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

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

ATLANTIC RICHFIELD COMPANY'S
RESPONSE IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS

Plaintiff Atlantic Richfield Company hereby submits its response in opposition to Defendant United States of America's Motion to Dismiss.

INTRODUCTION

In 1986, Atlantic Richfield paid $43,600,000 to fund the cleanup of the Jackpile-Paguate Uranium Mine in Cibola County, New Mexico ("Jackpile Site"). In exchange, Atlantic Richfield received comprehensive releases from the Pueblo of Laguna ("Pueblo") and the United States concerning environmental conditions at the Jackpile Site. As part of this settlement, the United States promised to refrain from "attempting to obligate [Atlantic Richfield] to engage in cleanup,

reclamation or other environmental remedial action at the Mine."[1] Nearly thirty years later, after Defendants squandered the $43.6 million on a poorly executed and incomplete reclamation effort, the United States is trying to force Atlantic Richfield to single-handedly finance the cleanup of the Jackpile Site a second time. The Government does not deny these facts, but instead contends that it can break its promises with impunity because Atlantic Richfield's CERCLA claims are simultaneously too early and too late. Moreover, the Government argues, the Settlement Agreement is ineffective because the Secretary of the Interior signed it six weeks before he was delegated the authority to do so. The Government's arguments are both unpersuasive and unworthy. Regardless, the issues the Government presents in the Motion are inappropriate for resolution on a motion to dismiss. The Motion should be denied.

LEGAL STANDARD

When considering a motion to dismiss under Rule 12(b)(6), a court must "assume the truth of all well-pleaded facts in the complaint, and draw all reasonable inferences therefrom in the light most favorable to the plaintiff[]." *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009). A complaint must allege "a plausible claim for relief," *id.*, which means it must contain factual allegations that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To be "plausible" an allegation need not be probable or even likely provable, *id.* at 556, and granting a motion to dismiss remains "a harsh

[1] The Agreement to Terminate Leases ("Settlement Agreement"), is attached as Exhibit A to Atlantic Richfield's Complaint [Doc. No. 1-2], and is therefore considered part of the pleading. *See* Fed. R. Civ. P. 10(c).

remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias*, 567 F.3d at 1178.[2]

ARGUMENT

I. ATLANTIC RICHFIELD HAS PLEADED SUFFICIENT FACTS TO SUPPORT ITS CERCLA § 107(a) CLAIMS.

The United States contends that Atlantic Richfield's CERCLA § 107(a) cost-recovery claims should be dismissed because (1) Atlantic Richfield has not actually started cleaning up the Jackpile Site, and (2) Atlantic Richfield's costs are litigation expenses incurred solely to defend against a potential action brought by the Environmental Protection Agency ("EPA"). (U.S. Mot. at 10-15.) Neither argument has merit. First, the Government's distinction between an "actual cleanup" and preliminary investigation activities is unsupported by case law, inconsistent with the express language of the statute, and incorrect because there has been an actual cleanup ongoing at the site for nearly thirty years. Second, the United States cannot defeat Atlantic Richfield's § 107(a) claims merely by arguing that Atlantic Richfield's costs were incurred for litigation purposes. Finally, whether response costs are necessary and consistent with the National Contingency Plan ("NCP") are questions of fact inappropriate for determination on a Rule 12(b)(6) motion.

[2] The Government's reliance upon Rule 12(b)(1) is misplaced. "Any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits." *City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1006 (9th Cir. 2010); *see also United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1220 (10th Cir. 2000) (A federal claim is "incapable of conferring jurisdiction" only when it is "obviously without merit" or "wholly frivolous."). Atlantic Richfield's non-frivolous assertion of claims under CERCLA, a federal statute providing private rights of action, is sufficient to confer subject matter jurisdiction here.

A. Atlantic Richfield's Preliminary Investigation Costs Are Necessary And Recoverable CERCLA Response Costs.

The scope of recoverable response costs under CERCLA § 107(a) is exceptionally broad and includes costs for site assessment and investigation, such as those incurred by Atlantic Richfield here. Further, such preliminary costs are recoverable regardless of whether any subsequent remedial action takes place. Contrary to the United States' arguments, neither CERCLA nor Tenth Circuit precedent prohibits the recovery of such costs prior to the commencement of an "actual cleanup." Indeed, the United States routinely brings claims to recover preliminary response costs before commencing formal remediation activities—a fact the Government cannot deny. And, in any event, actual cleanup has been ongoing at the Jackpile Site for many years, and—because the site is now on the National Priorities List ("NPL")—additional cleanup will certainly be conducted in the future.

