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

ATLANTIC RICHFIELD COMPANY, Plaintiff, v. UNITED STATES OF AMERICA, THE PUEBLO OF LAGUNA, an Indian tribe, and LAGUNA CONSTRUCTION COMPANY, INC., Defendants.	) Case No. 1:15-cv-00056-JAP-KK

UNITED STATES' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

The United States hereby moves to dismiss all claims against the United States for failure to state a claim and lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). Plaintiff Atlantic Richfield Company ("Plaintiff") opposes this motion. The Pueblo of Laguna and Laguna Construction Company, Inc. do not oppose this motion.

Plaintiff seeks cost recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") section 107(a), 42 U.S.C. § 9607(a), and contribution under CERCLA section 113(f), *id.* § 9613(f), for costs Plaintiff alleges it incurred to address contamination at a former uranium mine located on the Pueblo of Laguna Reservation in Cibola County, New Mexico (the "Jackpile Site" or "Site"). *See* Compl. ¶¶ 164-96. Plaintiff also seeks a declaratory judgment as to the United States' liability for future costs at the Site. *See id.* ¶¶ 197-202. These claims are premature and without merit.

First, the Complaint fails to state a claim for cost recovery under CERCLA section 107(a), 42 U.S.C. § 9607(a)(4)(B), because Plaintiff has not incurred necessary response costs consistent with the national contingency plan at the Site, and has instead incurred only litigation costs to defend itself against potential future action by EPA. Second, Plaintiff has failed to state a claim for contribution under CERCLA section 113(f), 42 U.S.C. § 9613(f), because no person has yet filed a civil action against Plaintiff and Plaintiff has not resolved liability to the United States or a State, and, in any event, any such claim would be time-barred. Finally, Plaintiff's claim for a declaratory judgment also must be dismissed because Plaintiff has no underlying claim to support such a judgment. For these reasons, further explained *infra*, Plaintiff's claims against the United States must be dismissed.

LEGAL BACKGROUND

Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998); *see also Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992). "[T]he twin aims of CERCLA are to cleanup hazardous waste sites and impose the costs of such cleanup on parties responsible for the contamination." *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005). Especially important to this case, the Tenth Circuit has held that "[t]he former, under the statutory scheme, must precede the latter." *Id.*

CERCLA grants broad authority, largely delegated to EPA, to ensure the cleanup of contaminated sites. EPA has several options when it determines that a "removal" or "remedial" action is needed to clean up or contain contamination at a particular site. EPA may undertake the response action on its own, utilizing funds from the Superfund, and then seek reimbursement of the Superfund from responsible parties. 42 U.S.C. §§ 9601(23), (24), 9604, 9607. Alternatively,

EPA may compel responsible parties to undertake the response action, either by issuing an administrative order, or by seeking injunctive relief. *Id.* § 9606. Pre-enforcement review of EPA response action is barred under CERCLA section 113(h). *Id.* § 9613(h).

If private parties incur costs related to the cleanup of hazardous substances, CERCLA provides two "clearly distinct" avenues by which they can recover some or all of those costs. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007). First, under CERCLA section 107(a), private parties may clean up contaminated hazardous waste sites and then recover "response costs" that are "necessary" and incurred "consistent with the national contingency plan"[1] from certain liable parties. 42 U.S.C. § 9607(a). Liable parties under CERCLA include: (1) the owner or operator of the facility; (2) any person who owned or operated the facility at the time of disposal of hazardous substances; (3) any person who arranged for disposal of the hazardous substances; and (4) any person who accepts or accepted hazardous substances for transport to disposal or treatment facilities. *Id.* § 9607(a)(1)-(4). Such voluntarily incurred costs "are recoverable only by way of § 107(a)(4)(B) . . . ." *Atl. Research*, 551 U.S. at 139 n.6. As discussed in more detail *infra*, however, costs are not necessary or consistent with the NCP unless they are closely tied to an *actual cleanup* of hazardous substances. *Young*, 394 F.3d at 863.

Second, CERCLA section 113(f) allows a party in certain procedural postures to seek contribution. 42 U.S.C. § 9613(f)(1) & (3)(B). A claim for contribution under CERCLA, like a claim for contribution under common law, is the "'right to collect from others . . . after the tortfeasor has paid more than his or her proportionate share.'" *Atl. Research*, 551 U.S. at 138

[1] The national contingency plan ("NCP"), 40 C.F.R. Part 300, is EPA's regulation that sets forth procedures and requirements for responding to hazardous substance contamination. *See Young*, 394 F.3d at 863.

(quoting Black's Law Dictionary 353 (8th ed. 2004)); *Nw. Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 87-88 (1981). "[C]osts of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under 113(f)." *Atl. Research*, 551 U.S. at 139 n.6.

Under CERCLA section 113(f)(1), a party "may seek contribution . . . during or following any civil action under [CERCLA section 106 or 107(a)]." 42 U.S.C. § 9613(f)(1). Under CERCLA section 113(f)(3)(B), "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution" from any party who is not a party to the settlement. *Id.* § 9613(f)(3)(B), (f)(2).

CERCLA provides separate limitations periods for cost recovery under section 107(a) and contribution under section 113(f). *See* 42 U.S.C. § 9613(g)(2), (3). Initial actions for cost recovery are governed by the limitation periods contained in CERCLA section 113(g)(2). *See* 42 U.S.C. § 9613(g)(2). Under that provision, claims are timely if they are filed within three years after completion of a removal action or six years after "initiation of physical on-site construction" of a remedial action. *See id.*

CERCLA section 113(g)(3) provides the limitations period for all contribution actions. *See Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 772-73 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1161 (2015). Specifically, the provision has two subsections, which "provide[] two corresponding 3-year limitations periods for contribution actions[.]" *Cooper Industs., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). The first subsection provides a three-year limitations period that begins to run "after . . . the date of judgment in any action under [CERCLA] for recovery" of response costs. 42 U.S.C. § 9613(g)(3)(A). This limitations

period corresponds to contribution actions brought under CERCLA section 113(f)(1). *Aviall*, 543 U.S. at 167. The second subsection provides a three-year limitations period that begins to run "after . . . the date of an administrative order under section [122(g)] . . . (relating to de minimis settlements) or [122(h)] . . . (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages." 42 U.S.C. § 9613(g)(3)(B). As explained *infra*, this limitations period corresponds to all contribution actions brought under CERCLA section 113(f)(3)(B), even when not triggered by a section 122(g) administrative order or 122(h) cost recovery settlement. *See Hobart*, 758 F.3d at 772-75.

