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

ATLANTIC RICHFIELD COMPANY,

Plaintiff,

v. Civ. No. 1:15-56-JAP/KK

UNITED STATES OF AMERICA, THE PUEBLO OF LAGUNA, an Indian tribe, and LAGUNA CONSTRUCTION COMPANY, INC.,

Defendants.

MEMORANDUM IN SUPPORT OF THE PUEBLO OF LAGUNA'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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The Atlantic Richfield Company ("ARCO") attempts to paint itself as the victim in this action by revising history, most particularly the 1986 Agreement to Terminate Leases ("Termination Agreement" or "Agreement") entered into by the Pueblo of Laguna ("Pueblo") and ARCO, with the approval of the United States. In the first paragraph of its Complaint, ARCO misconstrues the Termination Agreement as a "comprehensive settlement," and for the next forty-nine pages proceeds to distort the plain meaning and structure of that Agreement in an apparent attempt to obscure the fact that the Pueblo's liability under that agreement, and its waiver of sovereign immunity, was expressly limited to ten years and $10 million with respect to ARCO's claims.

In fact, ARCO's claims against the Pueblo must be dismissed in their entirety. Congress did not abrogate tribal sovereign immunity in CERCLA, nor did the Pueblo waive its sovereign immunity for claims such as those made here unless brought on or before December 1996, ten years after the effective date of the Termination Agreement. Accordingly, the Court must dismiss ARCO's claims against the Pueblo under Fed. R. Civ. P. 12(b)(1). Similarly, Congress did not include Indian tribes like the Pueblo within the definition of "persons" subject to potential liability under CERCLA. And, as a matter of law, one cannot somehow become a "person" by contract. Claims 1-5, which arise under CERCLA, therefore, would have to be dismissed under 12(b)(6) even if ARCO's claims were not already barred by the Pueblo's sovereign immunity.

So too must claims 6-8, which allege that the Pueblo is somehow obligated under the Termination Agreement to pay or perform because the United States has now included the Jackpile Mine on the National Priorities List ("NPL"). The Termination Agreement, read as a

whole as it must be, does not reach ARCO's claims of breach, which are impermissibly based on CERCLA and which regardless were filed twenty years after the work on the reclamation project was completed.

I. Historical and Legal Background

Although the Court must accept factual allegations in the Complaint as true for purposes of Fed. R. Civ P. 12(b)(6), there is a wealth of information available in the public domain regarding the background in this case.[1] Moreover, it is important to understand the statutory and regulatory environment in which the events discussed in ARCO's complaint arose.

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[1] This background section relies on the following documents: ARCO's Complaint; the Agreement to Terminate Leases, which is integral to and was attached to ARCO's Complaint; the Record of Decision, which is also integral to ARCO's Complaint and referenced throughout the Complaint; the Environmental Impact Statement, from which the Record of Decision was derived; and updates on the reclamation project by Reclamation Project Manager, James H. Olsen. Jr. These are all public records. The Record of Decision was published by the Bureau of Indian Affairs and the Bureau of Land Management in December 1986. The Record of Decision is attached for the court's reference and cited herein as ROD. The Environmental Impact Statement was published in October 1986 by Bureau of Indian Affairs and the Bureau of Land Management and is available at http://catalog.hathitrust.org/Record/002568102 and cited herein as Final EIS; James Olsen's two updates are available as follows: Regulatory and Reclamation Design Process Update: Jackpile Uranium Mine Reclamation Project, a paper presented at the 1991 National Meeting of the American Society for Surface Mining and Reclamation, Durango, Colorado, May 14-17, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCUQFjAA&url=http%3A%2F%2Fwww.asmr.us%2FPublications%2FConference%2520Proceedings%2F1991%2520Meeting%2520Vol%25201%2FOlsen%25203-8.pdf&ei=ufRkVfPbA-W1sQSCr4LwCw&usg=AFQjCNEgdh7rPZkFp7s7m03Vb4p9qvWw0Q&bvm=bv.93990622,d.b2w&cad=rja and cited herein as Olsen 1 and Jackpile Reclamation Project History & Progress Update Planning, Rehabilitation, and Treatment of Disturbed Lands, in 1993 Mineral Frontiers On Indian Lands, Bureau of Indian Affairs Division of Energy and Mineral Resources, General Publication G-94-1, available at http://babel.hathitrust.org/cgi/pt?id=mdp.39015051884545;view=1up;seq=87 and cited herein as Olsen 2. Defendant, the Pueblo of Laguna, respectfully requests that the court take judicial notice of these public records.

A. The Jackpile Mine

As noted by ARCO in its Complaint, the Jackpile-Paguate uranium minesite is located within the Pueblo of Laguna Reservation, 40 miles west of Albuquerque, New Mexico. Before, during, and after mining operations at the Site by ARCO's predecessor, Anaconda Company("Anaconda"), the United States held legal title in trust for the Pueblo of Laguna to all of the land within the Site. *See* Compl. ¶ 2. The United States currently holds legal title in trust for the Pueblo of Laguna to all of the land within the minesite. *Id*. At all relevant times, pursuant to treaties, statutes, and regulations, the United States owed the Pueblo fiduciary obligations with regard to the trust assets and resources of the Pueblo, including all of the land within the Jackpile-Paguate minesite. *Id*.

The Jackpile Mine was once the world's largest surface uranium producer and was operated by Anaconda (later merged with Atlantic-Richfield Corporation in the mid-1970's). Olsen 2 at 84. In the early 1950s, Anaconda had obtained exploration and mining leases from the Pueblo of Laguna which were approved by the United States as trustee. Compl. ¶¶ 58-60. Mining operations were conducted from 1952 through early 1982 under three uranium mining leases between Anaconda and the Pueblo. Compl. ¶¶ 63,72. The leases covered approximately 7,868 acres. Final EIS 1-1. Mining operations were conducted from three open pits and nine underground mines. *Id.* During the active life of the mining operation, approximately 24 million tons of uranium-bearing ore were produced and approximately 400 million tons (23.5 million cubic yards) of ore, mine waste, and overburden were handled during the mining operations. Olsen 2 at 83. The disturbed area encompassed about 2,700 acres. *Id*.

> The United States promoted and encouraged uranium exploration and mining on the Pueblo of Laguna Reservation, including at the Jackpile minesite. Beginning in the 1940s, the United States implemented a decades-long program to locate,

> acquire, and process uranium ore and to purchase uranium ore and uranium concentrate for military purposes. The United States' uranium procurement program ultimately included the Jackpile Site. Until the late 1960s, the United States was the sole purchaser of all the uranium produced from domestic uranium mines, including from the Jackpile-Paguate Uranium Mine. During this period, the United States exercised pervasive control over the domestic uranium industry, including all aspects of uranium exploration, production, processing, and marketing.

Compl. ¶ 3.

As a property owner of the Jackpile Site and trustee for the Pueblo, the United States owned, and still owns, raw materials and waste products at the Site, including uranium ore, protore, waste rock, and overburden. *See* Compl. ¶ 4.

B. Federal Statutes

Mining laws enacted in the nineteenth century sought to encourage mineral production and were largely unconcerned with environmental protection. This was especially true when it came to hard rock mining, including uranium, and reclamation of the mine sites after mining ended. The absence of mine reclamation policies or regulations until the 1970s meant there were no or few requirements to clean up mine sites.

The 1970s and 80s were critical decades for the passage of federal environmental legislation after the enactment of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*., in 1969. NEPA was one of the first laws ever written that established the broad national framework for protecting our environment. NEPA required an Environmental Impact Statement (EIS) for all "major federal actions significantly affecting the quality of the human environment." All federal agencies including the Department of Interior were obligated to follow the mandates of NEPA. *Id.*

Enacted in 1976, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, is the principal federal law in the United States governing the disposal of solid waste and hazardous waste at active, ongoing operations. RCRA gave EPA the authority to control hazardous waste from generation, transportation, treatment, storage, to disposal.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 commonly known as Superfund, was enacted by Congress on December 11, 1980. CERCLA, which applies only to historical or abandoned contaminated sites, provides broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA), Pub. L. 99-499, on October 17, 1986, two months prior to the execution of the Termination Agreement.

C. Federal Regulations

Although both CERCLA and SARA were in existence when the parties executed the Termination Agreement in 1986, there were no federal or state regulations or standards for reclaiming uranium mines. Federal regulations (25 C.F.R. Part 211 and 216 and 43 C.F.R. Part 3570) did require, however, that reclamation be performed by the leaseholder. *See* Final EIS 1-5. 25 C.F.R. Part 216 (1982), Subpart A reflects a significant focus on regarding and revegetation. The entirety is attached as Exhibit 2:

> **§ 216.1 Purpose.**
> It is the policy of this Department to encourage the development of the mineral resources underlying Indian lands where mining is authorized. However, interest of the Indian owners and the public at large requires that, with respect to the exploration for, and the surface mining of, such minerals, adequate measures be taken to avoid, minimize, or correct damage to the environment-land, water, and air-and to avoid, minimize, or correct hazards to the public health and safety. The regulations in this part prescribe procedures to that end.

§ 216.3 Definitions.
As used in the regulations in the part:
. . .
(h) "Reclamation" means measures undertaken to bring about the necessary reconditioning or restoration of land or water that has been affected by exploration or mineral development, mining or onsite processing operations. and waste disposal, in ways which will prevent or control oriSite and offsite damage to the environment.