1. Preliminary investigation costs are recoverable irrespective of any subsequent remedial activity.

In order to state a claim under § 107(a), a plaintiff must allege that it has incurred "necessary costs of response … consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B); *see Young v. United States*, 394 F.3d 858, 862-65 (10th Cir. 2005). "CERCLA 'response costs' are defined generally as the costs of investigating and remedying the effects of a release or threatened release of a hazardous substance into the environment." *Cnty. Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1512 n.7 (10th Cir. 1991). The statutory definition of "response" includes "remove" and "removal." 42 U.S.C. § 9601(25). "Remove" or "removal," in turn, include "such actions as may be necessary to *monitor, assess, and evaluate* the release or threat of release of hazardous substances." 42 U.S.C. § 9601(23) (emphasis added). "Investigatory

costs fall within the ambit of this provision," *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988),[3] as do costs associated with the identification of potentially responsible parties ("PRPs"). *Key Tronic Corp. v. United States*, 511 U.S. 809, 819-20 (1994). There is no minimum amount of response costs that a party must incur to state a claim under § 107—even one dollar is sufficient. *Bowen Eng'g v. Estate of Reeve*, 799 F. Supp. 467, 476 (D.N.J. 1992) ("Although plaintiffs' costs to date have been minimal, there is no requirement that they reach some threshold level of expenses."); *see also Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 668 n.4 (9th Cir. 2004) ("As soon as the [plaintiff] expended its first dollar, it could have sued [defendant] for this dollar …."). And preliminary costs "are recoverable even if Plaintiff never incurs actual clean-up costs." *Containerport Grp., Inc. v. Am. Fin. Grp., Inc.*, 128 F. Supp. 2d 470, 481 (S.D. Ohio 2001).[4]

Ostensibly relying on *Young v. United States*, the Government maintains that Atlantic Richfield's preliminary investigation, assessment, and evaluation costs are not recoverable under § 107(a) because Atlantic Richfield has not begun any "actual cleanup" at the site. (U.S. Mot. at 10-13.) *Young* held no such thing.

In *Young*, the plaintiffs purchased a property "for considerably less than its appraised value" adjacent to a superfund site. 394 F.3d at 860-61. Upon discovering contamination, rather

[3] *Accord Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 933 (6th Cir. 2004); *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 962 (8th Cir. 2000); *Raytheon Aircraft Co. v. United States*, 556 F. Supp. 2d 1265, 1294 (D. Kan. 2008).

[4] *Accord Johnson*, 226 F.3d at 963; *Artesian Water Co. v. Gov't of New Castle Cnty.*, 851 F.2d 643, 651 (3d Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986); *Marriott Corp. v. Simkins Indus., Inc.*, 825 F. Supp. 1575, 1581-82 (S.D. Fla. 1993); *Bowen Eng'g*, 799 F. Supp. at 476.

than undertake any cleanup actions, the plaintiffs brought suit against the Government and the city under CERCLA and Oklahoma law. *Id.* at 860. In affirming summary judgment, the Tenth Circuit found "[a]bsolutely no nexus exist[ed] between the costs Plaintiffs expended and an actual effort to clean up the environmental contamination." *Id.* at 864. Because the plaintiffs' costs were incurred solely for litigation purposes, the court held that they were neither necessary nor consistent with the NCP. *Id.* at 864-65.

Young did not hold that costs incurred prior to the implementation of a formal remediation plan are categorically excluded from § 107(a) actions—if it had, that would have been inconsistent with the language of the statute and a radical departure from prevailing case law. Instead, *Young* merely held that the plaintiffs' preliminary costs were not recoverable *in that case* because the evidence showed that: (1) the plaintiffs had "abandoned their property and d[id] not intend to spend any money to clean up the contamination," *id.* at 861-62; (2) the "costs [were] incurred solely for litigation," *id.* at 865; and (3) the plaintiffs were attempting to manipulate § 107(a) to obtain a financial windfall, having purchased their property at a substantial discount and then seeking funds for its improvement. *See id*. at 861-63. The distinction in *Young* was not between preliminary activities and subsequent remediation, but rather between costs incurred for the purpose of cleaning up the property and those incurred solely for litigation.[5] And the court was able to make that distinction only on a fully developed factual record.