STATEMENT OF FACTS[2]

In 1951, Plaintiff's predecessor, the Anaconda Copper Mining Company ("Anaconda"), began exploring for uranium on 410,000 acres of land within the boundaries of the Pueblo of Laguna Indian Reservation ("Laguna Reservation"), s*ee* Compl. ¶ 58, which is located in Cibola County, New Mexico. *See id.* ¶ 2. On March 27, 1952, Anaconda entered into a lease agreement with the Pueblo of Laguna for the Jackpile Paguate Uranium Mine, which initially covered 799.09 acres of land, but was later amended to cover approximately 4,988.48 acres. *See* Compl., Ex. A ¶ 1(a). On July 24, 1963, Anaconda entered another lease agreement for an additional 2,560 acres, and on July 6, 1976, Anaconda entered a third lease agreement for another 320 acres. *See id.* ¶ 1(b) and (c).

[2] The statement of factual background is derived from the factual allegations in the Complaint (which the United States considers as true solely for the purposes of this motion), the December 12, 1986 Agreement to Terminate Leases attached to the Complaint as Exhibit A, and matters of public record. *See Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006) (explaining that the court can take judicial notice of matters of public record for purposes of ruling on a motion to dismiss).

Anaconda began mining operations at the Jackpile Site in 1952, and ceased operations in 1982. *See* Compl. ¶¶ 62, 72. Between 1952 and 1970, Anaconda mined 9,498,698 tons of uranium ore from the Jackpile Site, which produced 46,194,350 pounds of uranium concentrate. *Id.* ¶ 63. Anaconda sold the concentrate to the United States under contracts with the Atomic Energy Commission. *Id.* ¶¶ 61, 63. Anaconda ceased mining operations in 1982, and on December 12, 1986, Anaconda and the Pueblo of Laguna entered into an Agreement to Terminate Leases that provided for termination of the leases and reclamation of the mine. *See id.* ¶ 76; Ex. A.

Specifically, the Agreement to Terminate Leases provided that the three mining leases were terminated, *see* Compl., Ex. A ¶ 1, and that "[i]n consideration for the release of Anaconda from all responsibility and liability for reclamation of the Mine, for performing other environmental remedial measures relating to the Mine, and for all other obligations arising under the leases," Anaconda would pay $43.6 million to the Pueblo of Laguna. *Id.* ¶ 2. The payment was to be "used for reclamation and related purposes as prescribed by the Record of Decision issued jointly by the Bureau of Indian Affairs ["BIA"] and the Bureau of Land Management ["BLM"], and pursuant to the management plan and agreement between The Pueblo and the Secretary of the Interior governing the performance of reclamation by The Pueblo." *Id.* ¶ 2(a).

After signatures by the representatives of the Pueblo of Laguna and Anaconda, an Assistant Secretary of the Interior signed the last page of the Agreement to Terminate Leases under a paragraph entitled, "Approval by Secretary of the Interior." *Id.* at 6. That paragraph states:

> The Secretary of the Interior hereby approves this Agreement to Terminate Leases, and further releases Anaconda from any claims of the Secretary of the Interior or The Pueblo arising under the leases, or for damages to The Pueblo's natural resources, and further agrees to refrain from asserting against Anaconda on

> behalf of the Secretary of the Interior or The Pueblo any claims or actions under the leases, or for damage to The Pueblo's natural resources, or from otherwise attempting to obligate Anaconda to engage in cleanup, reclamation or other environmental remedial action at the Mine.

Between 1986 and 1995, the Laguna Construction Company, formed by the Pueblo of Laguna, performed mine reclamation work with BIA oversight as contemplated by the Agreement. *See* Compl. ¶¶ 74, 95, 107, 110, 111-17. That work was deemed complete in 1995. *See id.* ¶ 117. However, the Pueblo of Laguna later retained OA Systems Corporation ("OA Systems"), an independent consulting firm, to determine whether the work met the requirements of the Record of Decision required by the Agreement to Terminate Leases. *See id.* ¶ 129. OA Systems conducted two assessments in 2007 and 2011. *See id.* ¶¶ 130-31. These assessments concluded that the reclamation efforts were "not successful in prevention or mitigation of public health or environmental impacts," *id.* ¶ 134 (quotation omitted), and "inadequate to prevent radiation emissions." *Id.* ¶ 140 (quotation omitted). OA Systems made detailed recommendations for the implementation of an effective water quality monitoring and data evaluation program. *See id.* ¶ 147. After reviewing the OA Systems assessments, BLM's New Mexico State Office determined in January 2012 that the reclamation project at the Jackpile Site could not be closed out. *See id.* ¶¶ 155-56.