§ 216.7 Approval of mining plan.
(a) Before surface mining operations may commence under any permit or lease, the operator must file a mining plan with the mining supervisor and obtain his approval of the plan. The mining supervisor shall consult with the superintendent with respect to the surface protection and reclamation aspects before approving said plan.
(b) Depending on the size and nature of the operation and the requirements established pursuant to § 216.4 the mining supervisor may require that the mining plan submitted by the operator include any or all of the following:
(1) A description of the location and area to be affected by the operations;
(2) Two copies of a suitable map, or aerial photograph showing the topography, the area covered by the permit or lease. the name and location of major topographic and cultural features, and the drainage plan away from the area affected;
(3) A statement of proposed methods of operating, including a description of proposed roads or vehicular trails; the size and location of structures and facilities to be built;
(4) An estimate of the quantity of water to be used and pollutants that are expected to enter any receiving waters;
(5) A design for the necessary impoundment, treatment or control of all runoff water and drainage from workings so as to reduce soil erosion and sedimentation and to prevent the pollution of receiving waters;
(6) A description of measures to be taken to prevent or control fire, son erosion, pollution of surface and ground water, damage to fish and wildlife, and hazards to public health and safety; and
(7) A statement of the proposed manner and time of performance of work to reclaim areas disturbed by the holder's operation.
(c) In those instances in which the permit or lease requires the revegetation of an area of land to be affected, the mining plan shall show:
(1) Proposed methods of preparation and fertilizing the soil prior to replanting;
(2) Types and mixtures of shrubs, trees, or tree seedlings, grasses or legumes to be planted; and
(3) Types and methods of planting, including the amount of grasses or legumes per acre, or the number and spacing of trees, or tree seedlings, or combinations of grasses and trees.

(d) In those instances in which the permit or lease requires regrading and backfilling, the mining plan shall show the proposed methods and the timing of grading and backfilling of areas of land to be affected by the operation.
(e) The mining supervisor shall review the mining plan submitted to him by the operator and shall promptly indicate to the operator any changes, additions, or amendments necessary to meet the requirements formulated pursuant to § 216.4, the provisions of these regulations and the terms of the permit or lease. The operator shall comply with the provisions of an approved mining plan.
(f) A mining plan may be changed by mutual consent of the mining supervisor and the operator at any time to adjust to changed conditions or to cor- rect any oversight. To obtain approval of a change or supplemental plan, the operator shall submit a written statement of the proposed changes or supplement and the justification for the changes proposed. The mining supervisor shall promptly notify the operator that he consents to the proposed changes or supplement, or in the event he does not consent, he shall specify the modifications thereto under which the proposed changes or supplement would be acceptable. After mutual acceptance of o. change of a plan, the operator shall not depart therefrom without further approval.
(g) If circumstances warrant or if development of a mining plan for the entire operation is dependent upon unknown factors which cannot or will not be determined except during the progress of the operations, a partial plan may be approved and supplemented from time to time. The operator shall not, however, perform any operation except under an approved plan.

§ 216.8 Performance bond.
(a) Upon approval of an exploration plan or mining plan, the operator shall be required to file a suitable performance bond of not less than $2,000 with satisfactory surety. payable to the Secretary of the Interior, and the bond shall be conditioned upon the faithful compliance with applicable regulations, the terms and conditions of the permit, lease, or contract, and the exploration or mining plan as approved, amended or supplemented. The bond shall be in an amount sufficient to satisfy the reclamation requirements established pursuant to an approved exploration or mining plan, or an approved partial or supplemental plan. In determining the amount of the bond consideration shall be given to the character and nature of the reclamation requirements and the estimated costs of reclamation in the event that the operator forfeits his performance bond. . . .

§ 216.9 Reports.
(a) Within 30 days after the end of each calendar year, or if operations cease before the end of a calendar year, within 30 days after the cessation of operations, the operator shall submit an operations report to the mining supervisor containing the following information:
(1) An identification of the permit or lease and the location of the operation.

(2) A description of the operations performed during the period of time for which the report is filed.
(3) An identification of the area of land affected by the operations and a description of the manner in which the land has been affected.
(4) A statement as to the number of acres disturbed by the operations and the number of acres which were reclaimed during the period of time.
(5) A description of the method utilized for reclamation and the results thereof.
(6) A statement and description of reclamation work remaining to be done.
(b) Upon completion of such grading and backfilling as may be required by an approved exploration or mining plan, the operator shall make a report thereon to the mining supervisor and request inspection for approval. Whenever it is determined by such inspection that backfilling and grading have been carried out in accordance with the established requirements and approved exploration or mining plan, the superintendent shall issue a release of an appropriate amount of the performance bond for the area graded and backfilled. Appropriate amounts of the bond shall be retained to assure that satisfactory planting, if required, is carried out.
(c)(1) Whenever planting is required by an approved exploration or mining plan, the operator shall file a report with the superintendent whenever such planting is completed. The report shall-
(i) Identify the permit or lease:
(ii) Show the type of planting or seeding, including mixtures and amounts:
(iii) Show the date of planting or seeding;
(iv) Identify or describe the areas of the lands which have been planted;
(v) Contain such other information as may be relevant.
(2) The superintendent, as soon as possible after the completion of the first full growing season, shall make an inspection and evaluation of the vegetative cover and planting to determine if a satisfactory growth has been established.
(3) If it is determined that a satisfactory vegetative cover has been established and is likely to continue to grow, any remaining portion of the surety bond may be released if all requirements have been met by the operator.
(d) (1) Not less than 30 days prior to cessation or abandonment of operations, the operator shall report to the mining supervisor his intention to cease or abandon operations, together with a statement of the exact number of acres of land affected by his operations, the extent of reclamation accomplished and other relevant information.
(2) Upon receipt of such report an inspection shall be made to determine whether operations have been carried out in accordance with the approved exploration or mining plan.

D. The Leases

Paragraph 3(f) of the 1952 lease and paragraph 7 of the 1963 lease required Anaconda to "abide by and conform to any and all regulations of the Secretary of Interior now or hereafter in

force relative to such leases." The 1963 lease specifically included 25 C.F .R. Section 171 and 30 C.F .R. Section 231. Final EIS A-41, testimony of Les Taylor, counsel for the Pueblo of Laguna at the September 10, 1985 hearing in Albuquerque, N.M. on the draft EIS for the Jackpile Mine.

E. Implementation of the Regulations Through the Environmental Impact Statement

Anaconda advised the Department of the Interior(DOI) and the Pueblo in April 1980 that it was planning to terminate open pit operations in February 1981. Final EIS 1-4. From the early to mid-1980s, Tribal, Company, and Federal officials engaged in discussions and negotiations regarding reclamation and the ultimate disposition of the Site. Compl. ¶ 75.

As discussed above, specific regulations did not exist at that time which would determine the required reclamation criteria for the uranium minesite. The lease terms and regulations required reclamation but did not contain specific goals or standards to guide the DOI's decision. Final EIS 1-5. Therefore, the DOI had to consider various reclamation alternatives pursuant to an EIS assessment, and choose the one that it considered to be the most appropriate. *See* Final EIS 1-5.

The EIS provided the scope of the assessment as "1) the reclamation(restoration to productive use) of the Jackpile-Paguate uranium mine and the affected adjacent areas, and 2) mitigation of impacts resulting from reclamation." *Id.* The EIS further provided that "[d]ue to the governing regulations and the Secretary of the Interior's trust responsibility to Indians(and in this action specifically to the Pueblo of Laguna), the DOI is responsible for determining the proper level of reclamation for the Jackpile-Paguate uranium mine. *Id.*

> The BLM and BIA share joint responsibility for a decision on approval of a reclamation plan for the Jackpile-Paguate uranium mine. However, each agency has specific

> responsibilities with regard to reclamation as outlined below. The BLM is responsible for authorizing the commencement and approving the completion of the Jackpile-Paguate uranium mine reclamation. The authorities for this action are the terms of the mining leases that require compliance with applicable Federal regulations. Specifically, they include the following:
>
> 1. 25 C.F.R. Part 211, Leasing of Tribal Lands for Mining (formerly 25 CFR Part 171);
>
> 2. 25 C.F.R. Part 216, Surface Exploration, Mining and Reclamation of Lands (formerly 25 C.F.R. Part 177); and
>
> 3. 43 C.F.R. Part 3570, Operating Regulations for Exploration, Development and Production (formerly 30 C.F.R. Part 231).
>
> The BLM is also responsible for authorizing any necessary changes in the ongoing reclamation operations and for preparing any corresponding environmental documentation that would be required.
>
> The BIA is responsible for determining that the surface aspects of mine reclamation, including revegetation, have been completed in accordance with the Secretary's trust responsibility as well as established requirements. In conjunction with this determination, the BIA is responsible for authorizing partial or total release of any bonding requirements, and partial or total surrender of the involved mining leases. The authorities for these actions are various terms of the mining leases and the provisions of 25 C.F.R. Parts 211 and 216.
>
> *Id*. at 1-6.

The EIS listed the alternatives issues eliminated from detailed study, and a brief explanation as to why they were rejected including:

> Managing the reclaimed mine for zero discharge of waste material using conventional control techniques(i.e., lining, capping and hydrodynamic control) would be extremely expensive, provide little environmental benefit over simpler methods and would require permanent maintenance. Such techniques would result in large areas of the mine being unsuitable for any other use.

Final EIS 1-9.

Compared with one of the alternatives selected for detailed study:

> The scoping process indicated that reclamation of the Jackpile-Paguate uranium mine could be accomplished in several ways due to the interrelationships of various reclamation components(e.g., backfilling and resloping of waste dumps). However, since no specific standards exist for uranium mine reclamation, either

> in regulations or lease terms, reclamation objectives were developed to assist in determining the most appropriate reclamation measures for the Jackpile-Paguate uranium mine. The primary goal of these objectives is to reclaim and stabilize the minesite to restore productive use of the land and to ensure that adverse environmental impacts are reduced to the extent possible."

Final EIS 1-9 - 1-10.

F. Record of Decision

The Record of Decision ("ROD") is a record of the decisions made by the Bureau of Land Management(BLM) New Mexico State Office and the Bureau of Indian Affairs(BIA) Albuquerque Area Office for the level of reclamation required for the Jackpile-Paguate Uranium Mine. Dated December 5, 1986, the ROD specified in considerable detail how the construction was to be conducted. It provided briefly that the post-reclamation monitoring would be considered complete when revegetated sites reach 90 percent of the density, frequency, follar cover and production of undisturbed reference areas(but not sooner than 10 years following seeding) The ROD listed eight specific criteria. ROD at 3. BLM and BIA decided on the level of reclamation to be performed at the Jackpile Mine. ROD at 3-4. The scope of the ROD was "to determine the level of reclamation to be performed. The party or parties responsible for performing reclamation will continue to be determined by the conditions specified in the leases." ROD at 4. Measures laid out in the ROD were "approved as the level of reclamation required. *Id*.