[5] The other decisions cited by the United States similarly concern the distinction between litigation expenses and cleanup costs—not preliminary activities versus subsequent cleanup. *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 481-82 (6th Cir. 2004) ("[T]he district court noted that to recover any costs, the 'citizens must prove' that the costs were not 'primarily for litigation,' which it concluded they had failed to do."); *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*,

This case is nothing like *Young*. Atlantic Richfield has neither abandoned the Jackpile Site nor refused to contribute funds to clean it up. Atlantic Richfield paid $43.6 million for the property to be cleaned up in 1986, and has now incurred additional costs as a result of Defendants' mismanagement of those funds. And, Atlantic Richfield has repeatedly stated its willingness to work alongside the United States and the other PRPs to ensure that the site is cleaned up properly, and has contributed to that effort.[6] Far from trying to profit from its § 107(a) claims, Atlantic Richfield seeks only to avoid the injustice of the Government's demand that it shoulder the cost for environmental remediation again, required as a consequence of the failed prior effort. Furthermore, by placing the Jackpile Site on the NPL, the Government has assured that a CERCLA-quality cleanup will occur at the site. The only question—to be answered in this lawsuit—is who is going to pay for that cleanup.

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228 F.3d 275, 294 (3d Cir. 2000) ("[T]he district court did not err in concluding that ESI's consulting fees for which appellants seek reimbursement were litigation-related expenses."); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91-92 (2d Cir. 2000) ("While compensable costs are broadly defined in the statute, they do not include expenses incurred solely in preparation for litigation …."). In fact, in *Amoco Oil Co. v. Borden, Inc.*, the court held that the costs of "hir[ing] several consultants to measure the radioactivity, to determine geology and hydrology, and to characterize the data" were recoverable even though no "actual cleanup," as the United States would use the term, had yet taken place. 889 F.2d 664, 666-71 (5th Cir. 1989).

[6] *See, e.g.*, July 16, 2014 Letter from Atlantic Richfield to EPA, Attach. 1 to Lucari Decl., at 7 ("We look forward to working cooperatively with EPA to define a future course that is fair to all parties."); August 13, 2014 Letter from Atlantic Richfield to EPA, Attach. 2 to Lucari Decl., at 2 ("I look forward to hearing from you and to working cooperatively with EPA to define a future course that will be effective, efficient and expeditious, but also fair to all parties."). All of the documents attached to the Declaration of James L. Lucari, including these two letters, are publicly available as part of EPA's file for the Jackpile Site. As such, the Court may take judicial notice of these letters in deciding this motion to dismiss. *See Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006).

2. Actual cleanup has been ongoing at the site for nearly thirty years.

Even if response costs incurred prior to the commencement of an "actual cleanup" were prohibited, the United States' argument still would fail because an actual, on-the-ground cleanup has been ongoing at the Jackpile Site since 1986. (*See* Compl. ¶¶ 90-117.) The United States attempts to sidestep this fact by stating that it "disputes that the Laguna's mine reclamation activities constitute a response action under CERCLA" and "even if they did, the Complaint alleges that [the] activities … were deemed complete in 1995." (U.S. Mot. at 15 n.4.) This argument is untenable. Given CERCLA's expansive definition of what constitutes a "response action," *see* 42 U.S.C. § 9601(23)-(25), the United States cannot reasonably maintain that no part of a multi-year environmental reclamation project qualifies, particularly where the project was conducted pursuant to an Environmental Impact Statement ("EIS") and Record of Decision ("ROD") issued by the United States.[7] In fact, in a publication released just last month, EPA described this reclamation work as "Response Activities" that have been conducted at the Site to date. (*See* Jackpile-Paguate Uranium Mine Superfund Site Report ("EPA Site Report"), July 10, 2015, Attach. 3 to Lucari Decl., at 2.)