In 2010, prior to OA Systems' second assessment and BLM's conclusion, EPA sent Plaintiff a request for information under CERCLA section 104(e), 42 U.S.C. § 9604(e), seeking information and documents related to the Jackpile Site. *See* Compl. ¶ 160. Plaintiff produced approximately 43,000 documents in response on March 1, 2011, and subsequently engaged its own consultant to assess the condition of the Jackpile Site and "help identify responsible parties for the Jackpile Site." *Id.* ¶¶ 160-61. In March 2012, when EPA proposed listing the Jackpile

Site on the National Priorities List ("NPL"),[3] Plaintiff submitted comments. *See id.* ¶ 162. EPA issued a final rule listing the Jackpile Site on the NPL on December 12, 2013. *See* 78 Fed. Reg. 75,475 (Dec. 12, 2013). In May 2014, EPA determined that a remedial investigation and feasibility study ("RI/FS") under CERCLA must be completed for the Jackpile Site and attempted to obtain Plaintiff's agreement to fund or perform the RI/FS. *See* Compl. ¶ 163. EPA also sent Plaintiff a Special Notice Letter advising Plaintiff of its potential liability under CERCLA. *See id.* ¶ 207. Since that time, Plaintiff has "retained technical experts to aid with the assessment and negotiations concerning the RI/FS and to identify potentially responsible parties[,] . . . and also [] incurred other costs to respond to EPA's demand." *See id.* ¶ 163. However, Plaintiff and EPA were not able to come to an agreement regarding the RI/FS. *See id.* ¶ 207. In fact, Plaintiff alleges it is not responsible for any cleanup, reclamation, or remediation of the Site, *see, e.g., id.* ¶¶ 208, 220, and the Site remains contaminated. *See, e.g., id.* ¶¶ 163, 171, 207.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must dismiss a complaint that "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). However, "a document central to the plaintiff's claim and

[3] The NPL is "a list of national priorities among the known or threatened releases of hazardous substances, pollutants or contaminants throughout the United States." 78 Fed. Reg. 74,475, 75,476 (Dec. 12, 2013) (EPA's final listing of the Jackpile Site); *see also* 42 U.S.C. § 9605(a)(8)(C)). It is "an EPA compiled list which prioritizes CERCLA sites for cleanup based on the relative risk or danger to public health or welfare to the environment." *Daigle*, 972 F.2d at 1531 n.1.

referred to in the complaint may be considered in resolving a motion to dismiss." *Pace v. Swerdlow*, 519 F.3d 1067, 1072-73 (10th Cir. 2008).

In order to determine whether the complaint states a claim, the court applies a "plausibility standard" to ascertain whether the complaint includes enough facts that, if assumed to be true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, 556 U.S. at 678. Indeed, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. "[T]he complaint must give the court reason to believe that [the] plaintiff has a reasonable likelihood of mustering factual support for [its] claims." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

Additionally, federal courts are courts of limited jurisdiction, and must have a statutory or constitutional basis to exercise jurisdiction over the subject matter of a suit. *See* U.S. Const. art. III; *Sheldon v. Sill*, 49 U.S. 441, 448-49 (1850). Thus, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the court must dismiss a claim when it lacks subject matter jurisdiction over that claim. Fed. R. Civ. P. 12(b)(1). Statutes conferring jurisdiction must be strictly construed. *See F & S Constr. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). Additionally, when ruling on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), the court must determine whether jurisdiction exists "from the allegations of fact in the complaint, without regard to mere

conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). The plaintiff bears the burden to establish that jurisdiction exists, and because federal courts are courts of limited jurisdiction, there is a presumption against its existence. *See Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

For each claim against the United States, Plaintiff has either failed to allege sufficient factual allegations to support the legal conclusions in the Complaint or failed to establish jurisdiction. Accordingly, the claims against the United States must be dismissed.

ARGUMENT

I. THE FIRST, SECOND, AND THIRD CLAIMS AGAINST THE UNITED STATES SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS NOT PLEAD SUFFICIENT FACTS TO SUPPORT A CERCLA SECTION 107(a) CLAIM.

Claims One, Two, and Three of the Complaint allege claims for cost recovery under CERCLA section 107(a)(1), (2), and (4)(B). *See* Compl. ¶¶ 164-88. In order to plead the prima facie elements of a cost recovery claim under CERCLA section 107(a), a plaintiff must allege, among other things, that it has incurred "costs of response" that are "necessary" and that its response action is "consistent with the [NCP]." *See* 42 U.S.C. § 9607(a)(4)(B); *see also Young*, 394 F.3d at 862. Plaintiff has failed to plead sufficient facts showing that is has incurred such costs, and thus, Plaintiff's section 107(a) claims should be dismissed.

A. Plaintiff's Alleged Costs Are Not Necessary Response Costs Or Consistent With The NCP Because Plaintiff Has Not Even Begun To Clean Up The Site.

Under CERCLA, "response" means "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25). The terms "remove" or "removal action" mean "the cleanup or removal of released hazardous substances from the environment. . . [,]" and the terms "remedy" or "remedial action" mean "those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . ." 42 U.S.C. § 9601(23)-(24).

Although CERCLA does not define "necessary costs of response," the Tenth Circuit has observed that "the heart of the definitions of removal and remedy are 'directed at containing and cleaning up hazardous substance releases[,]'" and has therefore concluded that "'necessary costs of response' must be necessary to the containment and cleanup of hazardous releases." *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992) (quoting *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992)). Indeed, "[a] response cost must be 'necessary to the containment *and* cleanup of hazardous releases.'" *Young*, 394 F.3d at 863 (quoting *Hardage*, 982 F.2d at 1448) (emphasis in original). The Tenth Circuit is not alone in this conclusion—"several circuit courts of appeal have concluded a response cost is only 'necessary' if the cost is closely tied to the *actual cleanup* of hazardous releases." *Id.* (citing *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 482 (6th Cir. 2004); *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 297 (3d Cir. 2000); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 92 (2d Cir. 2000); and *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669-70 (5th Cir. 1989)). "[C]osts cannot be deemed 'necessary' to the containment and cleanup of hazardous releases absent some nexus between the alleged response cost and an actual effort to respond to environmental contamination." *Young*, 394 F.3d at 863.

