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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT LAGUNA CONSTRUCTION COMPANY'S MOTION TO DISMISS THE COMPLAINT (DOC. #1) AGAINST IT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Legislative Material:

Other Material:

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT LAGUNA CONSTRUCTION COMPANY'S MOTION TO DISMISS THE COMPLAINT (DOC. #1) AGAINST IT

Defendant Laguna Construction Company, Inc. ("LCC" or "the Corporation") submits this Memorandum of Law in support of its Motion to Dismiss the Complaint[1] against it.

PRELIMINARY STATEMENT

In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.* ("IRA"). Its purpose was to encourage tribal self-determination and economic development after "a century of oppression and paternalism."[2] Section 17 of the IRA authorized the issuance of federal corporate charters to corporations formed by Indian tribes. These corporations are

[1] Doc. #1 (hereinafter "Complaint, ¶ ___").

[2] H.R.Rep.No. 1804, 73d Cong., 2d Sess., 6 (1934), quoted in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). *See* discussion *infra* at Section II.A.

clothed with their tribal owners' sovereign immunity and resemble in form and function arms of their governmental owners rather than ordinary for-profit corporations. As intended by Congress, LCC has enabled its tribal governmental shareholder – the Pueblo of Laguna – to train and provide employment for tribal members and to provide financial wherewithal for the tribal government to provide essential governmental services to its citizenry.

Plaintiff Atlantic Richfield Company ("ARCO" or "Plaintiff") has brought four claims against Defendant LCC under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[3] All four must be dismissed. As discussed in detail below, LCC possesses sovereign immunity from suit, and therefore the Court lacks subject matter jurisdiction over ARCO's claim. Even if the Court disagrees, however, the Complaint must be dismissed against LCC because it fails to state a claim against the Corporation. LCC is not a "person" that may be held liable under CERCLA.

FACTUAL BACKGROUND

LCC is a tribal corporation formed pursuant to Section 17 of the Indian Reorganization Act. 25 U.S.C. § 477.[4] Its sole shareholder is the Defendant Pueblo of Laguna ("the Pueblo"), a federally recognized Indian tribe located in New Mexico.

---

[3] 42 U.S.C. §§ 9601-9628. The four claims for relief against LCC are based on 42 U.S.C. § 9607(a)(3), (4)(B) (Claim 2 - Arranger liability); § 9607(a)(1), (2), (4)(B) (Claim 3 - Operator liability); § 9613(f)(1), (f)(3)(b) (Claim 4- Contribution); and § 9613(g)(2) and 28 U.S.C. § 2201 (Claim 5 - Declaratory Judgment). (Complaint, ¶¶ 173-203)

[4] Section 477 provides: "The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-

Starting in 1952, Anaconda Minerals Company, Plaintiff's predecessor, conducted uranium mining on the Pueblo's tribal lands ("Jackpile Site") pursuant to leases with the Pueblo that were approved by the Secretary of the Interior. (Complaint, ¶ 60) Mining operations ended in or about 1982. (Complaint, ¶¶ 10, 72) In 1986, the Pueblo and Anaconda entered into an Agreement to Terminate Leases (Doc. 1-A, hereinafter "Agreement"). The Agreement terminated the leases and allotted responsibility for the reclamation of the land ("Reclamation Project"). In the Agreement, the Pueblo and Anaconda anticipated that the Pueblo would form a tribal corporation that would participate in some fashion in the Reclamation Project. (Doc. 1-A, at 2) LCC was not a party to the Agreement; it would not come into existence for another two years. After its incorporation in 1988, on or about July 17, 1989, LCC entered into an Agreement with the Pueblo for Completion of Mobilization Work, and on December 4, 1989, it entered into an Agreement with the Pueblo for Construction Services.

The Pueblo initially incorporated LCC in 1988 as a New Mexico corporation. (Exh. A) In 1994, the Pueblo established a second corporation of the same name, Laguna Construction Company, Inc. This corporation was established as a federal Section 17 corporation. The Secretary, acting through the Assistant Secretary for Indian Affairs, issued the approved Charter in September of 1994 (Exh. B, at B-16), and the Pueblo's Tribal Council, acting as the sole Shareholder, ratified issuance of the Charter on October 4, 1994. (Exh. C)

It was the intention of the Shareholder that after formal establishment of the federal Section 17 corporation, the two Laguna Construction Company entities would merge, with the federal Section 17 company as the surviving entity. (*Id.*, at C-2) Accordingly, Articles of

---

five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress."