Further, since 1995, the Jackpile Site was added to the NPL and an independent consulting firm retained by the Pueblo issued reports in 2007 and 2011 concluding that the initial reclamation activities conducted by Defendants did not comply with the requirements of the ROD and "were not successful in prevention or mitigation of public health or environmental impacts." (Compl. ¶¶ 129-34.) The Bureau of Land Management came to a similar conclusion

[7] It is not unusual for federal agencies other than EPA to undertake response actions. *See, e.g.*, *United States v. Chrysler Corp.*, 157 F. Supp. 2d 849, 853 (N.D. Ohio 2001) (DOI); *Reynolds v. Lujan*, 785 F. Supp. 152, 154 (D.N.M. 1992) (BLM).

in January 2012, when it determined that the project was "not ready to be closed out." (*Id.* ¶ 156.) No one—least of all the Government—believes that the cleanup of the Jackpile Site is "complete." If it were, EPA would not be seeking the assistance of Atlantic Richfield in developing a CERCLA remedial investigation / feasibility study ("RI/FS"), the site would not be on the NPL, and this lawsuit would not be necessary.

3. Preliminary investigation costs are recoverable irrespective of compliance with the NCP.

The United States does not explain why Atlantic Richfield's response costs are not "consistent with the NCP" other than to lump that assertion into its broader argument that response costs incurred prior to the commencement of an actual cleanup may not be recovered. In any event, preliminary investigation costs need not be consistent with the NCP for them to be recoverable under § 107(a). *Donahey v. Bogle*, 987 F.2d 1250, 1255 (6th Cir. 1993), *vacated on other grounds sub nom., Livingstone v. Donahey*, 512 U.S. 1201 (1994) ("Although consistency with the NCP is a necessary element for recovery of remedial costs, it does not necessarily follow that consistency with the NCP is required for recovery of monitoring or investigative costs.")[8] "The NCP is a long and detailed list of procedures," *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1136 (10th Cir. 2002), which includes requirements such as evaluating threats to public health, notifying affected citizens, and providing a period of public comment. *See, e.g.*, 40 C.F.R. § 300.415. These requirements simply do not fit preliminary investigation activities, and thus cannot be applied to them. *Marriott Corp.*, 825 F. Supp. at 1583 ("[T]he detailed NCP provisions governing other response action cannot reasonably be applied to

[8] *Accord Milford*, 390 F.3d at 934; *Bowen Eng'g*, 799 F. Supp. at 477; *Carlyle Piermont Corp. v. Fed. Paper Bd. Co.*, 742 F. Supp. 814, 821 (S.D.N.Y. 1990). *See also Tinney*, 933 F.2d at 1515 (acknowledging this rule, but declining to reach the argument because it was not preserved).

preliminary monitoring and evaluation of a release of hazardous substances."). Accordingly, the Government's NCP-compliance argument is misguided.

B. Atlantic Richfield Is Not Seeking To Recover Litigation Costs.

The United States argues that Atlantic Richfield's costs are not "necessary to the containment and cleanup of hazardous releases" because, according to the Government, they were incurred primarily for litigation purposes. (*See* U.S. Mot. at 11-15.) Atlantic Richfield disagrees, of course, but that should not matter for now. For the United States to prevail on this point, the Court would have to determine that *not even one dollar* of Atlantic Richfield's costs is recoverable based merely on the Government's say-so. The United States has given the Court no basis on which to make that determination. Atlantic Richfield has alleged facts plausibly showing that it incurred cognizable response costs directly related to the cleanup effort. Nothing more is required at this stage of the case.

The Government is demonstrably wrong anyway. For example, as described in the Complaint, Atlantic Richfield "engaged a consultant—URS Corporation—to conduct an analysis of current conditions at the Jackpile Site and the success of the cleanup work performed by the Laguna and Laguna Construction under government oversight." (Compl. ¶ 161.) "Atlantic Richfield also submitted comments on the Hazard Ranking System Documentation Record after EPA proposed listing the Jackpile Site on the NPL on March 15, 2012. This work was used to advance the NPL listing and planning the overall cleanup at the Jackpile Site." (*Id.* ¶ 162.) And Atlantic Richfield incurred costs responding to EPA's CERCLA § 104(e) information request, which involved the collection, review, and production of 43,000 historical documents. (*Id.* ¶ 160.) As EPA explained in its request, this information was needed to "aid the EPA in its

investigation of the release or threat of release of certain hazardous substances, pollutants or contaminants at this Site." (May 26, 2010 Letter from EPA to Atlantic Richfield, Attach. 4 to Lucari Decl., at 1.) The Government cannot claim that these costs were incurred solely for litigation purposes.