The NCP provides that a private party response action is consistent with the NCP "if the action, *when evaluated as a whole*, is in substantial compliance with the applicable requirements in [the regulation], *and* results in a CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i) (emphasis added). "A 'CERCLA-quality cleanup' results if the response action protects human health and the environment through the utilization of permanent solutions and alternative treatment or resource recovery technologies to the maximum extent possible." *Young*, 394 F.3d at 864. A private party is entitled to a presumption of consistency with the NCP when acting

under an administrative or consent order from EPA; however, when a private party is acting on its own, the private party's burden to demonstrate compliance is "ordinarily not an easy one." *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1136 (10th Cir. 2002).

In *Young v. United States*, the Tenth Circuit found that the plaintiffs had not incurred "necessary" response costs and that any costs they had incurred were not consistent with the NCP. *Young*, 394 F.3d at 864-65. Specifically, the court found that although "some of the costs [p]laintiffs expended [were] 'classic examples' of preliminary steps taken in response to the discovery of the release or threatened release of hazardous substances, such as site investigation, soil sampling, and risk assessment," the plaintiffs' claim failed because there existed "[a]bsolutely no nexus [] between the costs [the plaintiffs] expended and an actual effort to cleanup the environmental contamination." *Id.* at 864. The court further explained that the plaintiffs had "also repeatedly testified that they [did] not intend to spend any money to cleanup the contamination on their property." *Id.* Accordingly the Tenth Circuit concluded that the plaintiffs had, "as a matter of law," failed to establish their cost recovery claim under CERCLA section 107(a). *Id.* at 865. The court further concluded that awarding the plaintiffs their costs without any actual cleanup of their property would "defeat the main purpose of CERCLA—that hazardous waste sites actually be cleaned up—and flip the statutory scheme on its head." *Id.*

The allegations in the Complaint establish that Plaintiff in this case is likewise attempting to flip the statutory scheme on its head. As in *Young*, Plaintiff alleges a few "classic examples" of costs typically incurred in the preliminary stages of a CERCLA response action—*i.e.*, "engag[ing] a consultant . . . to conduct an analysis of current conditions at the Jackpile Site . . . [and] to identify responsible parties," but has made no actual effort to clean up the Jackpile Site. *See* Compl. ¶ 161. Plaintiff acknowledges that the Site remains contaminated, *see id.* ¶¶ 125-27,

133-34, 140, 154, and insists that it should not be liable for any further remediation at the Site. *See id.* ¶¶ 157-59, 204-23; *see also* ¶ 171 (formulaically reciting that Plaintiff has incurred costs, and stating only that Plaintiff "*may* continue to incur" recoverable costs) (emphasis added). Because Plaintiff has not begun any actual cleanup of the Jackpile Site, Plaintiff has not incurred any necessary response costs and therefore, Plaintiff's 107(a) cost recovery claims against the United States must be dismissed. *See Young*, 394 F.3d at 864-65. *See also Calmat Co. v. San Gabriel Valley Gun Club*, 809 F. Supp. 2d 1218, 1221-25 (C.D. Cal. 2011) (granting a motion to dismiss CERCLA claims as unripe when the plaintiff had not begun a cleanup "but rather ha[d] just done some investigation and testing, primarily for the purposes of [the] litigation"); *Champion Labs., Inc. v. Metex Corp.*, No. 02-5284, 2009 WL 2496888, at *19-22 (D.N.J. Aug. 13, 2009) (granting summary judgment in the defendant's favor when the plaintiff had incurred investigatory costs but "ha[d] not even begun to clean up the contamination . . . ."); *Walnut Creek Manor, LLC v. Mayhew Ctr.*, LLC, 622 F. Supp. 2d 918, 929-31 (N.D. Cal. 2009) (same).

B. Plaintiff's Costs Are Litigation Costs, Not Necessary Response Costs.

Furthermore, the allegations in the Complaint also reveal that Plaintiff incurred its preliminary costs solely to defend against EPA action, not to clean up the Jackpile Site. Specifically, Plaintiff alleges that EPA "propounded a CERCLA Section 104(e) Request on [Plaintiff]" to which Plaintiff responded, and "subsequently engaged a consultant . . . to conduct an analysis of current conditions at the Jackpile Site . . . [and] help identify responsible parties . . . ." Compl. ¶¶ 160-61. Plaintiff next alleges that, in response to EPA's alleged attempt "to place sole responsibility" for the RI/FS that EPA determined "must be completed for the Jackpile Site" on Plaintiff, Plaintiff "retained a technical expert to aid with the assessment *and negotiations concerning the RI/FS* . . . ." Compl. ¶ 163 (emphasis added). These allegations

plainly reveal that any costs incurred by Plaintiffs at the Jackpile Site constitute litigation costs incurred solely to defend Plaintiff in the enforcement action Plaintiff believed EPA would take against Plaintiff and absolve it from any liability at the Site.

The Supreme Court and Tenth Circuit have held that such costs incurred "solely to defend" Plaintiff from impending EPA enforcement action are not "necessary" costs. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 820-21 (1994); *Hardage*, 982 F.2d at 1448. In *Key Tronic*, the Supreme Court held that "legal services performed in connection with the negotiations between [a private liable party] and the EPA . . . do not constitute 'necessary costs of response'" because they primarily serve to protect the private party's interest in establishing the extent of its liability. *Key Tronic*, 511 U.S. at 810, 820. And prior to *Key Tronic*, the Tenth Circuit held that "when a private party incurs response costs in developing its own remedy, solely to defend against the government's 106(a) injunction action, the private party's response costs are not 'necessary' within the meaning of CERCLA § 107(a)(4)(B)." *Hardage*, 982 F.2d at 1448; *see also United States v. Hardage*, 750 F. Supp. 1460, 1519 (W.D. Okla. 1990) ("Costs borne primarily to support [the private party's] litigation position are not 'necessary costs of response . . . consistent with the national contingency plan.'"), *aff'd*, 982 F.2d at 1448 (citation omitted).