Merger and a Plan of Merger were submitted to the New Mexico State Corporation Commission on June 1, 1995, which issued the Certificate of Merger on June 2, 1995. (Exh. D, at D-12).

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE LCC POSSESSES SOVEREIGN IMMUNITY FROM SUIT

Tribal sovereign immunity is a matter of subject matter jurisdiction. *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir. 2001); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Bales v. Chickasaw Nation Industries,* 606 F.Supp.2d 1299, 1301 (10th Cir. 2009). If a defendant possesses sovereign immunity, a court lacks the authority to adjudicate claims against it. When a defendant challenges the court's subject matter jurisdiction under Federal Rule 12(b)(1), the plaintiff, as the party asserting jurisdiction, bears the burden of establishing jurisdiction. *Bales*, 606 F.Supp.2d at 1301; *Sydnes v. United States*, 523 F.3d 1179, 1183 (10th Cir. 2008); *Port City Properties v. Union Pacific R. Co.,* 518 F.3d 1186, 1189 (10th Cir. 2008).

LCC is a tribal corporation established under Section 17. Section 17 corporations possess sovereign immunity from suit. *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011), *cert. denied*; *Bales*, 606 F.Supp.2d at 1305; *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, {25}, 146 N.M. 735, 742, 215 P.3d 44, 51 (N.M. Ct. App.), *cert. denied*, 2009-NMCERT-7, 147 N.M. 361, 223 P.3d 358 (2009) (stating "corporations formed under Section 17 enjoy sovereign immunity, but may waive such protection ...."); *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, {6}136 N.M. 682, 685, 104 P.3d 548, 551 (N.M. App. 2004), *cert. denied*, 2005-NMCERT-1, 137 N.M. 16, 106 P.3d 578 (2005) (same) *cf.*

Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1185 n.8 (10th Cir. 2010) *cert. dismissed,* 132 S.Ct. 64 (2011) (noting that "Section 17 is not the exclusive means for tribes to incorporate for business or other purposes—*i.e.,* tribes can create corporate entities under their own laws or those of other sovereigns. The principal legal difference is that, while section 17 corporations retain their tribal status—and, accordingly, sovereign immunity in the absence of a "sue and be sued" waiver—the other species of [tribal] corporations are not imbued automatically with such status") (*quoting* Clay Smith, *Tribal Sovereign Immunity: A Primer*, 50 Advoc. 19, 20-21 (May 2007)).

ARCO alleges that the Corporation's shareholder, the Pueblo, waived its own immunity in the Agreement and that, "by virtue of the Laguna's ownership of Laguna Construction and the conduct of Laguna Construction at the Jackpile Site, this waiver applies to Laguna Construction to the extent sovereign immunity would otherwise apply to Laguna Construction." (Complaint, ¶ 21) The allegations of the Complaint are both devoid of detail and wrong as a matter of law. LCC does possess sovereign immunity, and neither the Pueblo's alleged waiver of its own immunity nor any conduct of LCC waived that immunity.

The language of Section 17 is silent as to sovereign immunity. In the face of this silence, courts have held that "it is more appropriate to interpret this silence as not abrogating sovereign immunity ...." *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 920, 921 (6th Cir. 2009). This Court has reached the same conclusion. *Bales*, 606 F.Supp.2d at 1305. That immunity stays in place unless abrogated by Congress or waived by the entity possessing the immunity. As demonstrated below, the Corporation's sovereign immunity remains intact.[5]

[5] Plaintiff has not alleged that Congress abrogated LCC's sovereign immunity, and it is therefore not addressed in this Memorandum of Law.