The investigation and evaluation activities conducted by Atlantic Richfield's technical consultants also provided information relevant to the identification of PRPs for the Jackpile Site. (Compl. ¶¶ 161 and 163.) The Supreme Court has held that "work performed in identifying other PRPs" is a type of investigation that "is closely tied to the actual cleanup [and] may constitute a necessary cost of response." *Key Tronic*, 511 U.S. at 820. The rationale for allowing these costs is that "such identification increases the probability of an effective cleanup, significantly benefits the entire cleanup effort, and serves a statutory purpose apart from the reallocation of costs." *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 571 (10th Cir. 1996).

The United States tries to dismiss Atlantic Richfield's costs of identifying PRPs by arguing that the Defendants' involvement at the site was known before Atlantic Richfield conducted its investigation. (*See* U.S. Mot. at 14-15.) But the Government's correspondence with Atlantic Richfield shows that the Government did *not* believe that the Pueblo, the Laguna Construction Company ("LCC"), or the Department of the Interior ("DOI") were PRPs. (*See* August 29, 2014 Letter from EPA to Atlantic Richfield, Attach. 5 to Lucari Decl., at 1.) In fact, the EPA invited Atlantic Richfield to investigate and present evidence to the contrary. (*Id.* ("Although DOI and LCC oversaw the reclamation activities, the EPA *has no evidence* to indicate that DOI or LCC would fall within any of the liability categories under CERCLA. *If you have any analyses that would indicate otherwise, we will re-evaluate our current position.*")

(emphasis added).) Atlantic Richfield performed a PRP investigation and provided that information to EPA.[9]

Atlantic Richfield was not required to specifically describe each and every response cost it incurred in its Complaint, nor is it required to do so here. That said, the activities discussed above do not represent the totality of the recoverable costs incurred by Atlantic Richfield to date. For example, Atlantic Richfield also commissioned a Conceptual Site Model ("CSM") from URS, the purpose of which is described in the document as follows:

> ***1.1 Purpose and Scope***
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> The purpose of the CSM is to integrate the existing hydrologic and geochemical data for the Site to fully understand site conditions as it pertains to contaminant impact to environmental media and potential human health and environmental receptors. The CSM will also identify data gaps necessary for complete characterization of the contamination at the Site. The CSM is intended to be a dynamic document that should be updated as pertinent site information and data is obtained.

Atlantic Richfield hired another technical consultant—Anderson Engineering—to perform a comprehensive analysis of historical aerial photographs and satellite imagery in order to pinpoint the locations of various waste repositories at the Jackpile Site. Neither of these projects was commenced for litigation purposes, and neither consultant was engaged by Atlantic Richfield's legal counsel. These are just two examples of the types of costs that Atlantic Richfield has incurred to further the overall cleanup effort at the site. And Atlantic Richfield continues to

[9] That EPA chose not to pursue these parties for political or other reasons is irrelevant. *See Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 550 (6th Cir. 2001) ("*Key Tronic Corp.* expressly approves of attorney fees in connection with identifying potentially responsible parties, and we are unpersuaded by [defendant's] assertion that an attorney seeking to identify such parties must actually identify those who will ultimately be responsible for payment.").

incur recoverable response costs as it continues its aerial photogrammetry analysis and other investigations. The facts relating to these costs can and should be developed in discovery.[10]

C. Whether Atlantic Richfield's Response Costs Are Necessary And Consistent With The NCP Cannot Be Decided On The Pleadings.

Even if they had merit, the Government's arguments are inappropriate for resolution under Rule 12(b)(6). Tellingly, *not one* of the cases cited by the United States involves a CERCLA claim being dismissed under Rule 12 because the alleged response costs were not necessary or consistent with the NCP.[11] There is a good reason for this lack of authority—these issues are too fact-dependent to be decided on the pleadings.