Although in *Key Tronic*, the Supreme Court held that costs incurred to "track[] down other responsible solvent polluters" are recoverable because "such efforts significantly benefit the entire cleanup effort and serve[] a statutory purpose apart from the reallocation of costs[,]" 511 U.S. at 820, that cannot be the case here. Plaintiff alleges that its predecessor opened and closed the mine, and was the sole entity responsible for mining it. *See* Compl. ¶¶ 58-62; 87, 89. Additionally, Plaintiff was aware of the involvement of various federal agencies at the Site prior

to incurring its alleged costs. *See* Compl. ¶¶ 61, 65, 70, 81, Ex. A, ¶ 2(a). Thus, Plaintiff's own allegations demonstrate that Plaintiff's alleged search could not have served any statutory purpose or benefitted the cleanup. *See, e.g., Champion Labs.*, 2009 WL 2496888, *22 (concluding that the plaintiff had not incurred recoverable costs to "track down" a liable party when the plaintiff had already identified that party prior to incurring costs). Indeed, Plaintiff's formulaic recitation of incurring such costs cannot save the first through third claims from dismissal under Rule 12(b)(6), *Twombly*, 550 U.S. at 555 (requiring more than formulaic recitations), especially in light of the utter lack of any allegations of any cleanup effort by Plaintiff at the Site.[4]

Thus, under Supreme Court and Tenth Circuit precedent, Plaintiff has not sufficiently alleged recoverable response costs under CERCLA because no CERCLA-quality cleanup has yet occurred, and any costs incurred are plainly litigation-related costs generated solely to defend against EPA's pursuit of Plaintiff as a liable party at the Site. Accordingly, Plaintiff has failed to state a prima facie case under CERCLA section 107(a), and therefore, claims one through three of the Complaint must be dismissed under Fed. R. Civ. P. 12(b)(6).

[4] To the extent Plaintiff is relying on its allegations regarding the payment of $43.6 million to the Laguna under the Agreement to Terminate Leases to support its claim under CERCLA section 107(a), *see* Compl. ¶¶ 1, 95, such payment does not constitute "response costs." *See Atl. Research*, 551 U.S. at 139 ("When a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred."). In any event, a claim to recover such settlement costs would be time-barred under CERCLA section 113(g)(2) (providing that cost recovery actions under 107 must be brought within three years "after completion of the removal action" or six years "after initiation of physical on-site construction" of a remedial action. 42 U.S.C. § 9613(g)(2). The United States disputes that the Laguna's mine reclamation activities constitute a response action under CERCLA. However, even if they did, the Complaint alleges that activities began sometime after the Agreement to Terminate Leases was signed in 1986 and were deemed complete in 1995. *See* Compl. ¶¶ 107, 117.

II. THE FOURTH CLAIM AGAINST THE UNITED STATES MUST BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO STATE A CLAIM FOR CONTRIBUTION UNDER CERCLA SECTION 113(f), AND ITS SECTION 113(f)(3)(B) CLAIM IS TIME-BARRED.

In addition to its claim under CERCLA section 107(a), Plaintiff alleges a claim for contribution under CERCLA section 113(f)(1) and 113(f)(3)(B). Compl. ¶¶ 189-96. This claim must be dismissed. First, Plaintiff failed to allege that its claim is filed "during or following" a civil action as required by CERCLA section 113(f)(1). *See id.*; *see also* 42 U.S.C. § 9613(f)(1). Indeed, the United States has not yet filed such an action and Plaintiff cannot bootstrap a contribution claim onto its own section 107(a) claim. Second, Plaintiff has not resolved liability to the United States or the State as required by CERCLA section 113(f)(3)(B), and even if it had, any such claim would be time-barred under CERCLA section 113(g)(3).

A. Plaintiff Has Not Alleged A Claim Under CERCLA Section 113(f)(1).

CERCLA section 113(f)(1) allows any person to "seek contribution . . . during or following any civil action under section 9606 of this title or section 9607(a) of this title." 42 U.S.C. § 9613(f)(1). Plaintiff fails to state a claim for relief under CERCLA section 113(f)(1) because it does not identify the "civil action" that gives rise to its right to seek contribution. The Complaint is devoid of any allegation that Plaintiff has been sued under CERCLA. *See* Compl. ¶¶ 1-163, 189-96. Indeed, Plaintiff could not allege that it has been sued by EPA. Thus far, EPA has issued only a Special Notice Letter to Plaintiff, *see id.* ¶ 207, under its settlement authority in CERCLA section 122(e), 42 U.S.C. § 9622(e), and has not brought a civil action against Plaintiff under CERCLA section 106 or 107(a). Without a pending or completed civil action to resolve its CERCLA liability, Plaintiff has no basis to seek contribution.

To the extent Plaintiff is attempting to bootstrap its section 113(f)(1) claim to its own section 107(a) claim, that attempt fails. First, because Plaintiff's section 107(a) claim must be

dismissed, it cannot serve as the "civil action" that triggers the right to contribution. *See infra*, Part I. Second, even if Plaintiff's section 107(a) claim were valid (which it is not), the resolution of that claim would resolve the liability only of the defendant (the United States), not Plaintiff. A claim for contribution under CERCLA, like a claim for contribution under common law, is the "right to collect from others . . . after the tortfeasor has paid more than his or her proportionate share." *Atl. Research*, 551 U.S. at 138. Thus, only a "private party who has[] been sued," in other words, a defendant, "may obtain contribution under § 113(f)(1) from other liable parties." *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 160 (2004); *see also Atl. Research*, 551 U.S. at 133 ("In *Cooper Industries*, we held that a private party could seek contribution from other liable parties only after having been sued under § 106 or § 107(a)."). A plaintiff's own section 107(a) action cannot give rise to the plaintiff's claim for contribution because the plaintiff will not be compelled to pay for its liability at all, much less a disproportionate share.