A. Neither The Pueblo of Laguna Nor LCC Waived LCC's Sovereign Immunity.

1. *Waiver by the Shareholder*. The Complaint is not specific as to how or when exactly plaintiff believes the Pueblo shareholder waived the Corporation's sovereign immunity. This is undoubtedly because it didn't. To be sure, the Pueblo agreed in its 1986 Agreement with Anaconda that any entity it "established to carry out reclamation at the Mine which is controlled by or related to The Pueblo will assume all of the responsibilities and liabilities of the Pueblo under this Agreement." (Agreement, § 6(b)) Nowhere, however, is there any reference to, much less waiver of, any sovereign immunity the Corporation might have. This is not surprising, since LCC was initially incorporated under the laws of the State of New Mexico. While LCC does not concede that the initial state corporation did not possess sovereign immunity, it assumes that fact for the purpose of this argument. At the time of entering into the Agreement and incorporating LCC, its sovereign shareholder did not waive an immunity it probably did not believe the future entity would possess.

The Pueblo's agreement that a yet to be incorporated entity would assume its responsibilities and liabilities is not the same thing as an explicit or even implicit pronouncement that the Pueblo agreed to waive the future tribal corporation's sovereign immunity (if any). Waivers of sovereign immunity must be clear and unequivocal. *Santa Clara Pueblo v.* Martinez, 436 U.S. 49, 58 (1978); *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1304 (10th Cir. 2001). The promise of assumption and liability does not explicitly or implicitly refer to sovereign immunity. It does not constitute a waiver by the sovereign shareholder of any immunity the future entity might have.

In 1994, the Pueblo created the second LCC as a tribal corporation pursuant to Section 17, and then merged the initial corporation into it. The new corporation – the one ARCO has

sued here – did and does possess sovereign immunity. Contrary to waiving the federal corporation's sovereign immunity, the Pueblo Governmental shareholder expressly asserted it and described in precise detail how that immunity could be waived. Article III of the LCC federal Charter states that "[t]he Corporation is organized, incorporated and chartered under the laws of the United States as a Federally Chartered Corporation under 25 U.S.C. § 477, as amended, and shall have the powers, privileges *and immunities* granted by that statute embodied in this Charter." (Exh. B, at B-2) (emphasis added) Article IV.B of the Charter recites that "[t]he Corporation shall have the same tax status *and immunities* under Federal law as the Pueblo of Laguna." (Exh. B, at B-2) (emphasis added). Finally, Article XVI, entitled Claims Against the Corporation, eliminates any doubt as to the Shareholder's intent with respect to the Corporation's possession of sovereign immunity. Subsections B and D of that Article provide:

> B. *The Corporation is hereby authorized to waive, as provided in this Article XVI, any defense of sovereign immunity from suit the Corporation*, its Directors, officers, employees, or agents may otherwise enjoy under applicable Federal, state or tribal law, arising from any particular agreement, matter or transaction as may be entered into to further the purposes of the Corporation, and to consent to suit in state and/or Federal court. The Corporation is authorized to designate United States Federal courts to be among the courts of competent jurisdiction for all matters related to the Small Business Administration's programs including but not limited to 8(a) Program Participation, loans, advance payments and contract performance.
>
> * * *
>
> D. *Any waiver by the Corporation authorized by paragraph B ... of this Article XVI shall be in the form of a resolution duly adopted by the Board of Directors,* which resolution shall not require the approval of the Pueblo of Laguna or the Secretary of the Interior. The resolution shall identify the party or parties for whose benefit the waiver is granted, the transaction or transactions and the claims or classes of claim for which the waiver is granted, the property of the Corporation which may be subject to execution to satisfy any judgment which may [be] entered into the claim, and

> shall identify the court or courts in which suit against the Corporation may be brought. Any waiver shall be limited to claims arising from the acts or omissions of the Corporation, its Directors, officers, employees or agents, and shall be construed only to effect [sic] the property and income of the Corporation.

(Exh. B, at B-12) (emphasis added). Thus, the Pueblo clearly and unequivocally asserted LCC's sovereign immunity when it approved the Corporation's Charter.

2. *Waiver by LCC.* Although LCC itself may waive its sovereign immunity, it may do so *only* if that waiver is effected by a resolution of the Board of Directors, and only if that resolution addresses the specific limiting factors identified in Article XVI(D). The presence of a sue and be sued clause in the federal Charter does not constitute a waiver of LCC's sovereign immunity. That clause refers explicitly to the only way for a waiver of sovereign immunity to occur. Specifically, Article VIII(K) of the Charter confers on the Corporation the power "to sue and be sued in its Corporate name *to the extent provided in Article XVI of this Charter.*" (Exh. B, at B-4) (emphasis added). As noted above, Article XVI of the Charter requires that any waiver be accomplished through a resolution of the Board of Directors.