CERCLA claims do not have to be pleaded with any greater particularity than other federal claims. *See Warwick Admin. Grp. v. Avon Prods., Inc.*, 820 F. Supp. 116, 121 (S.D.N.Y. 1993) ("[W]e hold that a heightened pleading standard does not apply to CERCLA cases."). Thus, Atlantic Richfield is not required to prove at this stage that it properly incurred cognizable response costs under CERCLA or that it will incur such costs in the future. These factual questions "should not be resolved in the context of a Rule 12(b)(6) motion." *Norwest Fin.*

[10] Atlantic Richfield's preliminary investigations may have uncovered information relevant to this lawsuit, but that does not convert those costs into nonrecoverable litigation expenses. *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 937 (8th Cir. 1995) (holding that costs for PRP investigation were recoverable even though it was "fortuitous for Control Data that it happened on to the [] defendants' contamination"); *In re Combustion, Inc.*, 968 F. Supp. 1112, 1114 (W.D. La. 1996) (*Key Tronic* allows recovery of "fees incurred in connection with a PRP search … even though the search also benefited the third-party plaintiffs' ability to initiate and maintain a third-party action by identifying third-party defendants.").

[11] This includes *Calmat Company v. San Gabriel Valley Gun Club*, 809 F. Supp. 2d 1218 (C.D. Cal. 2011), which the United States incorrectly describes as "granting a motion to dismiss CERCLA claims." (U.S. Mot. at 13.) *Calmat* involved a motion for summary judgment—which the court emphasized in its holding. 809 F. Supp. 2d at 1222 ("Here, at the summary judgment stage, Vulcan has had the opportunity to present evidence ….").

Leasing, Inc. v. Morgan Whitney, Inc., 787 F. Supp. 895, 901 (D. Minn. 1992). As one district court in this circuit explained:

> While [the plaintiff] will bear the ultimate burden of showing 'some nexus between the alleged response cost and an actual effort to respond to the environmental contamination,' it is sufficient at this stage of the litigation that [the plaintiff] has pleaded a recoverable cost. Although [the defendant] argues [the plaintiff] incurred the costs only as a response to the litigation—costs that are not recoverable under CERCLA—this is a factual argument that should not be resolved in the context of a Rule 12(b)(6) motion.

Bd. of Cnty. Comm'rs of Cnty. of La Plata, Colo. v. Brown Grp. Retail, Inc., No. CIV. 08-CV00855LTB, 2009 WL 1108463, at *4 (D. Colo. Apr. 24, 2009) (citations omitted).[12] Here, too, the United States' fact-based arguments cannot be resolved on a motion to dismiss.

If, however, the Court determines that Atlantic Richfield should more specifically identify the CERCLA response costs it has incurred and will incur in the future, then Atlantic Richfield requests leave under Rule 15(a)(2) to amend its Complaint to add those specific allegations. Such leave should be freely granted. Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

II. ATLANTIC RICHFIELD STATES CLAIMS FOR CONTRIBUTION UNDER CERCLA § 113(f).

All of the response costs at issue in this case relate to the environmental cleanup of the Jackpile Site. Once the CERCLA liability of the respective parties is established, the Court will equitably allocate these costs among the liable parties. *See* 42 U.S.C. § 9613(f). Because these

[12] *See also Tanglewood*, 849 F.2d at 1574-75 ("The issue of [NCP] consistency cannot be resolved on the pleadings alone, but must await development of relevant evidence."); *Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1306, 1314 (D. Kan. 2007) (denying United States' motion to dismiss because the court could not determine the plaintiff's "ability to recover costs related to its PRP search in the absence of evidence concerning the timing, nature and extent of that search.").

costs were incurred by different parties, in different ways, and at different times, Atlantic Richfield has asserted both cost recovery claims under § 107(a) and contribution claims under § 113(f). As explained below, Atlantic Richfield has adequately pleaded CERCLA contribution claims against the United States under both § 113(f)(1) and § 113(f)(3)(B).

A. Atlantic Richfield's CERCLA § 113(f)(1) Claim Should Not Be Dismissed Because The United States Will File A § 107 Counterclaim In This Case.

Atlantic Richfield generally agrees with the Government that CERCLA claims for voluntarily incurred cleanup costs must be brought under § 107(a), and that CERCLA contribution claims must be brought under § 113(f). *See United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007). (U.S. Mot. at 3-4.) Atlantic Richfield likewise agrees that a CERCLA § 113(f)(1) contribution claim may only be brought "during or following any civil action" under §§ 106 or 107 of CERCLA. 42 U.S.C. § 9613(f)(1). (U.S. Mot. at 16-17.) Where multiple PRPs have incurred cleanup costs at the same site, the parties must assert reciprocal §§ 107(a) and 113(f)(1) claims to ensure they can recover their own costs, insulate themselves from joint and several liability for costs incurred by others, and trigger "the equitable apportionment of costs among the liable parties." *Atl. Research*, 551 U.S. at 140. Because the United States has not yet filed a responsive pleading, it has not yet asserted a § 107(a) counterclaim. But it will do so, and it will do so "during" this action. 42 U.S.C. § 9613(f)(1). Thus, Atlantic Richfield's § 113(f)(1) claim is properly asserted, and there is no point in dismissing it.