Additionally, the Supreme Court has held that CERCLA sections 107 and 113 provide two "clearly distinct" remedies. *Atl. Research*, 551 U.S. at 138. "CERCLA provide[s] for a *right to cost recovery* in certain circumstances, § 107(a), and *separate rights to contribution* in other circumstances, §§ 113(f)(1), 113(f)(3)(B)." *Id*. (emphasis in original) (internal quotation marks and citation omitted). Sections 107(a) and 113(f) "complement each other by providing causes of action to persons in different procedural circumstances." *Id*. at 139 (internal quotation marks omitted). Accordingly, Plaintiff may attempt to seek cost recovery under section 107(a) or contribution under section 113(f), but may not use one in an attempt to gain another. Thus, Plaintiff's CERCLA section 113(f)(1) claim fails because Plaintiff has failed to allege any "civil action" that triggers its right to contribution.

B. Plaintiff Has Not Alleged A Contribution Claim Under CERCLA Section 113(f)(3)(B), And, In Any Event, Any Such Claim Is Time-Barred.

CERCLA section 113(f)(3)(B) provides a right of contribution to "a person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement" against "any person who is not party to [such] a settlement . . . ." 42 U.S.C. § 9613(f)(3)(B). Plaintiff has failed to allege facts necessary to support its legal conclusion that it resolved its liability to the United States or a State for some or all of a response action at the Site. Moreover, even if Plaintiff could establish that it has (which it cannot), Plaintiff's claim is time-barred under CERCLA section 113(g).

1. Plaintiff has not sufficiently alleged a contribution claim under CERCLA section 113(f)(3)(B).

As an initial matter, although the Complaint formulaically recites a contribution claim under CERCLA section 113(f)(3)(B), *see* Compl. ¶¶ 193-96, the Complaint fails to specify the manner in which Plaintiff resolved liability to the United States or the State. The only facts in the Complaint that could possibly relate to such a claim are those regarding the Agreement to Terminate Leases. *See* Compl. ¶¶ 76-88; Ex. A. Yet the Agreement to Terminate Leases fails on its face to satisfy the requirements of CERCLA section 113(f)(3)(B).

First, the Agreement to Terminate Leases "is between the Pueblo of Laguna . . . and Anaconda Minerals Company[,]" not between Plaintiff's predecessor and the United States or the State. Compl., Ex. A. To the extent Plaintiff's claim hinges on the theory that Pueblo of Laguna constitutes a "State" under CERCLA, the claim must fail. According to the Complaint, Pueblo of Laguna is "a federally recognized Native American tribe located in New Mexico." *Id.* ¶ 27; *see also* 80 Fed. Reg. 1942, 1945 (Jan. 14, 2015) (listing the Pueblo of Laguna as a tribal

entity recognized by the Bureau of Indian Affairs by virtue of its status as an Indian tribe). Under CERCLA, "Indian tribe" and "State" are defined separately, and neither include the other. *See* 42 U.S.C. §§ 9601(36) (defining "Indian tribe") and 9601(27) (defining "State").

To the extent Plaintiff's claim hinges on the theory that the Agreement resolved Plaintiff's liability to the United States, *see* Compl., Ex. A at 6, Plaintiff is likewise wrong. As a matter of law, the Secretary of the Interior did not have the authority to resolve CERCLA liability on behalf of the United States at the time the Agreement was signed on December 12, 1986. Specifically, after Congress enacted CERCLA in 1980, the President issued Executive Order 12316 in 1981, which delegated a number of the President's authorities under CERCLA to various federal agencies. *See* Executive Order 12316, 46 Fed. Reg. 42,237 (Aug. 14, 1981). EPA was delegated enforcement authority over releases or threatened releases on land under CERCLA section 106(a), and administrative settlements under that provision were conducted under that delegation. *See id.* at Sec. 3, 46 Fed. Reg. at 42,238. The Secretary of the Interior was not similarly delegated any enforcement authority or other settlement authority in Executive Order 12316. *See generally id.*

Congress amended CERCLA to include section 122, which expanded the President's settlement authority, effective October 17, 1986, *see* 42 U.S.C. § 9622(a); Pub. L. 99-499. But the President did not issue a subsequent Executive Order revoking Executive Order 12316 and delegating authority under the amended statute until January 23, 1987. *See* Executive Order 12580, Sec. 4(b)(1), 52 Fed. Reg. 2923, 2925 (Jan. 23, 1987).[5] Because the Secretary of the

[5] The Department of Interior was delegated authority to implement the settlement provisions of CERCLA section 122 (except for one provision not relevant here) with respect to "releases or threatened releases . . . under the jurisdiction, custody, or control" of Interior in Executive Order 12580. *See id.* However, even under Executive Order 12580 (which postdates the Agreement), that authority could be "exercised only with the concurrence of the (footnote cont'd . . . .)

Interior was not delegated enforcement authority under Executive Order 12316, s*ee generally id.*, and had not yet been delegated settlement authority under CERCLA section 122 at the time the Agreement to Terminate Leases was signed, the Secretary of the Interior had no authority to resolve CERCLA liability in December 1986. Thus, Plaintiff has failed to allege a contribution claim under CERCLA section 113(f)(3)(B).

2. Even if Plaintiff had adequately alleged a CERCLA section 113(f)(3)(B) contribution claim, that claim would be time-barred.

a. The claim would be time-barred under CERCLA section 113(g)(3).

CERCLA section 113(g)(3) states that

> [n]o action for contribution for any response costs or damages may be commenced more than 3 years after (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3). These two provisions provide "two *corresponding* 3-year limitations periods" for CERCLA's "two express avenues for contribution"—"one beginning at the date of judgment, § 113(g)(3)(A), and one beginning at the date of settlement, § 113(g)(3)(B)." *Aviall*, 543 U.S. at 167 (emphasis added). Indeed, "113(g)(3) provides the statute of limitations for all contribution actions." *Hobart*, 758 F.3d at 773.