Courts have repeatedly held that notwithstanding a sue-and-be-sued clause in a Section 17 corporation's Charter, there can be no waiver if the Charter's specific conditions for effecting that waiver are not followed. In *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), the plaintiff claimed that a Section 17 tribal corporation had waived its immunity through a sue-and-be sued clause. Rejecting the argument, the court noted that "CNI's charter does not contain a broad sue-and-be-sued clause; instead the ability to take legal action is limited to action approved by the board of directors." 585 F.3d at 921-22. Similarly, in *Sanchez v. Santa Ana Golf Club, Inc.*, 136 N.M. 682, 104 P.3d 548 (NM App. 2004), the New Mexico Court of Appeals examined the charter of a Section 17 corporation and concluded:

> We conclude that the present case, with its sue or be sued clause, is distinguishable from the cases which found an express waiver. The clause in defendant's charter could only be made effective if certain requirements were met, and since those requirements were not met, the clause had no effect. We have found no case holding that a sue or be sued clause expressly stating that the clause was ineffective unless certain requirements were met served as a waiver of sovereign immunity where the requirements were not met.

136 N.M. at 686, 104 P.3d at 552, 2005-NMCA-003 at ¶ 12. *See also Bales*, 606 F.Supp.2d at 1305 (noting that "since the defendant's corporate charter unequivocally waives tribal sovereign immunity in only limited circumstances not applicable to this case, … defendant retains its tribal sovereign immunity due to its status as a § 503 tribal corporation").[6]

LCC's Charter requires any waiver of its sovereign immunity to be authorized by a resolution of the Board of Directors addressing six specific issues. LCC has submitted with this Motion the Declaration of Robert Plunkett, the Corporation's Acting Vice President, attesting to the fact that he has reviewed all available LCC Board Minutes and Resolutions from October 4, 1994, the date of LCC's federal incorporation, through May 10, 2010,[7] and that he has found no Board resolution or any reference in the minutes waiving the Corporation's sovereign immunity in connection with any activity at the Jackpile Site at any time. Accordingly, LCC has not waived its immunity from this suit and it must be dismissed.

---

[6] The tribal corporation in *Bales* was formed under 25 U.S.C. § 503, which extended to Indian tribes in Oklahoma the rights and powers previously granted to tribes elsewhere under the Indian Reorganization Act. Thus, as noted in *Bales*, a § 503 corporation is functionally the same as a Section 17 [§ 477] corporation. *Bales*, 606 F.Supp.2d at 1300.

[7] The May 10, 2010 cut-off date is one of common sense. The Reclamation Project was completed in 1995 (Complaint, ¶ 117), and there is no remotely plausible reason the Corporation would address sovereign immunity in the context of the Project more than fifteen years later.

B. For Purposes of Sovereign Immunity, It Is Irrelevant That the Section 17 Corporation Is the Surviving Entity of a Merger with a State Corporation And Assumed all of the State Corporation's Obligations and Liabilities.

LCC's sovereign immunity from this suit is not defeated by the fact that it is the surviving federal entity of a merger between the state incorporated LCC and the federally incorporated LCC. Nor is that immunity defeated by the fact that LCC's sole shareholder agreed, before the state corporation was even formed, that any such entity to be formed in the future "will assume all of the responsibilities and liabilities of the Pueblo under this Agreement." (Agreement, § 6(b)).

In all relevant respects, this case is on all fours with *Amerind Risk Management Corp. v. Malaterre, supra.* The tortured procedural and litigation history of that case is fully described in the court's decision. *See* 633 F.3d at 682-84. Of relevance here is that a Section 17 tribal corporation (Amerind) was incorporated while litigation was pending against a corporation organized under the tribal law of the Red Lake Band of Chippewa (ARMC), and that Amerind, in its charter, assumed all the rights and responsibilities of ARMC. Although ARMC had waived its sovereign immunity to suit in the pending litigation, Amerind contended that as a Section 17 corporation it possessed sovereign immunity and had not waived it. A majority of the Sixth Circuit Court of Appeals agreed with Amerind.