G. Termination Agreement

Following issuance of the Record of Decision, Anaconda and the Pueblo executed the Agreement to Terminate Leases on December 12, 1986, which included a separate release signed by the Assistant Secretary for Indian Affairs.

Anaconda itself in 1986 helped to clarify the scope and magnitude of work bargained for by the parties to the Termination Agreement by its representation that "[t]o the best of its knowledge and belief, there are no materials at the Mine that are presently classified by federal laws as either hazardous substances or wastes, or toxic materials." Anaconda's statement was technically accurate in that radioactive mining waste is "solid waste"(if discarded) but not "hazardous" unless listed or meeting hazardous criteria, which it does not. Radioactive is not included in those hazardous criteria. *See* 40 C.F.R. Part 261 and Subpart D (listing Hazardous Wastes). With respect to CERCLA, 40 C.F.R. Part 302 designates reportable substances but does not include radioactive mine waste. The EIS noted that:

> Subtitle C of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, directed the U.S. Environmental Protection Agency to promulgate regulations for the management of hazardous wastes. These regulations were issued, but they exclude mining wastes.
>
> Final EIS at 1-8.

II. Standards of Review

The claims by ARCO against the Pueblo should be dismissed under Fed. R. Civ. P. 12(b)(1) because the Pueblo has not waived its tribal sovereign immunity and, alternatively, under Fed. R. Civ. P. 12(b)(6) because they fail to state claims upon which relief can be granted. This Part lays out the standard of review, and how additional evidence may be used, under each rule.

A. Fed. R. Civ. P. 12(b)(1)

Faced with a 12(b)(1) motion asserting sovereign immunity, "the party asserting jurisdiction bears the burden of proving that sovereign immunity has been waived." *Sydnes v. United States*, 523

F.3d 1179, 1183 (10th Cir. 2008). As this Court noted in *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1300 n.2 (D.N.M. 2009):

> When the Court is faced with a challenge to the factual basis for subject matter jurisdiction, as it is in this case, the Court does not presume that the complaint contains truthful allegations and can in its discretion examine evidence presented outside of the complaint "'to resolve disputed jurisdictional facts under Rule 12(b)(1).'" *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001)(quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)). Furthermore, the parties have requested that the Court take judicial notice of certain facts contained in their exhibits. Under Fed. R. Evid. 201(d), the Court is required to "take judicial notice if requested by a party and supplied with the necessary information." Considering its discretion to examine evidence outside the complaint and the applicability of Rule 201(d), the Court will consider the parties' exhibits in deciding the motion to dismiss.

Judge Johnson recently summarized the parameters for considering a motion to dismiss under Fed. R. Civ. P.12(b)(1), including consideration of evidence:

> Rule 12(b)(1) empowers a court to dismiss a complaint for lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). When making a Rule 12(b)(1) motion, a party may go beyond the allegations in the complaint to challenge the facts upon which jurisdiction depends by relying on affidavits or other evidence properly before the court. *See New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir.1995); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir.1995). A court has broad discretion to consider affidavits or other documents to resolve disputed jurisdictional facts under rule 12(b)(1). *See Holt*, 46 F.3d at 1003. In those instances, a court's reference to evidence outside the pleadings does not necessarily convert the motion to a rule 56 motion. *Id*. (citing to *Wheeler v. Hurdman*, 825 F.2d 257, 259 n. 5 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987)). Where, however, the court determines that jurisdictional issues raised in rule 12(b)(1) motion are intertwined with the case's merits, the court should resolve the motion under either Rule 12(b)(6) or Rule 56. *See Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1129 (10th Cir.1999), *cert. denied*, 528 U.S. 964 (1999).

Amerind Risk Mgmt. Corp. v. Blackfeet Housing, Civ. No. 15-00072, Mem. Op. at 5, (D.N.M. May 11, 2015), ECF No. 36.

B. Fed. R. Civ. P. 12(b)(6)

> Rule 12(b)(6) tests the viability of the allegations in a complaint. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to '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, 570 (2007)). Although a court must accept all the complaint's factual allegations as true, the same is not true of legal conclusions. *Id.* Mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555.

Amerind Risk Mgmt. Corp., Civ. No. 15-00072, Mem. Op. at 4-5.. "Generally, the sufficiency of a complaint must rest on its contents alone." *Anderson Living Trust v. WPX Energy Prod., LLC*, 27 F. Supp. 3d 1188, 1209 (D.N.M. 2014) (citing *Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir. 2010)). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B Wright & Miller § 1357 (3d ed. 2004 and Supp. 2007)). Rule 201 of the Federal Rules of Evidence provides that a court may judicially notice a fact that is not subject to reasonable dispute, because it: "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). "In addition to the complaint, the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002) (citing *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997)). *See also Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) ("[W]hen a defendant attaches a document to its motion to

dismiss, 'a court may consider it in determining whether to dismiss the complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity."). "[T]his principle does not apply to any and all documents that might be referenced in a complaint; rather, this principle requires more: it requires that the referenced document be central or integral to the claim in the sense that its very existence, and not the mere information it contains, gives rise to the legal rights asserted." *Walker v. S.W.I.F.T. SCRL*, 517 F. Supp. 2d 801, 806 (E.D. Va. 2007).

> [F]acts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment. *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004) (citing 27A Fed. Proc., L. Ed. § 62:520 (2003)). This allows the court to "take judicial notice of its own files and records, as well as facts which are a matter of public record."

Tal v. Hogan, 453 F.3d 1244, 1264 & n.24 (10th Cir. 2006) (citing *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000)).

III. Claims Arising Under CERCLA: Claims 1-5 Must Be Dismissed Because CERCLA Contains No Congressional Abrogation of Tribal Sovereign Immunity and Because Tribes Are Not "Persons" Under the Statute.

Claims 1-5 are all based on various provisions of CERCLA. Despite ARCO's assertion, CERCLA does not contain an abrogation of tribal sovereign immunity. Moreover, CERCLA's definition of a relevant "person" does not include Indian tribes, which means that the Pueblo cannot be an "owner," "operator," or "arranger" under CERCLA and accordingly is also not subject to its contribution or declaratory judgment provisions. Consequently, claims 1-5 against the Pueblo must be dismissed under both Fed. R. Civ. P. 12(b)(1) and (6).

A. 12(b)(1) Sovereign Immunity Claims 1-5: Sovereign Immunity Under Fed. R. Civ. P. 12(b)(1)

ARCO alleges that Congress abrogated tribal sovereign immunity under 42 U.S.C. §9620(a)(1) of CERCLA. Compl. ¶ 20. 42 U.S.C. Section 9620(a)(1) reads: [2]

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

Id. As the Tenth Circuit recognized in *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263-64 (10th Cir. 1998):

> In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court established the rule for determining whether a tribe's immunity from suit has been waived. The Court stated, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58. The Court recognized that "this aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress," which may limit or abrogate a tribe's immunity from suit. *Id.* Nevertheless, "it is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* (internal quotations omitted); *see also Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751 (1998) *(reaffirming* doctrine of tribal immunity and stating Congress can alter the limits of tribal immunity through "explicit legislation").

Section 9620(a)(1) does not mention tribes. Presumably, ARCO is asserting in ¶ 20 of the Complaint that the Pueblo is a "department, agency, [or] instrumentality of the United States" and that somehow the statute is "explicit legislation" which "unequivocally" abrogates tribal sovereign immunity implicitly. Such an argument is patently wrong.

Congress clearly knew how to include tribes in CERCLA when it desired to do so.[3] The fact that it did not do so here is determinative. Moreover, the phrase "department, agency, and

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[2] ARCO also alleges that the Pueblo waived its sovereign immunity as to the CERCLA claims in the Termination Agreement. That assertion is addressed specifically in Part IV below.

instrumentality of the United States" is used throughout CERCLA, often in contexts where it cannot logically include tribes. Accordingly, ARCO's assertion that there has been a congressional abrogation of tribal sovereign immunity in CERCLA fails on its face. The Pueblo must await any arguments ARCO may make in response to determine if there is any reasoned basis for the Complaint's bald assertion of an abrogation in section 9620(a)(1) and will reply as appropriate.

It is therefore clear that Congress did not abrogate tribal sovereign immunity in CERCLA. However, ARCO also alleges in ¶ 21 of the Complaint that the Pueblo waived sovereign immunity as to all claims in the Termination Agreement. The Termination Agreement does contain an express limited waiver of the Pueblo's sovereign immunity, so it is necessary to understand that Agreement thoroughly to understand the limits of that waiver. Because the Agreement forms the core of ARCO's assertions under claims six through eight, that discussion is deferred to Part IV below.

B. Indian Tribes Are Not "Persons" as Defined in CERCLA and Are Therefore Not Subject to ARCO's Claims 1-5, Which Accordingly Must Also Be Dismissed Under Fed. R. Civ. P. 12(b)(6).

It is not surprising that Congress did not abrogate tribal sovereign immunity in CERCLA because Congress did not intend for tribes to be subject to CERCLA liability in the first instance.

1) Tribes Are Not "Persons" Under CERCLA, and Therefore ARCO's CERCLA Claims Against the Pueblo Must be Dismissed.

The Pueblo is not a "person" under CERCLA, and only "persons" are subject to the claims raised by ARCO in claims 1-5. In the only reported case identified by the Pueblo

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[3] *See infra* at n. 5 and accompanying text.

regarding whether a tribe has such liability under CERCLA, the United States District Court for the District of Eastern Washington in a well-reasoned opinion concluded that tribes are not subject to CERCLA liability.[4] *Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029 (E.D. Wa. 2009). In *Pakootas*, the Confederated Tribes of the Colville Reservation brought claims against the defendant, which counterclaimed against the Tribes asserting CERCLA claims materially similar to those asserted by ARCO against the Pueblo here. *Id.* at 1031 (Teck brought CERCLA claims for "cost recovery, contribution and declaratory relief").[5]

The *Pakootas* court held:

> CERCLA's definition of "person" is plain. It does not include "Indian tribes." Finding that CERCLA liability cannot be imposed on Indian tribes per the terms of the statute is not an "absurd" result. Whereas CERCLA specifically provides for liability *to* an Indian tribe, 42 U.S.C. Section 9607(a)(4)(A) and 9607(f), it contains no specific provision for the liability *of* an Indian tribe. Under the canon of statutory construction *expressio unius est exclusio alterius*, the express mentioning of one thing implies exclusion of another. Thus, to the extent it is necessary to rely on any additional canons of statutory construction beyond "plain meaning," *expressio unius est exclusio alterius* supports the conclusion that Indian tribes are not "persons" subject to CERCLA liability. Furthermore, sovereigns will not be read into the term "person" unless there is affirmative evidence that Congress intended to include sovereigns.