The first statute of limitations in section 113(g)(3)(A) does not apply to Plaintiff's purported contribution claim because, as established in Part II.A *supra*, no civil action has been filed and thus, no judgment for cost recovery has been entered. Nor does the Agreement to

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Attorney General[,]" *id.*, and in consultation with any "interested Federal agency." *Id.* at Sec. 11(f), 52 Fed. Reg. at 2929. The Agreement to Terminate Leases contains no indication of Attorney General concurrence or consultation with EPA.

Terminate Leases trigger section 113(g)(3)(B) under the statute's express language—it is not an administrative order under section 122(g) or (h) or a judicially approved settlement. However, that does not mean that no statute of limitations would apply to a 113(f)(3)(B) contribution claim if the Agreement to Terminate Leases could somehow trigger such a claim. Instead, courts have held that the statute of limitations in section 113(g)(3)(B) applies as the most analogous statute of limitations for contribution claims under section 113(f)(3)(B) that do not explicitly trigger section 113(g)(3)(B). *See Hobart*, 758 F.3d at 774-75 (applying section 113(g)(3)(B)'s 3-year limitations period to a contribution claim brought under an Administrative Settlement and Order on Consent); *N. States Power Co. v. City of Ashland*, -- F. Supp. 3d ----, No. 12-cv-602-bbc, 2015 WL 1243597, at *9-10 (Mar. 18, 2015) (applying the 3-year limitations period to a contribution claim based on an administrative order issued under CERCLA section 122(a)); *Chitayat v. Vanderbilt Assocs.*, 702 F. Supp. 2d 69, 82 (E.D.N.Y. 2010) (applying the 3-year limitations period to a contribution claim based on an administrative settlement with the State); *BASF Catalysts LLC v. United States*, 479 F. Supp. 2d 214, 220-24 (D. Mass. 2007) (holding that a contribution claim based on a RCRA administrative settlement, if viable, was time-barred under the 3-year limitations period); *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 842-43 (W.D. Tenn. 2006) (applying the 3-year limitations period to a contribution claim based on an administrative order on consent).

In *Hobart*, for example, the Sixth Circuit addressed what, if any, statute of limitations applied to the plaintiff's 113(f)(3)(B) contribution claim, which was based on costs incurred under an Administrative Settlement and Order on Consent issued by EPA that did not explicitly trigger the limitations period in section 113(g)(3)(B). *See Hobart*, 758 F.3d at 772-76. Among other things, the appellants argued that section 113(g)(3)(B)'s listing of several triggering events

precluded a finding that other triggering events not mentioned in the statute exist, and therefore that section 113(g)(3)(B) did not apply to their claim. *See id.* at 774. In rejecting that theory, the Sixth Circuit explained that "even though 113(g)(3) does not provide an explicit triggering event, controlling and persuasive caselaw indicates that there must be one." *Id.* at 774. The Sixth Circuit then concluded that section 113(g)(3)(B) "set[] the proper limitations period for contribution actions" and provided the most analogous triggering event—the effective date of settlement. *Id.* at 775-76. Thus, the Sixth Circuit held that the triggering event for the 3-year limitations period applicable to the contribution claim was the date of signature, which rendered the claim time-barred.[6] *See id.*

Here, as in *Hobart*, the most logical triggering event for Plaintiff's purported 113(f)(3)(B) contribution claim, if viable (which it is not), is the effective date of the Agreement to Terminate Leases—December 12, 1986. *See* Compl., Ex. A. Because Plaintiff's 113(f)(3)(B) claim was

[6] Since *Cooper* and *Atlantic Research* clarified the "distinct remedies" in sections 107(a) and 113(f), the Tenth Circuit has not had occasion to address the issue of which statute of limitations applies to contribution claims that do not explicitly trigger 113(g)(3)(A) or (B). However, before those cases were decided, the Tenth Circuit had held that section 113(g)(2) applied to a contribution claim by a liable party that was seeking contribution for costs paid under an EPA order that did not explicitly trigger 113(g)(3)(B). *See Sun Co. Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191-94 (10th Cir. 1997). The Tenth Circuit reasoned that "because 113(f) incorporates the liability provision of § 107, . . . a 113(f) action for contribution is an action under 107[,]" *id.* at 1191, and because no 106 or 107 action had been brought against the party by the government, the party's contribution claim was an "initial action for recovery of costs" under 113(g)(2). *Id.* at 1192-93.

The Tenth Circuit is unlikely to reach the same result following *Cooper* and *Atlantic Research*. *See Hobart*, 758 F.3d at 773-74 (concluding that *Sun Company* and other similar cases are no longer good law on this point). Even if it did, however, Plaintiff's claim also would be time-barred under *Sun Company*. Section 113(g)(2) bars claims not filed within three years of completion of a removal action or six years of "initiation of physical on-site construction" of a remedial action. As noted *supra*, the United States disputes that the mine reclamation activities constitute a response action under CERCLA. However, even if they did, the Complaint alleges that activities began sometime after the Agreement was signed in 1986 and were deemed complete in 1995. *See* Compl. ¶¶ 107, 117.

not filed within three years of that date, and was in fact filed nearly thirty years later, Plaintiff's purported 113(f)(3)(B) claim is time-barred under CERCLA section 113(g)(3)(B). Accordingly, the Court must dismiss Plaintiff's 113(f)(3)(B) contribution claim.

b. The claim would be time-barred under 28 U.S.C. § 2401(a).