The mere act of succeeding ARMC and inheriting its liabilities did not preclude Amerind from asserting its sovereign immunity:

> A sovereign entity does not automatically waive its sovereign immunity through the mere act of succeeding a corporation that is either not entitled to sovereign immunity or that has waived such immunity. *See Asociation de Empleados del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1315-16 (11th Cir. 2006); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49-50 (1st Cir. 2003); *Kroll v. Bd. Of Trs. Of the Univ. of Ill.*, 934 F.2d 904, 909 (7th Cir. 1991). *In other words, a predecessor corporation's amenability to*

> *a pending suit is irrelevant unless the sovereign successor's immunity has been expressly and unequivocally waived.* Thus, if Amerind did not expressly waive its sovereign immunity, we need not determine whether ARMC was immune from suit.

Id., at 686 n.7 (emphasis added). The *Amerind* court looked to the surviving corporation's Charter to determine whether the sovereign successor's immunity "has been expressly and unequivocally waived." That Charter provision, while stating that Amerind was to assume ARMC's obligations and liabilities, "does not state that Amerind … consents to submit to a particular forum, or consents to be bound by its judgment." *Id.,* at 687. Rather, the required manner of waiver in that Charter was identical to that in LCC's Charter, requiring a resolution of the Board of Directors identifying the same list of limiting factors.[8]

In *Kroll v. Board of Trustees of Univ. of Ill.*, 934 F.2d 904 (7th Cir.), *cert. denied*, 502 U.S. 941 (1991), the state legislature had merged one defendant in pending litigation into a second defendant in that litigation. The surviving defendant was the University's Board of Trustees. The Seventh Circuit reversed the District Court's rejection of the Board's argument that the case should be dismissed against it because it possessed sovereign immunity. The plaintiff argued "that the Board, as successor to the Athletic Administration, cannot invoke the eleventh amendment because that defense was unavailable to the Athletic Administration." 934 F.2d at 909. Rejecting plaintiff's argument, the court held:

---

[8] Article 16.4 of Amerind's Section 17 Charter provided: "Any waiver [of tribal immunity] by the Corporation … shall be in the form of a resolution duly adopted by the Board of Directors …. The resolution shall identify the party or parties for whose benefit the waiver is granted, the transaction or transactions and the claims or classes of claim for which the waiver is granted, the property of the corporation which may be subject to execution to satisfy any judgment which may be entered in the claim, and shall identify the court or courts in which suit against the corporation may be brought. Any waiver shall be limited to claims arising from the acts or omissions of the corporation, its Directors, officers, employees or agents, and shall be construed only to effect [sic] the property and Income of the Corporation." 633 F.3d at 687-88.

> The Board is still the Board, regardless of its status as a successor entity, and in the absence of waiver or congressional abrogation must be accorded the respect due a state under the eleventh amendment.

Id.

Nothing in the instruments of creation or otherwise in the instant case suggests that LCC, by assuming its predecessor's assumption of its shareholder's responsibilities and liabilities under the Agreement, waived its sovereign immunity from suit. The contrary is true. First, and perhaps most significantly, the Plan of Merger provides:

> This Plan and the legal relations between the parties hereto shall be governed by and construed in accordance with the laws of the State of New Mexico, as described in the New Mexico Business Corporations Act, *except that the Surviving Corporation shall have all the rights, privileges, immunities and powers of a corporation organized under 25 U.S.C. § 477 as specified in the Charter of the Federal Corporation.*

(Art. VI(c), Exh. D, at D-9) (emphasis added). Second, as previously noted, LCC's corporate Charter permits waiver subject to clearly defined requirements, none of which was met here. By the clear and express language of both the Plan of Merger and the Charter, then, the successor corporation retained its sovereign immunity from suit unless and until it was waived in a situation-specific Board resolution identifying the required limiting factors. It did not do so.

In sum, the Section 17 corporation ARCO has sued here possesses sovereign immunity from suit, and that immunity has been waived by neither LCC itself nor the Pueblo of Laguna, its sole tribal Shareholder. That LCC is the post-merger successor to a state corporation that may or may not have possessed sovereign immunity is irrelevant. To borrow from *Kroll,* LCC is still LCC, regardless of its status as a successor entity, and in the absence of waiver or congressional abrogation, its sovereign immunity from suit endures.