Id. at 1032 & n.2 (emphasis added) (citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979); *Fayed v. CIA*, 229 F.3d 272, 274 (D.C. Cir. 2000)). Because *Pakootas* is persuasive but not controlling authority for this Court, the Pueblo restates the reasoning that compels the same result here.

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[4] In *Berrey v. Asarco Inc.*, 439 F.3d 636 (10th Cir. 2006), the Tenth Circuit noted that the Quapaw Tribe raised the argument that tribes are not "persons" on appeal. The court did not consider that argument, however, because it had not been raised below. *Id.* at 646-47 & n.10. To the Pueblo's knowledge, that issue was never considered and decided by the district court.

[5] Because the Colville Tribes had brought suit in the first place, sovereign immunity was not at issue.

ARCO's claims one through three all allege that the Pueblo is liable under 42 U.S.C § 9607(a)(1)-(4) because it is, respectively an "owner," "arranger," or "operator" under the statute. In paragraph 30 of the Complaint, ARCO also alleges that the Pueblo is a "person" under the statute. Section 9607(a) defines who Congress intended may be subject to CERCLA liability. It reads:

> **(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date.** Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the ***owner and operator*** of a vessel or a facility,
> (2) ***any person*** who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) ***any person*** who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) ***any person*** who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id. (Emphasis added). Paragraphs 2-4 all refer to "any person." While paragraph 1 refers to an "owner or operator," the definition of that term in the statute also limits liability to "any person." Section 9601(20)(A) states:

> The term "owner or operator" means (i) in the case of a vessel, ***any person*** owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, ***any person*** owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, ***any person*** who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Id. Read together, sections 9607(a) and 9601(20)(A) mean that only a "person" is liable under CERCLA. As *Pakootas* concluded in the quoted language above, an Indian tribe is not a "person," the definition of which is found in section 9601(21):

> The term "person" means 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. This definition does not include Indian tribes, and Indian tribes do not logically fit within any of the listed terms.

The ***exclusion*** of tribes by Congress from the definition of "person" must be considered to have been intentional especially when one considers the ***inclusion*** of Indian tribes at a number of points in CERCLA, including in section 9607(a)(4)(A) quoted above.[6] One cannot argue that

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[6] Other sections of CERCLA refer to Indian tribes, Indians, and Indian lands in considerable detail and with obvious understanding of the nuances applicable under federal Indian law to tribes, their members, and Indian lands. *See, e.g.*, § 9601(16) ("The term 'natural resources' means land, fish, [etc.] belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government, any foreign government, ***any Indian tribe***, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe."); § 9601(36)("The term ***'Indian tribe'*** means . . .."); § 9601(39)(B)(7)("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***");

Indian tribes were simply not considered by Congress in CERCLA, as has regrettably been the case in other statutes. *See, e.g., NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). There is no need, therefore, for this Court to analyze whether Congress intended to include tribes within one of the other terms in the definition of "person." Congress knew how to and did include tribes in CERCLA, but it did not make tribes "persons." Claims one through three therefore must be dismissed because they do not state a claim for which relief can be granted.

Claim four for contribution and claim five for declaratory relief fail for the same reason, but some additional discussion of each is warranted.

2) Claim 4 For Contribution Also Fails Because the Pueblo is Not a "Person" and Because There Has Not Been a Necessary Preceding Settlement as Defined by CERCLA.

ARCO's Claim 4 for contribution invokes 42 U.S.C. § 9613(f)(1) and (f)(3)(B), both of which only apply to "persons" and therefore not to tribes. Section 9613(f)(1) provides that "Any person may seek contribution from ***any other person*** who is liable or potentially liable under section 9607(a)." As shown above, the Pueblo is not liable under section 9607(a) because it is an Indian Tribe and is not a "person."

Similarly, section 9613(f)(3)(B) provides:

> 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

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§ 9604(c)(3)("In the case of remedial action to be taken on land or water held ***by an Indian tribe***, held by the United States ***in trust for Indians***, held by a ***member of an Indian tribe*** (if such land or water is subject to a trust restriction on alienation), or ***otherwise within the borders of an Indian reservation***, the requirements . . .") (all emphasis added.)

> administrative or judicially approved settlement may seek contribution from ***any person*** who is not party to a settlement referred to in paragraph (2).

ARCO's claim for contribution under § 9613(f)(1) and (3)(B) must be denied for that reason alone.

In addition, dismissal is appropriate because ARCO is not "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement." § 9613(f)(2). ARCO mischaracterizes the Termination Agreement as such a "settlement" and mischaracterizes its $43.6M payment to the Pueblo as "response costs beyond its equitable share" for which it seeks contribution. In 1986, there was no "response action" and therefore no "response costs" for which ARCO (or Anaconda) was liable to the United States. Indeed, Anaconda asserted in the Termination Agreement, ¶ 6(a)(ii), that "[t]o the best of its knowledge and belief, there are no materials at the Mine that are presently classified by federal laws as either hazardous substances or wastes, or toxic materials."

Furthermore, CERCLA § 9613 deals with Civil Proceedings. There are no "civil actions" under § 9606 (abatement action) or § 9607(a) (liability of covered "persons") under which ARCO can seek contribution, nor were there earlier civil proceedings under which ARCO could seek contribution or now claim to have resolved its liability by settlement under § 9613(f)(2). Under section 9613(f) ARCO as a potentially responsible party ("PRP") could seek contribution against another PRP, but only after ARCO has itself been sued under § 9606 or § 9607(a). *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). Here ARCO has not been sued and the Pueblo is not a PRP. ARCO attempts to treat § 9613(f)(2) (settlement) as a separate basis for seeking contribution whether or not there exists a prerequisite civil proceeding, much less any "settlement" of such proceeding.

There are therefore three independent reasons why claim four must be dismissed.

3) Claim 5 For Declaratory Judgment Must Be Dismissed Because the Underlying Relief Sought by ARCO is Unavailable.

ARCO Claim 5 seeks declaratory relief under both 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201. Declaratory judgment is unavailable because none of the underlying bases for such a judgment, i.e. claims 1-4, can lead to relief.

Section 9613(g)(2) provides, with respect to "[a]n initial action for recovery of the costs referred to in section 9607":

> In any such action described in this subsection, the court shall 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 or damages.

ARCO seeks a declaratory judgment "pursuant to CERCLA section 9613(g)(2) that requires the United States, the Laguna, and Laguna Construction to reimburse Atlantic Richfield for all necessary response costs to be incurred by Atlantic Richfield in the future at the Jackpile Site." Under CERCLA, "response costs" are only due from "persons" as discussed above. Because the Pueblo is not a "person," it cannot owe response costs, and no relief can be granted against the Pueblo under claim 5. Moreover, there has been no "initial action for recovery of the costs referred to in section 9607." Section 9607 deals with the cost of response to a release or threatened release of hazardous substances. Indeed, according to Anaconda, there were no hazardous substances at the mine site. Accordingly, there can be no declaratory relief under § 9613(g)(2). Again, 12(b)(6) dismissal is appropriate.

ARCO's reliance on § 2201 is superfluous. ARCO notes that "[a]n actual and substantial controversy exists." *See Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (explaining the requirements of § 2201). Because the Declaratory Judgment Act does not confer

an independent basis for federal jurisdiction, however, ARCO's declaratory relief claim under § 2201 must be predicated on CERCLA. It must invoke an independent basis for federal jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950). Because ARCO's declaratory judgment claim is based in CERCLA, as discussed above, it has no claim for declaratory relief where it cannot sustain the underlying claim. As claims 1-4 must be dismissed, so must claim 5.

Accordingly, CERCLA provides no basis for any claims against the Pueblo and claims 1-5 must be dismissed under Fed R. Civ. P. 12(b)(6). All of ARCO's remaining claims against the Pueblo, six through eight, are asserted under the Termination Agreement. To provide a foundation for discussion of those claims, the next Part discusses the meaning of that Agreement.

IV. The Termination Agreement Does Not Waive Sovereign Immunity For Any of ARCO's Claims, and Claims 6-8 Attempt to Pass CERCLA Claims Off as Contract Claims and Must be Dismissed Under Rule 12(b)(6).

Perhaps realizing that its claims 1-5 against the Pueblo asserted directly under CERCLA are without merit, ARCO also attempts to recast its CERCLA claims as contract claims under the 1986 Termination Agreement in 6-8. In the process, however, ARCO misconstrues the Termination Agreement, attempting to transform the Pueblo's agreement to undertake a limited reclamation project into a wholesale transfer of any and all liability to the Pueblo. Such a transfer was not intended and is also precluded by CERCLA: one party cannot "step into the shoes" of a responsible party under CERCLA, and yet that is the crux of ARCO's position. Finally, ARCO completely fails to mention in its Complaint that the Termination Agreement expressly limits both the waiver of the Pueblo's sovereign immunity and its liability.

A. Under the Termination Agreement, CERCLA Claims Can Be Brought Only Under Paragraph 3(b).

Paragraph 3(a) of the Termination Agreement defined the limited scope of the reclamation project undertaken by the Pueblo. Paragraph 3(b), in contrast, provided that the Pueblo would indemnify and hold harmless ARCO for ARCO's remaining liability. Finally, paragraph 5(a) included a limited waiver of the Pueblo's sovereign immunity, circumscribed as follows:

> . . . provided, however, that The Pueblo's liability shall not exceed Ten Million Dollars ($10,000,000) and the term of the indemnification agreement shall be for ten (10) years from the effective date of this Agreement[.]