Even if Plaintiff were to persuade the Court that CERCLA section 113(g)(3)(B) does not apply to its section 113(f)(3)(B) claim, that claim would still be time-barred. "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a) (emphasis added); *see also Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (28 U.S.C. § 2401(a) applies to all civil actions). "A claim against the United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Wild Horse Observers Ass'n, Inc. v. Jewell*, 550 Fed. Appx. 638, 641 (10th Cir. 2013) (unpublished) (internal quotation marks and citation omitted). It is a well-established rule that statutes of limitation for contribution actions begin to run when the would-be contribution plaintiff's cause of action accrues. *See D'Onofrio Constr. Co. v. Recon Co.*, 255 F.2d 904, 907-08 (1st Cir. 1958) (discussing the established rule and an "unusual" exception under state law); *Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 295 (9th Cir. 1996). If the Agreement to Terminate Leases could trigger a section 113(f)(3)(B) claim, that claim would have first accrued upon entry of the Agreement in 1986. Because Plaintiff did not file suit against the United States until far more than six years thereafter, its purported claim would be barred.

III. THE FIFTH CLAIM AGAINST THE UNITED STATES SHOULD BE DISMISSED BECAUSE PLAINTIFF CANNOT OBTAIN DECLARATORY RELIEF WITHOUT ESTABLISHING LIABLITY UNDER CERCLA.

Finally, in the Fifth Claim for relief against the United States, Plaintiff seeks a declaratory judgment under CERCLA section 113(g)(2) and the Declaratory Judgment Act, 28 U.S.C. § 2201, "that requires the United States . . . to reimburse Atlantic Richfield for all necessary response costs to be incurred by Atlantic Richfield in the future at the Jackpile Site." Compl. ¶¶ 197-202, 202. CERCLA section 113(g)(2) authorizes courts to "enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover *further* response costs." 42 U.S.C. § 9613(g)(2) (emphasis added). Thus, the right to pursue a declaratory judgment under section 113(g)(2) depends on establishing the existence of a valid underlying cause of action under CERCLA. *See Colton v. Am. Promotional Events, Inc.-West*, 614 F.3d 998, 1006-07 (9th Cir. 2010);[7] *Trimble v. Asarco, Inc.*, 232 F.3d 946, 958 (8th Cir. 2000), *overruled on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 92 (2d Cir. 2000); *United States v. Occidental Chem. Corp.*, 200 F.3d 143, 153054 (3d Cir. 1999); *see also Hobart*, 923 F. Supp. 2d at 1096–97 ("[T]he viability of the declaratory judgment claim

[7] *Colton* suggests that the Tenth Circuit is one of two circuits that "have held or suggested that declaratory relief may be available even in the absence of recoverable past costs." 614 F.3d at 1007 (citing *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991)). However, in *County Line*, the Tenth Circuit merely recognized in dicta that "there are some circumstances in which a CERCLA plaintiff may be entitled to a declaration of the defendant's liability even though the plaintiff has not yet established that *all* of its claimed response costs were incurred consistent with the NCP." *Id.* at 1513 (emphasis added) (citing cases having to do with the inability to establish at the point of briefing that all of the claimed costs were consistent with the NCP). Indeed, in that case, the Tenth Circuit affirmed the lower court's grant of summary judgment where the plaintiffs had "incurred no costs consistent with the NCP" and "CERCLA provide[d] them no remedy." *Id.* at 1512-13. Here, whether Plaintiff can establish that all of its claimed costs are NCP compliant is not the issue. As explained *supra*, Plaintiff in this case cannot establish that it has incurred *any* costs recoverable under CERCLA.

hinges on the viability of the substantive CERCLA claims."); *Union Station Assocs. LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1226, 1230 (W.D. Wash. 2002) (dismissal of underlying CERCLA claims mandated dismissal of claim for declaratory judgment under CERCLA section 113(g)(2)).

As for the Declaratory Judgment Act, 28 U.S.C. § 2201, that statute does not provide a cause of action or subject matter jurisdiction in federal court. Instead, it provides an additional remedy in cases where the Court otherwise has subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950); *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 822 (10th Cir. 1981) (citations omitted) ("It is settled that 28 U.S.C. § 2201 does not itself confer jurisdiction on a federal court where none otherwise exists. That statute was adopted by Congress to enlarge the range of remedies available in federal court, and does not extend subject matter jurisdiction to cases in which the court has no independent basis for jurisdiction."). For the reasons described above, Plaintiff has failed in the First through Fourth Claims of the Complaint to plead a valid CERCLA claim under section 107(a) or section 113(f) against the United States. In the absence of such a claim, the Court should dismiss Plaintiff's additional Fifth Claim for declaratory relief for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. [8]

[8] To the extent Plaintiff challenges EPA's work towards a response action at the Site, *see* Compl. ¶ 1 (alleging that Plaintiff seeks a "declaration . . . to prevent the United States from imposing upon [Plaintiff] responsibility for funding or performing any . . . remediation work at the [Site"), Plaintiff's claims are barred by CERCLA section 113(h). That section prohibits federal court review of "any challenges to removal or remedial action selected under [CERCLA]," except in specified circumstances not present here. 42 U.S.C. § 9613(h). Courts have interpreted section 113(h) broadly to encompass "any challenge" to a CERCLA cleanup regardless of the guise under which the challenge is brought. *See Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008) (applying the jurisdictional bar to an action filed after the United States had completed only preliminary steps towards cleanup); *see also Reynolds v. Lujan*, 785 F. Supp. 152, 153 (D.N.M. 1992) (Parker, J.) (footnote cont'd . . . .)

CONCLUSION

For the foregoing reasons, the Court should dismiss the claims against the United States under Federal Rule of Civil Procedure 12(b)(1) and (6).

Respectfully submitted,

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("The language of 113(h) is broad. It precludes 'any challenges,' rather than specified actions and goes beyond CERCLA itself since there shall be no federal jurisdiction under any federal or state law."). Addressing such issues would entangle EPA in this litigation and unavoidably distract its limited resources from remediating the Jackpile Site, which is inconsistent with the purpose of section 113(h). *See Cannon*, 538 F.3d at 1332 ("In 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.") (internal quotation marks and citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 26th day of May, 2015, via the Court's ECF system upon:

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