C. LCC's Conduct at the Jackpile Site Could not and Did not Waive its Sovereign Immunity.

Finally, the Complaint alleges that LCC waived its sovereign immunity "by the conduct of Laguna Construction at the Jackpile site." (Complaint, ¶ 21)[9] Not a single fact is pleaded in support of that conclusion, and LCC questions whether that allegation passes even the liberal standard of notice pleading required by Rule 8 of the Federal Rules of Civil Procedure.

The factual enigma aside, this allegation is irrelevant. The only "conduct" by which LCC may waive its immunity is by a resolution of the Board of Directors. Nothing it did or did not do at the Jackpile Site could, as a matter of law, result in such a waiver.

II. THE COMPLAINT AGAINST LLC MUST BE DISMISSED UNDER RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM BECAUSE LCC IS NOT A "PERSON" SUBJECT TO LIABILITY UNDER CERCLA

The Court need not reach this argument if, as LCC contends, the Complaint against it must be dismissed for lack of subject matter jurisdiction. Even if the Court rejects that argument, however, the Complaint must be dismissed against LCC because it fails to state a claim against it.[10]

---

[9] Paragraph 21 of the Complaint alleges in its entirety: "With regard to the CERCLA and breach of contract, declaratory judgment, and injunction claims asserted against [the Pueblo], the [Pueblo] expressly waived sovereign immunity in the Agreement to Terminate Leases. In addition, the [Pueblo] waived all statutory and common law defenses that are based on the [Pueblo's] status as a tribe relating to any claims brought under environmental laws by Atlantic Richfield with regard to the Jackpile Site. *By virtue of the [Pueblo's] ownership of Laguna Construction and the conduct of Laguna Construction at the Jackpile Site, this waiver applies to Laguna Construction to the extent sovereign immunity would otherwise apply to Laguna Construction.*" (Complaint, ¶ 21) (Emphasis added)

[10] In addition to the grounds for dismissal discussed in the text, LCC joins in the arguments of Co-Defendant Pueblo of Laguna that, as to LCC as well, the Fourth Claim for Relief should be dismissed because there has not been a necessary preceding settlement as defined by CERCLA, and the Fifth Claim for Relief must be dismissed because the underlying relief sought by ARCO is unavailable.

A Complaint will survive a Rule 12(b)(6) motion only if it alleges sufficient facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007); *Robbins v. Okla. Ex rel. Dep't of Human Services*, 519 F.3d 1242, 1247 (10th Cir. 2008). LCC submits that it cannot be held liable under CERCLA because (a) as a Section 17 tribal corporation, LCC should be considered more as a tribal entity than as a run of the mill commercial corporation, and (b) an Indian tribe is not a "person" under the statute.

A. Tribal Corporations. CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). This definition inarguably includes "corporation" within the definition of "person." LCC has found no case addressing specifically a Section 17 corporation's amenability to suit under CERLCA, but a reading consistent with Section 17's purpose argues strongly against it.

Section 17 corporations are not ordinary corporations. They are creatures of federal law. They exist by virtue of issuance by the Secretary of the Interior of a federal Charter, and may be dissolved only by an Act of Congress. 25 U.S.C. § 477. "The principal legal difference is that, while section 17 corporations retain their tribal status—and, accordingly, sovereign immunity in the absence of a 'sue and be sued' waiver—the other species of [tribal] corporations are not imbued automatically with such status."

In *Uniband Inc. v. C.I.R.*, 140 T.C. 230, 247 (Tax Court 2013), the Tax Court held that a state-chartered corporation, wholly owned by the Turtle Mountain Band of Chippewa, did not share the Tribe's exemption from federal income tax. In so holding, the court pointedly

distinguished between a wholly-owned tribal corporation incorporated under state law and a Section 17 corporation:

> Uniband does not have the distinctive characteristics of a section 17 corporation .... First, unlike a section 17 corporation that is established at the discretion of the Secretary of the Interior and that is given only the powers that the Secretary of the Interior approves, Uniband was established by the decision of [the Tribe] and its co-shareholder and was given by them all the lawful powers that a Delaware corporation may possess.
>
> Second, unlike a section 17 charter, which 'shall not be revoked or surrendered except by Act of Congress,' Uniband exists at the pleasure of its owner, [the Tribe], and its charter can be revoked by the State of Delaware. ...
>
> Third, Uniband does not possess the special power to purchase restricted Indian lands, a power that a section 17 corporation is given by statute.
>
> Fourth, Uniband is not bound by the restrictions the IRA places on the alienation of Section 17 corporate stock and of certain corporate-owned land. [The Tribe] is free to sell all or part of its Uniband stock, as it could any investment.
>
> In sum, Uniband lacks the special character of a section 17 corporation and its special relationship to an Indian tribe.

