

### **3. A decision from the U.S. District Court for the District of New Mexico granting in part spoliation sanctions based on a party's failure to take adequate steps to monitor compliance with a proper litigation hold.**

In *In re: Gold King Mine Release in San Juan County, Colorado, on August 5, 2015*, No. 1:18-md-02824-WJ, No. 18-cv-319-WJ, 2022 WL 2230759 (D.N.M. June 21, 2022), Chief Judge William P. Johnson granted in part a motion for discovery sanctions based on spoliation of potentially relevant documents by one Defendant because the Defendant did not take adequate steps to monitor compliance with a proper litigation hold.

This litigation arose from an environmental disaster that caused toxic waste to spill out of the Gold King Mine in Colorado and into Utah. After the spill, Utah sued the U.S. Environmental Protection Agency (EPA) and two contractors the EPA hired to assist with the work at the Gold King Mine: Environmental Restoration (ER) and Weston Solutions (Weston). ER had hired Harrison Western Construction Corporation (Harrison) to assist in the re-opening of the mine.

Harrison claimed that although it was involved with the planning of the work at the Gold King Mine, Harrison employees were not present during the release of the toxic waste from the mine, and the release did not result from any work performed by Harrison. *Id.* at \*1. Harrison claimed that the release was caused by excavation performed by the EPA's on-site team that was done without Harrison's knowledge, direction, or supervision. Utah claimed the release resulted from Harrison's intentional and/or reckless or negligent actions.

A dispute arose during discovery as to whether Harrison had produced all relevant documents requested by Utah. *Id.* at \*2. Utah sought documents related to the work Harrison performed or planned to perform at the Gold King Mine, but the only pre-release emails Harrison produced were those that pertained to its being awarded the subcontract work at the mine and related funding issues, and the only post-release documents were emails and an employee's journal (and no other types of documents, i.e., memoranda, reports, and non-email correspondence).

After counsel for Utah conferred with counsel for Harrison regarding the unproduced documents, counsel for Harrison stated that Harrison did not have any emails from the time periods reflected in the emails produced by other defendants. Harrison's counsel further stated that Harrison's third-party information technology consultant had twice searched Harrison's current server and also searched its previous server for responsive documents and concluded that a "catastrophic event" occurred at some time prior to the migration of information and data from the prior server resulting in information and

data that were corrupted and inaccessible. As a result, Harrison did not have any additional emails to produce.

After quoting extensively from Federal Rule of Civil Procedure 37(b) and 37(e) regarding a party's obligations to preserve ESI, Chief Judge Johnson addressed the facts related to Harrison's preservation of ESI. *Id.* at \*3.

Harrison claimed that it took reasonable steps to preserve ESI, including storing its ESI on its office server and then a Microsoft Office 365 server, "no different than countless litigants involved in lawsuits throughout the country." Harrison also claimed that it implemented a litigation hold on documents related to the Gold King Mine project immediately upon being made aware of imminent litigation.

Utah, on the other hand, claimed that Harrison must have had a backup storage system and used qualified experts to ensure that data would not be erased during a server migration and that it is implausible that its data for the Gold King Mine was destroyed. *Id.* at \*4. Utah also claimed that Harrison did not implement a proper litigation hold, including because Harrison did not disclose whether it had a backup storage system or whether it used qualified staff or experts to ensure that data would not have been erased before, during, or after a server migration.

Utah sought sanctions based on Harrison's loss of data, including an order permitting Utah to introduce evidence of Harrison's spoliation at trial; awarding Utah all reasonable attorneys' fees and costs associated with investigating Harrison's spoliation and preparing its motion to compel; precluding Harrison from proffering other evidence that it was not invited to attend or informed of the plans and actions to take place on the day of the Gold King Mine release; and an adverse inference instruction or presumption that the spoliated evidence would have been unfavorable to Harrison with respect to its participation, planning, recommendations, and communications with EPA and its other employees and contractors and its invitation to attend and notice of the plans and actions to take place on the day of the Gold King Mine release. *Id.* at \*5.

Chief Judge Johnson found that some spoliation sanctions were proper. *Id.* at \*6. He explained that spoliation sanctions are proper when "(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. But if the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case." Without a showing of bad faith, a district court may only impose lesser sanctions.

Chief Judge Johnson explained that counsel for parties have a continuing responsibility to ensure that the parties preserve relevant information. This responsibility obligates counsel to do more than simply notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Chief Judge Johnson explained that counsel must go beyond mere notification and take affirmative steps to monitor compliance, to talk to key employees in an effort to understand how evidence will be stored, to continually ensure that the party is preserving relevant evidence: “At the end of the day, however, the duty to preserve and produce documents rests on the party.”

Chief Judge Johnson found that Harrison failed to take reasonable steps to preserve its ESI. Other than implementing a litigation hold, Harrison did not identify any other steps it took to preserve its ESI, such as taking affirmative steps to monitor compliance, talking to key employees in an effort to understand how evidence will be stored, and continually ensuring that Harrison was preserving relevant evidence, for example by having a backup storage system in place to ensure that the relevant ESI would be preserved.

Chief Judge Johnson further found that Utah was prejudiced by the spoliation of Harrison’s ESI. He noted that the spoliated ESI was relevant to issues such as whether (i) Harrison declined or had other reasons for not being present at the on-site meeting scheduled for August 4, 2015; (ii) Harrison knew ER was planning to conduct excavation activities on August 4-5, 2015; and (iii) miscommunications created confusion regarding how to safely and properly accomplish work at the Gold King Mine.

Chief Judge Johnson agreed with Utah that the “destroyed documents could either corroborate or impeach Harrison’s witnesses” and “the testimony of its witnesses is not enough to replace the destroyed documents” because “it is unlikely they will be able to remember the specific contents of each destroyed work order.” *Id.* at \*7. However, Chief Judge Johnson was not persuaded by Utah’s assertion that “none of these documents can be replaced.” Utah has not shown that some of the documents at issue cannot be obtained from EPA and/or ER.

Chief Judge Johnson granted Utah’s request for an order permitting Utah to introduce evidence of Harrison’s spoliation at trial. He denied Utah’s request for an order precluding Harrison from proffering other evidence that it was not invited to attend or informed of the plans and action to take place on the day of the Gold King Mine release, finding that precluding Harrison from putting on such evidence while allowing Utah to introduce evidence of Harrison’s spoliation at trial would undermine the court’s interest in promoting accurate fact-finding by the jury.

In addition, Chief Judge Johnson denied Utah's request for an adverse inference instruction or presumption that the spoliated evidence would have been unfavorable to Harrison because "Utah has not persuaded the Court that Harrison acted with the intent to deprive another party of the information's use in the litigation." He noted that Harrison's spoliation appears to be the result of one "catastrophic" server event.

Finally, Chief Judge Johnson granted Utah's request for an order awarding Utah all reasonable attorneys' fees and costs associated with investigating Harrison's spoliation and preparing its motion for sanctions.