Id. The plain meaning of this language is clear: at a minimum, claims brought under ¶ 3(b), which directly addresses indemnification, must have been brought by 1996.

Significantly, ¶ 3(b) directly addresses CERCLA liability in great detail, involving any "claim, liability, or obligation

> . . . asserted under any applicable law or regulation, and relating to The Pueblo's obligation hereunder, including without limitation effects due to the generation, treatment, storage or disposal of hazardous substances or wastes, or toxic materials, or related activities, by Anaconda on The Pueblo lands including, but not limited to, any liability or obligation which exists or arises under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).

Id. at ¶ 3(b)(ii). Paragraph 3(c) also expressly mentions CERCLA. In contrast, ¶ 3(a) is completely silent as to CERCLA.

By including CERCLA in ¶¶ 3(b) and 3(c) but not ¶ 3(a), the parties expressed an irrefutable intent that any claims based on CERCLA must be brought under ¶ 3(b). Contracts must be read as a whole, *Flood v. Clearone Comm'ns, Inc.*, 618 F.3d 1110, 1125 (10th Cir. 2010) ("[t]he intention of the parties to a contract must be gleaned from a consideration of the whole instrument") (internal quotation marks and citations omitted), giving meaning to each term, "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms

is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Id.* (quoting Restatement (Second) of Contracts § 203 (1981)).

In turn, ¶ 5(a) establishes that claims under 3(b) are barred by the ten-year limitation, both because the ten-year window limits the Pueblo's waiver of sovereign immunity and the viability of such claims.

1) CERCLA Does Not Allow For the Transfer of Liability to Another

Similarly, the Pueblo could not as a matter of law have assumed ARCO's liability under CERCLA. The misplaced lynchpin of ARCO's contract claims is that the Pueblo agreed to "stand" in the "shoes" of ARCO. Compl. ¶¶ 205, 215, 220, and 225. This is a legal conclusion that is not supported by the Agreement itself, as is discussed below. Moreover, it is a legal impossibility under CERCLA, the significance of which cannot be overstated.

CERCLA, in 42 U.S.C. § 9607(e)(1), states:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

While some courts initially found this provision obtuse, the majority discerned its intent: a party can agree to indemnify or otherwise hold another party harmless, but a party ***cannot divest itself of CERCLA liability.***

The Tenth Circuit has held that the "plain meaning of this language is that although responsible parties may not altogether *transfer* their CERCLA liability, they have the right to obtain indemnification for that liability." *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993) (citation omitted). Similarly, in *Harley-Davidson, Inc. v. Minstar Inc.*, 41 F.3d 341,

342-43 (7th Cir. 1994), Judge Posner's opinion for the Seventh Circuit held that CERCLA "does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability." *Id.* at 342. The Ninth Circuit reached the same conclusion even earlier, before the Termination Agreement was signed, in *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986). The court held, "[s]uch agreements [apportioning "CERCLA liabilities"] cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability. Moreover, regardless of how or under what law these agreements are interpreted, the result cannot prejudice the right of the government to recover cleanup or closure costs from any responsible party, including either Mardan, Macmillan, or both. *Id.* at 1459.(citing CERCLA §. 107(a), 42 U.S.C. Sec. 9607(a) (1982)).

The import of this legal restriction is apparent. ARCO cannot avoid CERCLA liability by contract. No one can "stand in its shoes," and ARCO remains liable.[7] In contrast, the

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[7] Paragraph 28 of the Complaint alleges:

The Laguna is a 'person' within the meaning of CERCLA section 101(21) with respect to the Jackpile Site because Atlantic Richfield is a 'person' and the Laguna assumed Atlantic Richfield's responsibility and liability for the cleanup, reclamation, and other environmental action at the Jackpile Site under all applicable laws, including CERCLA.

As stated in the text, liability under CERCLA cannot be transferred. Moreover, the Pueblo could find no support in the law for an entity becoming a "person" under CERCLA by contract.

Similarly, ¶ 29 alleges:

The Laguna also became a 'person' within the meaning of CERCLA section 101(21) by entering into the Agreement to Terminate Leases in which it waived any defense based on its status as a tribe. This waiver and the Laguna's consent to be sued in this Court induced Atlantic Richfield to enter into the Agreement to Terminate Leases. By this conduct the Laguna is estopped from arguing that it is not a 'person' within the meaning of CERCLA section 101(21).

Again, this is a legal impossibility. In addition, the Pueblo could identify no provision in the Termination Agreement in which it arguably could have "waived any defense based on its status as a tribe." While ¶ 5(a) of the Agreement contains a waiver of sovereign immunity, that waiver is expressly limited and cannot as a matter of law

Termination Agreement does contain indemnification and hold harmless language in ¶ 3(b), but as already shown, the indemnification and hold harmless language itself is limited by an express limitation of the Pueblo's waiver of sovereign immunity to ten years (and $10 million).

B. ARCO Attempts to Construe Claims 6-8 as Arising Under Paragraph 3(a), They Are in Fact Claims Based on CERCLA

Not surprisingly, therefore, ARCO goes to great lengths to try to state its claims 6-8 under ¶ 3(a) but nevertheless improperly asserts that the Pueblo was "stepping into ARCO's shoes." ARCO quotes the phrase from ¶ 3(a) that the Pueblo would "[a]ssume full and complete responsibility and liability under all applicable laws" in full four times in the Complaint and refers to it many more times. While it misconstrues that language in an attempt to greatly expand its meaning and to transfer liability in contravention of CERCLA's plain terms, the relevant point at this juncture is that ARCO consistently attempts to base its contract claims on ¶ 3(a), not the obviously timed-out ¶ 3(b).

However, upon careful analysis of the Complaint, ARCO's claims six through eight are based solely on CERCLA, and specifically the recent placement of the Jackpile Mine on the NPL. While ARCO makes a thinly veiled attempt to recast claims 6-8 as arising solely under the Termination Agreement, its pleading reveals that attempt for the subterfuge it is.

The first nine paragraphs of claims 6-8 in the Complaint are materially identical. (The remaining paragraphs vary depending on the declaratory, injunction, or damages theory, respectively, in each claim.) The first six paragraphs of each claim state only two facts – (1) that

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be construed to estop or otherwise preclude the Pueblo from asserting the express limits of that waiver of any other "defense based on its status as a tribe." The Pueblo awaits any argument ARCO might be able to make to the contrary.

the Pueblo and ARCO entered into the Termination Agreement in 1986, and that ARCO paid $43.6 million. Compl. at ¶¶ 205, 215, 225. Those facts are not contested. The remainder of those first six paragraphs states ARCO's legal interpretation of the Termination Agreement (and are accordingly not entitled to any deference on a motion to dismiss).

The seventh through ninth paragraphs demonstrate the thrust of ARCO's arguments:

> 207. EPA has listed the Jackpile Site on the NPL and has issued a "Special Notice" letter to Atlantic Richfield advising it of its potential liability under federal law applicable to cleanup, reclamation, and other remedial action at the Jackpile Site. EPA requires performance of an RI/FS, and has engaged in negotiations with Atlantic Richfield regarding the scope and responsibility for the RI/FS. In its negotiations with Atlantic Richfield, EPA has stated that it will continue to move forward with a CERCLA enforcement process notwithstanding the parties' inability to come to an agreement on the RI/FS.
>
> 208. Under the Agreement to Terminate Leases, the Laguna assumed full and complete responsibility for the cleanup, reclamation, and remediation that EPA is seeking to impose on Atlantic Richfield through its enforcement process.
>
> 209. The Laguna has materially breached the Agreement to Terminate Leases by failing to discharge the full and complete responsibility that is defined by federal law and applicable to the cleanup, reclamation, or remediation activities required at the Jackpile Site. In particular, the Laguna failed to complete the Record of Decision and has not assumed full and complete responsibility and liability under applicable federal laws, including CERCLA, on behalf of Atlantic Richfield with respect to the "Special Notice," the listing of the Jackpile Site on the NPL, the RI/FS and further response actions that may be required by EPA.

See identical paragraphs 227-229 under claim 8 and materially identical paragraphs 217-219 under claim 7.

The seventh paragraph (the first quoted paragraph above) establishes clearly that the factual basis for ARCO's claims is based exclusively on the NPL listing of the mine, the resulting actions of the EPA and, implicitly, ARCO's fears of what may follow. While the Pueblo cannot attest to the negotiations between the United States and ARCO, the Mine has been

listed on the NPL. But the significance is that the listing under CERCLA is the only factual basis for the claim.

Accordingly, the eighth paragraph (¶¶ 208, 218, 228) reflects ARCO's misplaced attempt to use the "assumed full and complete responsibility" language from ¶ 3(a) in the Termination Agreement to encompass CERLCA liability and EPA's current enforcement action.

Similarly, the ninth paragraph from each claim in the Complaint (¶¶ 209, 219, 229) repeats the same impermissible claim with one additional nuance: it alleges that Laguna "failed to complete the Record of Decision."[8]

This analysis demonstrates that, at their core, each of ARCO's contract claims is in reality based on CERCLA. Any CERCLA claims under the contract must be brought under ¶ 3(b) of the Termination Agreement, rather than ¶ 3(a). But any ¶ 3(b) claims are subject to the express ten-year limitation in ¶ 5(a) on the Pueblo's waiver of sovereign immunity and the "term of the indemnification agreement."