140 T.C. at 263-64.

Section 17 corporations owe their existence to the Indian Reorganization Act.

> The IRA was part of [an] attempt to encourage economic development, self-determination, cultural plurality, and the revival of tribalism; ... The IRA was also an attempt to improve the economic situation of Indians; ...."

F. Cohen, *Handbook of Federal Indian Law* § D2c (1982 ed.). As noted by the Supreme Court, " ... a tribe taking advantage of the Act might generate substantial revenue for the education and social economic welfare of the people." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151

(1973). Thus, Section 17 corporations are characterized by their federal character and their governmental purpose, no matter how commercial their business may be.

In *Amerind*, *supra*, the court recognized the difference between Section 17 corporations and others: "We also note that Amerind is not an ordinary insurance company. Indeed, Amerind's purpose is to administer a self-insurance risk pool for Indian Housing Authorities and Indian tribes. … Because Amerind is a § 477 corporation that administers a tribal self-insurance risk pool, we hold that Amerind 'serves as an arm of the [Charter tribes] and not as a mere business and is thus entitled to sovereign immunity." 633 F.3d at 865. Similarly, it has been noted that "the language of Section 17 itself – by calling the entity an 'incorporated tribe' – suggests that the entity is an arm of the tribe." *Memphis Biofuels*, 585 F.3d at 921.

Here, LCC's raison d'etre is inextricably bound up with its government shareholder's duties towards and goals for its citizenry. Article VII of the Charter identifies the Pueblo's purpose for incorporating LCC:

> The purposes for which the Corporation is organized are:
>
> A. To provide job opportunities for members of the Pueblo of Laguna on or near the Laguna Indian Reservation which would utilize the talents of the members and provide adequate incomes on a long-term basis.
>
> B. To provide for the efficient and effective utilization of the resources of the Laguna Indian Reservation in a manner which protects the long-term interests of the Pueblo of Laguna and which provides an income to the Pueblo from the utilization of those resources.

(Exh. B, at B-3). These are precisely the kinds of factors that make Section 17 corporations different from other corporations. Providing job opportunities for its citizenry is a governmental goal, not the goal of a for-profit corporation. Utilization and protection of resources to provide

for the "long-term interests of the Pueblo of Laguna" is a governmental goal, not a traditional corporate goal.

Although the cases cited above (other than *Uniband*) arose in the context of recognizing a Section 17 corporation's sovereign immunity, their reasoning applies equally in the present context: the factors that require recognizing that a Section 17 corporation possesses its tribal shareholder's sovereign immunity confirm that such a corporation is more akin to a tribal government than to an ordinary business corporation whose sole purpose is to make money for its stockholders. As recognized by the court in *Amerind*, Section 17 corporations are not "ordinary" corporations. They serve governmental functions and they share their governmental shareholder's sovereign immunity. They are, as some courts put it, "arms of the tribe." For these reasons, LCC, as a Section 17 corporation, far more resembles in purpose and operation the Pueblo of Laguna than it does General Motors. Accordingly, LCC may be viewed as a "person" under CERCLA only if the Pueblo of Laguna may be.

B. Indian Tribes. ARCO has asserted claims against LCC under CERCLA alleging liability as an "arranger" (Claim 2, ¶¶ 173-180) and as an "operator" (Claim 3, ¶¶ 182-188). Liability under the relevant sections of the statute attaches only to "covered persons" under § 9607(a), and "person" is defined in §9601(21). All of the CERCLA claims against LCC hinge on ARCO's assertion that the Corporation is a "person." Because the Pueblo is not a "person," LCC, being the Pueblo's Section 17 corporation, is not one either.

