and manpower of an established city department." *Id*. at 253. Evidence of the need for a statute is shown by several other states who have enacted statutes that speak directly to the recovery of suppression costs for a wildfire.[5] For the Plaintiff to be allowed to recover for its suppression costs in Colorado, either the Colorado General Assembly or the United States Government would first need to enact a statute allowing for such recovery, which has not occurred.

CONCLUSION

The Plaintiff in this case, the United States, is seeking to recover substantial fire suppression costs related to the 416 Fire despite the lack of legal authority to allow the

Cal.App.2d 574 (Cal.App. 1966)*; Portsmouth v. Campanella & Cardi Construction Co.*, 100 N.H. 249.

[5] See Washington RCWA 76.04.495; see also California CA HLTH & S § 13009; Utah U.C.A. 1953 § 65A-3-4.

recovery of these costs. As such, the Defendants respectfully request that this Court dismiss the Plaintiff's Complaint seeking to recover suppression costs/damages.

Accordingly, Plaintiff's Complaint should be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim upon which relief can be granted..

WHEREFORE, the Defendants respectfully request that the Court grant Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. Pro. 12(b)(6), and for such further relief as the Court deems appropriate.

Dated this 9th day of September, 2019.

WALTZ|REEVES

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2019, I electronically filed a true and correct copy of the above Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. Pro. 12(b)(6) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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