C. There is No Effective Waiver of Sovereign Immunity in the Termination Agreement For ARCO's Claims 1-5 or 6-8

As this Court recognized in *Bales*, 606 F. Supp. 2d at 1301-02:

> Tribal sovereign immunity can be waived only if a tribe unequivocally waives its tribal sovereign immunity or Congress unequivocally abrogates tribal sovereign immunity. *St. Stephen's Indian High School*, 264 F.3d at 1304 (quoting *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997)). Furthermore, the courts

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[8] As argued in this Part, the reliance of the claims 6-8 on the NPL listing, i.e., on CERCLA, compels their dismissal under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Assuming *arguendo* that the Court were to conclude that the bare reference to Laguna's alleged "fail[ure] to complete the Record Decision" may support claims under ¶ 3(a) of the Termination Agreement as opposed to ¶ 3(b), a more thorough discussion of the Termination Agreement follows in Part **Error! Reference source not found.**.

construe statutes liberally in favor of Native Americans. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

1) Paragraph 5(a) of the Termination Agreement Does Not "Unequivocally" Waive the Pueblo's Sovereign Immunity as to Claims 1-5

From the discussion above in Part IV, it is clear that Congress did not abrogate tribal sovereign immunity in CERCLA, so all that remains is ARCO's allegation in paragraph 21 of the Complaint that the Pueblo waived its sovereign immunity in the Termination Agreement. The waiver of sovereign immunity in ¶ 5(a) with respect to claims under CERCLA, which would have had to have been brought under ¶ 3(b), was limited to ten years from the effective date of the Termination Agreement. The Pueblo's waiver therefore expired by its own terms more than nineteen years ago. Claims 1-5 are barred by tribal sovereign immunity, and those claims must be dismissed under Fed. R Civ. P 12(b)(1).

2) Paragraph 5(a) of the Termination Agreement Does Not "Unequivocally" Waive the Pueblo's Sovereign Immunity as to Claims 6-8.

The Pueblo has already shown (1) that CERCLA liability cannot be transferred as a matter of law, and (2) that the Pueblo only waived its sovereign immunity for CERCLA claims under ¶ 3(b), and only for claims brought by December 1996. Since ARCO's claims 6-8 have only CERCLA-based facts as their basis, the same analysis applies. The Pueblo simply has not "unequivocally" waived its sovereign immunity as to ARCO's claims based on a CERCLA enforcement action, and ARCO has certainly not carried its burden of showing that such a waiver has been made. Accordingly, claims 6-8 are barred by the Pueblo's sovereign immunity and they must be dismissed under Fed. R. Civ. P. 12(b)(1).

3) Summary of Abrogation/Waiver of Sovereign Immunity

The ten-year limitation on the Pueblo's waiver of sovereign immunity in ¶ 5(a) applies expressly to ARCO's first five claims, which are expressly based on CERCLA. Coupled with the fact that Congress did not abrogate tribal sovereign immunity in CERCLA, the Pueblo's sovereign immunity is in full force and precludes ARCO's claims under the statute.

Similarly, ARCO cannot avoid that ten-year limitation by attempting to disguise claims 6-8, which are based on CERCLA, and as such are also precluded by the Pueblo's sovereign immunity.

All of the claims against the Pueblo must be dismissed based on the Pueblo's tribal sovereign immunity.

D. Claims 6-8 Fail to State a Claim Under Fed. R. Civ. P. 12(b)(6)

Even if the waiver of sovereign immunity in the Termination Agreement were construed as extending to some of ARCO's current contract claims, those claims must nevertheless be dismissed under Fed. R. Civ. P. 12(b)(6) because ARCO fails to state a claim arising under the agreement. Just as ARCO's claims based on CERCLA are barred by the ten-year limitation and so fail under 12(b)(1) even if disguised by ARCO as paragraph 3(a) claims, ARCO also cannot state claims under the Termination Agreement based on CERCLA without running afoul of the requirements of 12(b)(6).

The Tenth Circuit and other courts

> generally embraced a liberal construction of the [FRCP 8(a)(2)] pleading requirement, derived from *Conley v. Gibson:* "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46 (1957) (emphasis added); *see, e.g. Kikumura v. Osagie*, 461 F.3d 1269, 1294 (10th Cir. 2006).

Robbins v. Okla. ex rel. Dep't of Human Servs., 519 F.3d 1242, 1246 (10th Cir. 2008). Then the Supreme Court in *Twombly* rejected the "no set of facts" language of *Conley* and announced "a new (or clarified) standard: to withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Robbins*, 519 F.3d at 1247 (quoting *Twombly*, 550 U.S. at 570).

The changing standard neither helps nor hurts ARCO. Its CERCLA claims 6-8 fail under *Conley* or *Twombly*. No set of facts in support of ARCO's CERCLA claims would entitle ARCO to relief because those sets of facts would always include the Pueblo's ten-year limit on its claims under CERCLA. Similarly, no ARCO CERCLA claim could ever be "plausible on its face" in light of the Pueblo's ten-year limit on its waiver and indemnification agreement.

ARCO seeks, respectively, declaratory relief, injunctive relief, and damages for breach of contract based on the circumstance of its having received a "Special Notice" letter advising it of its potential CERCLA liability. Because indemnification for CERCLA liability is included only in Termination Agreement ¶ 3(b) and because the Pueblo's agreement to indemnify and hold harmless ARCO, including with respect to CERCLA, is limited to 10 years, ARCO's claims 6-8 (20 years overdue) must be dismissed for failure to state a claim for which relief could be granted.

V. A More Detailed Analysis Shows That Any Vestigial ¶ 3(a) Claims Not Based on CERCLA Must Nevertheless Be Dismissed As Untimely

This memorandum could well end here, but the subterfuge in ARCO's Complaint has many layers. In an attempt to salvage a vestage of its claims against the Pueblo, ARCO may argue that some of its allegations in the Complaint are not based on CERCLA and therefore that the Court should conclude that such assertions provide a non-CERCLA basis for its bald

statements that Laguna "failed to complete the Record of Decision." Compl. ¶¶ 209, 219, 229. The Pueblo did not fail to complete the project that it undertook under ¶ 3(a) of the Termination Agreement (and ARCO essentially admits as much in the Complaint), but the Court may need a deeper understanding of the legal import and meaning of that Agreement to understand why any such arguments of "failure" by ARCO are hollow. What theoretically could remain are claims based solely on the Pueblo's fulfillment of its obligations under ¶ 3(a) to conduct the reclamation project.[9] This Part therefore delves into a more detailed discussion of the Termination Agreement, including the limited nature of the reclamation project undertaken by the Pueblo. The end result is that it is unlikely that the Court will find that any of ARCO's claims actually are based on ¶ 3(a), and that even if some are, those claims were nevertheless filed long after the statute of limitations has run.

A. The Legal and Historical Background Informs the Meaning of the Termination Agreement.

1) CERCLA Prohibits Transfers of Liability

The Pueblo reminds the Court that CERCLA prohibits transfers of liability, although it allows agreements to indemnify and hold harmless. *See* discussion at Part IV.A.1 . This is not a new conclusion either. The *Mardan* case cited in the prior discussion was decided before ARCO and the Pueblo executed the Termination Agreement.

[9] If for any reason the Court does not construe ARCO's claims 6-8 to be based **solely** on facts surrounding the current CERCLA enforcement, any vestigial claims based instead on the Pueblo's fulfillment of its obligations under 3(a) to conduct the reclamation project should still be dismissed.

2) 1986: The Legal, Regulatory, and Environmental Framework

The Court must interpret the contract in a manner intended to give effect to the parties' intent at the time of contract formation. *Pub. Serv. Co. v. Burlington N. R.R.*, 53 F.3d 1090, 1097 (10th Cir. 1995) ("Contracts must be interpreted as to give effect to the intention of the parties at the time of contracting"). To do so, the Court must have an understanding of the legal framework within which the parties were contracting, which is addressed in Part I.

B. A Thorough Analysis of the Key Provisions in the Termination Agreement Shows That the Reclamation Project Was Limited to the Earthmoving and Revegetation Work; The Pueblo Did Not Guarantee to ARCO That the Contracted Work Would Achieve a Particular Result

ARCO's construction of the Termination Agreement in the Complaint is untenable because it is both incomplete and inaccurate. As shown above, ARCO's Complaint focuses solely on trying to shoehorn its claims 6-8 into ¶ 3(a) and in the process, it completely omits any discussion of ¶ 3(b). ARCO also completely ignores ¶ 5, which includes an expressly limited waiver of the Pueblo's sovereign immunity that informs the interpretation of both paragraphs 3(a) and 3(b).

Before discussing each highlighted paragraph in detail, an overview of the proper construction of the Agreement may be helpful. Read properly and as a whole, the Termination Agreement in ¶ 2(a) required ARCO to pay $43.6 million to the Pueblo and the Pueblo would undertake the reclamation work "as prescribed by the Record of Decision." *Id.* Paragraph 3(a) goes on to define the limitations on the scope of that reclamation project, including that it would be conducted under the exclusive direction of the United States and requiring the federal government's approvals. The very structure of that reclamation project evidenced in the Termination Agreement shows that ARCO, the Pueblo, and the United States were all aware that

the scope of that reclamation fell far short of the "environmental cleanup" that ARCO's complaint now suggests the Pueblo agreed to undertake. If ARCO's expansive reading of ¶ 3(a) were correct, ¶ 3(b) would have been completely unnecessary. Of course, ¶ 3(b) is there, including its detailed language regarding CERCLA. It obligates the Pueblo to indemnify and hold Anaconda harmless in the event that Anaconda is found to have liability, including under CERCLA.

The Pueblo's liability under ¶ 3 is expressly limited by ¶ 5, however. Not only is its liability limited, but its waiver of sovereign immunity is limited as well. This Part discusses each of these provisions in detail to show that a proper interpretation of the Termination Agreement would lead to a dismissal under Rule 12(b)(6) of any vestigial remnants of ARCO's contract claims against the Pueblo and that those claims are barred by the Pueblo's sovereign immunity or, in the alternative, any conceivable interpretation of the statute of limitations.

The Pueblo's counsel requests the Court's indulgence. Because this more detailed discussion of the Termination Agreement builds on the CERCLA-centered argument in Part IV, some repetition is necessary.

1) Paragraph 2 Sets Out ARCO's Payment Obligation And Also Demonstrates the Limited Scope of the Reclamation Work

Paragraph 2 of the Termination Agreement sets out ARCO's primary obligation: to pay $43.6 million to the Pueblo:

> In 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 will . . . pay to The Pueblo in the manner specified by the Secretary of the Interior or his designee, Forty-three Million, Six Hundred Thousand Dollars ($43,600,000), in five (5) equal cash payments, with the first payment being due and payable within ten (10) days of the effective date of this Agreement, and the final four (4) payments being due and payable on consecutive

> annual anniversaries of the effective date of this Agreement. To the extent required such payments shall be used ***for reclamation and related purposes as prescribed by the Record of Decision*** issued jointly by the Bureau of Indian Affairs and the Bureau of Land Management, 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."