As noted earlier, CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.* That definition of "person" pointedly does not include Indian tribes. This was not

an instance where Congress was simply oblivious to tribes and did not consider them when crafting its statutory scheme. Indian tribes are separately defined in Section 9601,[11] and later identified as one of the governmental entities entitled to bring a CERCLA action for environmental injury to tribal land.[12] To be clear, Congress defined Indian tribes as a party that may bring an action, but not as a party against which one may be brought. Congress clearly knew that Indian tribes existed and defined and referred to them throughout the statute. The omission of tribes in the definition of "person" can only be interpreted as knowing and intentional.

There is a surprising dearth of authority on the subject. The only reported case LCC has found squarely held that a tribal government is not a "person" under CERCLA. In *Pakootas v. Teck Cominco Metals, Ltd.*, 632 F.Supp.2d 1029 (E.D. Wash. 2009), Teck asserted counterclaims against the Confederated Tribes of the Colville Reservation under CERCLA for cost recovery, contribution, and declaratory relief arising out of the contamination of Lake Roosevelt. The Tribes moved to dismiss the counterclaims on the ground that they are not "covered persons" under § 9601(21). The court held that "CERCLA is not ambiguous with respect to whether Indian tribes are covered 'persons' subject to CERCLA liability." 632

---

[11] "The term 'Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 42 U.S.C. § 9601(36). *See also* § 1901(16), including Indian tribes among other governmental entities possessing and controlling "natural resources"; § 9601(39)(B)(vii), excluding from the definition of "Brownfield Site" a "facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe."

[12] 42 U.S.C. § 9607(a)(4)(A).

F.Supp.2d at 1032. They are conspicuously not included in the statutory definition. That court further declined to read Indian tribes into the definition of "municipality" just because other environmental statutes included tribes within that definition. *Id.* at 1033-35.[13]

Because Indian tribes are not "persons" under CERCLA, and because LCC as a Section 17 corporation was created for the purpose of furthering its tribal shareholder's governmental purposes, LCC should not be considered a "corporation" for purposes of CERCLA's definition of "person." That being so, the Complaint fails to state a claim against LCC and must be dismissed.

CONCLUSION

For all of the foregoing reasons, Defendant Laguna Construction Company respectfully submits that the Complaint against it must be dismissed in its entirety.

Dated: May 26, 2015

Respectfully submitted,

JANOV LAW OFFICES, P.C.

/s/ Gwenellen P. Janov
901 Rio Grande Blvd. NW, Ste. F-144
Albuquerque, New Mexico 87104
(505) 842-8302
gjanov@janovlaw.com
Counsel for Laguna Construction Company, Inc.

[13] *See* the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(13)(A); the Safe Drinking Water Act, 42 U.S.C. § 300(f)(10); and the Clean Water Act, 33 U.S.C. § 1362(4).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Motion Defendant Laguna Construction Company's Motion to Dismiss the Complaint Against it was served this 26th day of May, 2015, via the Court's ECF system upon:

Mark F. Sheridan
Holland & Hart, LLP
PO Box 2208
Santa Fe, NM 87504-2208
505-988-4421
Fax: 505-983-6043
Email: MSheridan@hollandhart.com

John C. Anderson
Holland & Hart, LLP
PO Box 2208
Santa Fe, NM 87504-2208
505-988-4421
Fax: 505-983-6043
jcanderson@hollandhart.com

Johathan W. Rauchway
Davis Graham &Stubbs, LLP
1550 Seventeenth Street, Ste. 500
Denver, CO 80202
303-892-9400
Fax: 303-893-1379
Email: jrauchway@dgslaw.com
Counsel for Plaintiff

Andrea Wang
Davis Graham &Stubbs, LLP
1550 Seventeenth Street, Ste. 500
Denver, CO 80202
303-892-9400
Fax: 303-893-1379
Email: andrea.wang@dgslaw.com
Counsel for Plaintiff

Stephanie J. Talbert
Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
202 514-2617
Email: Stephanie.Talbert@usdoj.gov
Counsel for Defendant United States

Karen Grohman
United States Attorney's Office
P.O. Box 607
Albuquerque, NM 87103
505-224-1503
Email: Karen.grohman@usdoj.gov

Counsel for Defendant United States

Thomas J. Peckham
Nordhaus Law Firm
7411 Jefferson Street NE
Albuquerque, NM 87109-4488
505-243-4275
Fax: 505-
Email: tpeckham@nordhauslaw.com
Counsel for Defendant Pueblo of Laguna

/s/ Gwenellen P. Janov