Three facets of this section warrant closer scrutiny. First, as foreshadowed above, the Pueblo could not "release" ARCO from any obligation under federal law. Specifically, as a matter of law, ARCO could not transfer its CERCLA liability or responsibilities to the Pueblo.

Second, the last sentence obligated the Pueblo to use the funds "to the extent required" to finance the "reclamation and related purposes as prescribed by the Record of Decision issued by" BIA and BLM and "the Secretary of the Interior governing the performance of reclamation by The Pueblo." This requirement is significant to the interpretation of the entire agreement because it illustrates the scope of the Pueblo's work. The Record of Decision (which was developed from the EIS that came before and which was implemented by the management plans that came after) defined "the performance of the reclamation by the Pueblo." The work required of the Pueblo under the Termination Agreement was not, and was not intended to be, a "full-blown cleanup" under CERCLA. Reclamation had a much more limited meaning under the law and practice at the time.

Similarly, the parties' focus was whether Anaconda was responsible for "reclamation of the Mine, for performing other environmental remedial measures relating to the Mine, and for all other obligations ***arising under the leases."*** In contrast, CERCLA obligations do not arise under the leases (which predated CERCLA) but instead arise under statute. As discussed in the Background section in Part I, Anaconda was obliged to comply with regulations under the terms

of its leases with Laguna. In its comments on the EIS, Anaconda stated that it had limited reclamation obligations under the leases.

Thus, while ¶ 2 addresses ARCO's payment obligation, it also contains language that shows that the Pueblo's work and responsibilities under the Termination Agreement were limited to a physically huge but conceptually narrow earthmoving and revegetation project. That project was far more limited than the bare legal assertions in ARCO's Complaint would lead the Court to believe.

2) Paragraphs 3(a) and 3(b) Set Out the Pueblo's Responsibilities and Illuminate Each Other

Paragraph 3(a) of the Termination Agreement sets out the Pueblo's obligation to conduct the reclamation work as described in the Record of Decision. Paragraph 3(b) sets out the Pueblo's duty to indemnify ARCO. Each is discussed below in more detail, but at the outset it is worth reiterating the well-worn canons of contract construction cited above: contracts must be read as a whole, giving meaning to the component parts. *See* discussion of *Flood*, 618 F.3d at 1125, on page 27.

Read together, the component parts of ¶ 3 reinforce that the Pueblo's obligations under 3(a) were limited to performing the circumscribed reclamation project as defined in the Record of Decision. As stressed in Part IV, ¶3(b) was intended to address a situation, such as this one, in which ARCO's broader liability (including under CERCLA) could lead to indemnification of ARCO by the Pueblo. If the Court wonders why indemnification under 3(b) receives ***no*** mention in ARCO's complaint, the answer is apparent in the Termination Agreement itself: indemnification was expressly limited in ¶ 5 to ten years. In fact, ARCO's attempt to expand

¶ 3(a) beyond reason would reduce ¶ 3(b) to a nullity. (And of course ARCO ignores the cardinal point raised in Part IV: CERCLA is addressed in ¶ 3(b) but omitted ¶ 3(a).

3) Paragraph 3(b) of the Termination Agreement Requires the Pueblo to Indemnify and Hold Harmless ARCO for Certain Claims, Including CERCLA

Despite being overlooked in ARCO's complaint, ¶ 3(b) warrants attention first, and quotation in full, because in juxtaposition it illuminates the meaning of ¶ 3(a) and highlights ARCO's distortion of the latter. Paragraph 3(b) states that "the Pueblo will . . .

> (b) Indemnify and hold Anaconda harmless from, and reimburse Anaconda and its officers, directors or agents for any amounts paid or expenses incurred, including attorneys' fees and expenses, because of any claim, liability or obligation
>
> (i) related to cleanup and reclamation of the Mine, or
>
> (ii) asserted under any applicable law or regulation, and relating to The Pueblo's obligation hereunder, including without limitation effects due to the generation, treatment, storage or disposal of hazardous substances or wastes, or toxic materials, or related activities, by Anaconda on The Pueblo lands including, but not limited to, any liability or obligation which exists or arises under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).

This is precisely the type of indemnification and hold harmless agreement that CERCLA expressly allows in 42 U.S.C. § 9607(e)(1). The language is express and includes both terms – "indemnify" and "hold harmless" – from the statute. Note that several of its provisions stand in stark contrast to the language found in ¶ 3(a).

- Most significantly, it explicitly sets out CERCLA and RCRA as potential bases for liability (unlike ¶ 3(a)). [10]
- Again, unlike 3(a), it uses both "indemnification" and "hold harmless," the relevant types of agreements that CERCLA does allow in 42 U.S.C. § 9607(e)(1).
- It is also significant that it treats "cleanup and reclamation" as one possible source of claims for indemnification while CERCLA and RCRA are set off in a separate subparagraph. The parties clearly contemplated that claims might be brought against Anaconda related either to the performance of the reclamation work by the Pueblo, ***or*** under the relatively new, remarkably broad environmental statutes like CERCLA and RCRA.

As we turn to ¶ 3(a), the inclusion here of those statutes and the use of the disjunctive "or" both compel a far narrower interpretation of 3(a).

4) In Contrast, ¶ 3(a) Excludes CERCLA and is Limited to the Reclamation Work

With this background, ARCO's interpretation of ¶ 3(a) is untenable. For ease of reference, that paragraph reads:

> 3. In consideration for the monies to be paid by Anaconda under Paragraph 2 of this Agreement, Anaconda will be deemed to have met all of its reclamation and other environmental obligations relating to the Mine, and The Pueblo, with the approval of the Secretary of the Interior, hereby releases Anaconda from all responsibility and liability for reclamation of the Mine, for performing other environmental remedial

[10] Paragraph 3(c) reinforces the significance of the inclusion of CERCLA in 3(b) but not 3(a). 3(c) also expressly includes CERCLA in the types of actions that the Pueblo agrees not to bring against ARCO. This was a meaningful concession, as tribes may bring CERCLA actions. *See, e.g.*, *Berrey*, 439 F.3d 636 (10th Cir. 2006).

measures relating to the Mine, and for all other obligations arising under the leases, including all bonding requirements, and will:

(a) Assume full and complete responsibility and liability under all applicable laws, including any obligations imposed by Anaconda's leases with The Pueblo, for:

(i) the cleanup, reclamation or other environmental remedial action at the Mine; and
(ii) conducting all other related and necessary activities in a manner acceptable to, or required by governmental agencies with jurisdiction over reclamation and other related environmental programs, and which is otherwise consistent and in compliance with all applicable environmental laws and regulations; and
(iii) obtaining requisite approval for such activities from the appropriate governmental authorities.

As noted above, ARCO quotes the phrase "assume full and complete responsibility and liability under all applicable laws" in full four times in its Complaint and refers to it many more times in support of its claim that the Termination Agreement relieved it of all responsibility for any liability relating to the mine, including under CERCLA. Its argument hinges on CERCLA being included in "all applicable laws" and ignores the pivotal fact that CERCLA is expressly included in ¶ 3(b) but is conspicuously absent from ¶ 3(a) as argued above.

But significantly to this more detailed discussion of the Termination, ARCO's argument ***also*** rests on the Court concluding that the scope of the three subparagraphs of ¶ 3(a) encompass considerably more than the reclamation project governed by the Record of Decision. Claims 6-8 fail because ARCO is wrong on both counts.

The three subparagraphs in 3(a) demonstrate that the intended scope of the "applicable laws" in 3(a) was limited to the reclamation project. As was seen in ¶ 2, the consideration provided by ARCO was to be used for the reclamation project as defined by the Record of Decision and management plan. Subparagraph (i) is consistent with that conclusion and reinforces it. The Pueblo was responsible for "the cleanup, reclamation or other environmental

remedial action at the Mine," which in context is "the" same project defined in ¶ 2. "The" refers to a single "action" – the reclamation project. If the parties had intended 3(a) to apply to all future environmental activities at the mine, subparagraph (i) would not refer to "the . . . action." Instead, it would have included language akin to "any and all actions necessary to clean up, reclaim, restore, or otherwise remediate any environmental conditions relating to the Mine."

Subparagraph (ii) is consistent with this interpretation. It limits "other activities" the Pueblo must undertake only to those that are "related and necessary." Such other activities are further limited by the phrase "by governmental agencies with jurisdiction ***over reclamation and other related environmental programs."*** (Emphasis added.) The reference is not to "all environmental programs," and the limited scope must have significance. The repeated use of the word "related" ties back to the reclamation project in subparagraph (i).

Finally, subparagraph (iii) requires that the Pueblo get requisite federal approvals. This language only makes sense in the context of a project undertaken by the Pueblo, like the reclamation governed by the Record of Decision. If ¶ 3(a) it were intended to encompass federal actions under statutes like CERCLA, the parties would not have even been thinking about "approvals." The emphasis would have been on ***compliance*** with federal agency orders and mandates, not seeking approval.

In summary, the subject matter of the three subparagraphs is limited to the reclamation earthmoving and revegetation project defined by the Record of Decision incorporated in ¶ 2. The provisions are wholly consistent with that limited scope and with the regulatory structure in place at the time.

That language also limits the scope of the "applicable laws" phrase relied upon so heavily by ARCO in its complaint. The structure and syntax make it clear that "applicable laws" are only those that apply to the three subparagraphs. In this context, it becomes clear why the parties omitted CERCLA from ¶ 3(a) while including the statute expressly in 3(b) and 3(c) – liability under CERCLA was not within the scope of 3(a). CERCLA liability was the province solely of 3(b).

5) Paragraph 5 Contains Express Limitations on the Pueblo's Waiver of Sovereign Immunity and the Term of the "Indemnification Agreement"

As discussed briefly above, ¶ 5 further narrows the scope of the Pueblo's obligations, potential liability, and exposure to suit under the Termination Agreement. The discussion here is consistent with, but more extensive than, the discussion in Part IV above. Paragraph 5(a) provides:

> 5. (a) In order to provide Anaconda an effective means of securing judicial or other relief in the event of a breach by The Pueblo of its obligations under this Agreement, The Pueblo hereby expressly waives its sovereign immunity as to any claims or actions brought by Anaconda under this Agreement, and consents to be sued in a Federal Court of competent jurisdiction, provided, however, that The Pueblo's liability shall not exceed Ten Million Dollars ($10,000,000) and the term of the indemnification agreement shall be for ten (10) years from the effective date of this Agreement;

While the waiver of sovereign immunity is express, it is also limited to $10 million and to ten years. The $10 million limitation applies to all "liability," a term used in both ¶¶ 3(a) and 3(b). The language is plain: any claim by ARCO against the Pueblo is subject to a ceiling of

$10 million.[11] Whether the phrase "the indemnification agreement" means that the ten-year limitation does not apply to any claims ARCO has actually and properly raised under ¶ 3(a) may be open to debate, but as shown below, does not affect the ultimate conclusion of dismissal.

However, Paragraph 5(b) adds clarity to what the parties intended by both the time and monetary limitations:

> (b) The Pueblo agrees to make available up to Ten Million Dollars ($10,000,000) for a period of ten (10) years out of funds held in trust for The Pueblo by the Secretary of the Interior, or held by The Pueblo directly, for the purpose of satisfying any award or judgment obtained by Anaconda pursuant to this Agreement;

Accordingly, the Pueblo was to set aside the $10 million addressed in 5(a) ***for a period of ten years*** to fund any recovery to which Anaconda (now ARCO) might be entitled. In addition, ¶ 5(b) is strikingly similar to a construction performance bond, adding still more credence to the interpretation that the work undertaken by the Pueblo under the Termination Agreement was in fact a limited (albeit very large) earthmoving and revegetation project.

The legal import of the fact that far more than ten years have passed both since the Agreement was executed and since that project was completed is addressed below.

C. A Common Sense Check on the Parties' Interpretations

Unlike ARCO's interpretation of the Termination Agreement, the construction above survives a common sense review. ARCO would have the Court conclude that the benefits of the bargain in the Termination Agreement were completely one-sided. ARCO acknowledges that it

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[11] It also reinforces the Pueblo's construction of Paragraph 3 above. The Pueblo was to receive $43.6 million to conduct the reclamation project, which was expected to cost roughly $35 million. Compl. ¶ 86. It put an amount roughly equal to the difference, but only that amount, at risk.

would have spent $34.7 million, as calculated by BLM (Compl. ¶ 86), if it had conducted the reclamation itself. Instead it paid "about $9 million more than the amount that they anticipated spending to address environmental issues at the Site." *Id.*

What was ARCO getting for an extra $9 million? According to ARCO, it was getting a get-out-of-jail free card. It would have no further liability under any law, under any circumstance, for any future remedial actions at the mine no matter when they might occur. This assertion is untenable.

First, the Court must remember that the "extra" $9 million (and in fact $10 million) was expressly at risk and had to be set aside for ten years. In addition, the Agreement to Terminate Leases, as its title belies, was far more than an agreement about reclamation work and limited indemnification for certain liability. It expressly was an agreement to terminate mining leases that had been in place, collectively, for three decades. It settled Anaconda's royalty obligations under those leases. It allowed Anaconda to give various improvements to the Pueblo "as-is" rather than having to spend the money to remediate or remove them. It at least helped resolve the uncertainty regarding the reclamation obligations of Anaconda under the leases and the existing regulatory framework.

In this context and on a common sense level, an "extra" $9 million is nowhere near enough to justify an interpretation of the Termination Agreement that would leave ARCO with no liability. Only the Pueblo's reading of the contract can explain why CERCLA is included in ¶ 3(b) but not in ¶ 3(a). Only the Pueblo's reading accounts for the express ten-year and $10 million limitations. Only the Pueblo's reading is consistent with CERCLA's prohibition on transfers of liability

D. Summary of Termination Agreement

In summary, the language of the Termination Agreement does not mean what ARCO says it means, and the Agreement cannot support ARCO's broad contractual claims. Paragraph 3(a) was limited to what was essentially an earthmoving and revegetation project, and if any of ARCO's claims are to survive Part IV to reach this point in the analysis, they must be predicated legally and factually on the failure to perform that scope of work in accordance with the Record of Decision and management plan.

E. Claims 6-8 Fail to State a Claim Under Fed. R. Civ. P. 12(b)(6)

The Pueblo contends that ARCO has not successfully asserted a factual basis for any claim arising within the limited scope of ¶ 3(a) once that scope is properly defined. But even if it had and even if the Court concludes that the ten-year limitation in ¶ 5 does not reach properly-stated ¶ 3(a) claims, such claims should still be dismissed as untimely.

1) An Example:

An example might assist the Court. In ¶ 141 of its Complaint, ARCO alleges:

> OA Systems noted in 2011 that a "less rigorous design was approved after the ROD" for the protection of the "toes" of the waste dumps. This revised "design was inadequate to prevent the erosion of the banks below the toes of the waste piles" as demonstrated by the fact that "significant erosion has taken place in the past 12 years."

Assuming this is true for Rule 12 and exemplar purposes, it still fails to state a claim against the Pueblo under Rule 12(b)(6). As a matter of law and as recognized in ¶ 3(a)(iii) of the Termination Agreement, the Pueblo (by Laguna Construction Company) was not legally responsible for the approval of the plans designed to carry out its responsibility; the United States as both trustee to the Pueblo and as the regulator bore that responsibility. The Pueblo was

a contractor. This claim does not allege that the Pueblo, as contractor, did anything wrong, and therefore fails to state a claim.

But any claim based in whole or in part on this paragraph from the Complaint fails for another reason. As argued immediately below, ARCO knew or should have known that design changes were likely, if not certain, and certainly had a duty to monitor progress on the project if it meant to enforce its contract rights regarding how the work was performed. In fact, the United States was publishing updates on the project, including technical changes, for the world to see. *See, e.g.*, James H. Olsen. Jr., Jackpile Reclamation Project History & Progress Update Planning, Rehabilitation, and Treatment of Disturbed Lands, *in 1993 Mineral Frontiers On Indian Lands*, Bureau of Indian Affairs Division of Energy and Mineral Resources, General Publication G-94-1 (Stephen A. Manydeeds ed., 1993)[12] Finally, Records of Decision may be and often are modified, a fact which ARCO had to have known. *See* Olsen *supra* (utilize newer reclamation technologies); U.S. Envtl. Prot. Agency, EPA 540-F-96-026, Superfund Reforms: Updating Remedy Decisions, Sept. 27, 1996[13] (Modification of a ROD is not a new concept).

2) Reclamation Work Concluded in 1995

If ARCO successfully states claims based on breach of contract, those claims by definition must allege that the reclamation work was not done in accordance with the terms of ¶ 3(a), other relevant provisions of the Termination Agreement, and the Record of Decision. Regardless, the reclamation project was completed in 1995, as acknowledged by ARCO in its

[12] available at: http://babel.hathitrust.org/cgi/pt?id=mdp.39015051884545;view=1up;seq=87.

[13] available at: http://www.epa.gov/superfund/health/conmedia/gwdocs/rem_sel.htm

complaint at ¶ 117 ("In 1995, Defendants "completed" the Jackpile Site cleanup two years ahead of schedule and several million dollars below budget.") and ¶ 142 ("project was deemed completed").[14] The Law Does Not Allow a Contract Party to Sleep on its Rights for Two Decades.

Because the reclamation work was completed in 1995, ARCO cannot now bring claims based on breach of contract. ARCO knew or should have known long ago of the requirements of the Record of Decision, which predated and was explicitly referenced in the Termination Agreement in a manner having legal significance. Its contract rights were based on whether the Record of Decision requirements were carried out when the work was done.

ARCO claims that the Pueblo breached its contract with Anaconda by failing to complete the work properly, and yet for 20 years ARCO slumbered on its rights. That far exceeds any conceivably applicable statute of limitations. The claims should therefore be dismissed under Fed R. Civ. P. 12(b)(6) because relief cannot be granted (and similarly under the doctrine of laches, *see Galliher v. Cadwell*, 145 U.S. 368, 373 (1892) (discussing inequity of permitting delayed claim to be enforced).

VI. Conclusion

Claims 1-5 arise directly under CERCLA and must be dismissed under Fed. R. Civ. P. 12(b)(1) because there is no abrogation or waiver of the Pueblo's sovereign immunity and under

[14] ARCO apparently is trying to obscure the issue by putting "completed" in quotes and using the word "deemed" to describe the completion of the project by Laguna (through Laguna Construction). Laguna did indeed complete the project. Post-reclamation monitoring has been ongoing, but that does not change the terms of the Agreement that the Pueblo (through the entity, Laguna Construction, to be created) was to conduct the reclamation work itself. ARCO legally cannot and factually does not point to language in the Agreement that relieves ARCO of its liability under CERCLA.

Fed. R. Civ. P. 12(b)(6) because the Pueblo, as a tribe, is not a "person" under the statute and therefore not subject to statutory liability.

Claims 6-8 are ostensibly based on the Termination Agreement but are in fact thinly veiled CERCLA claims. Accordingly, they could only be brought under ¶ 3(b) in that contract. Claims under ¶ 3(b) are indisputably barred under both Fed. R. Civ. P. 12(b)(1) and (6) because of the express limitation that such claims had to have been brought by December 1996.

Even were the Court to conclude that some vestige of claims 6-8 have sufficient factual basis (outside of CERCLA-based facts) to potentially give rise to a claim under ¶ 3(a) of the Termination Agreement, such claims are limited by the scope of the Pueblo's obligations under that paragraph, properly construed, and nevertheless are long past due under any statute of limitations that might be applicable. They must therefore be dismissed under Fed. R. Civ. P. 12(b)(6).

For the reasons stated herein, the Pueblo respectfully requests that the Court grant its motion to dismiss.

May 26, 2015

Respectfully submitted,

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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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