Atlantic Richfield seeks to recover the costs it has incurred through its § 107(a) claims. *See supra*, Part I. To protect itself from joint and several liability for costs incurred by Atlantic Richfield, the United States must file a § 113(f)(1) counterclaim for contribution. *See Atl.*

Research, 551 U.S. at 140 ("[A] defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim."). However, to recover the costs *it* has incurred, the United States must also file a § 107(a) counterclaim. *See id.* at 139 (CERCLA "§ 107(a) permits a PRP to recover only the costs it has 'incurred' in cleaning up a site."); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160 (2004) ("[T]he Government may recover its response costs under § 107, the 'cost recovery' section of CERCLA." (citations omitted)). It is no secret that the Government will assert both of these counterclaims when it files a responsive pleading—it is required to plead in this fashion after the Supreme Court redefined the CERCLA framework in *Aviall* and *Atlantic Research*. Moreover, the United States has already indicated that it will be filing a § 107(a) cost recovery claim. (*See* May 12, 2014 Special Notice Letter, Attach. 6 to Lucari Decl. (informing Atlantic Richfield that EPA considers Atlantic Richfield to be a PRP under § 107(a) of CERCLA, and that unless Atlantic Richfield agrees to reimburse the Government for response costs it has incurred, it may initiate "enforcement actions").) This has been the standard pleading practice of the Government in similar CERCLA cases, including cases in this district.[13]

The Government will not deny that it intends to assert a § 107(a) counterclaim in this case. Instead, Atlantic Richfield anticipates it will argue that, because it has not *yet* asserted a § 107(a) counterclaim, Atlantic Richfield's § 113(f)(1) claim must be dismissed now. (*See* U.S. Mot. at 16 ("[T]he United States has not yet filed such an action ….").) But such a dismissal would serve no purpose and would waste the parties' and the Court's time for at least two

[13] *See, e.g.*, Answer and Countercls., *Gen. Elec. v. United States*, No. 10-cv-00404 (D.N.M. Apr. 25, 2011), ECF No. 35, at 27; U.S.' Answer and Countercls. Against Pl., *El Paso Nat. Gas Co. v. United States*, No. 14-cv-08165 (D. Ariz. Jan. 2, 2015), ECF No. 23, at 32.

reasons. First, if the Court were to dismiss Atlantic Richfield's § 113(f)(1) claim now, Atlantic Richfield would merely have to reassert it as soon as the Government files a responsive pleading. Second, although the Government devotes significant space to discussing the difference between § 107(a) and § 113(f) claims, in cases like this one, that difference is purely semantic. Once each party has asserted its respective § 107(a) and § 113(f) claims, all recoverable response costs will be subject to a common equitable allocation—no matter which party incurred those costs originally, and no matter which claim those costs relate to. *See Atl. Research*, 551 U.S. at 140 ("Resolution of a § 113(f) counterclaim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action.").

Accordingly, in the interests of efficiency and inevitability, the United States' motion to dismiss Atlantic Richfield's § 113(f)(1) claim should be denied. Alternatively, if the Court is inclined to grant the Government's motion, Atlantic Richfield requests leave to amend its complaint to reassert its § 113(f)(1) claim as soon as the Government pleads its § 107(a) counterclaim. *See* Fed. R. Civ. P. 15(a)(2).

B. Atlantic Richfield Asserts A Valid § 113(f)(3)(B) Contribution Claim.

Atlantic Richfield states a claim under CERCLA § 113(f)(3)(B) because it expressly resolved its liability to the United States in the Settlement Agreement and, given the unusual circumstances of this case, the statute of limitations for bringing a contribution claim under § 113(f)(3)(B) should be equitably tolled and the United States equitably estopped from asserting a statute of limitations defense.

1. Atlantic Richfield may assert a § 113(f)(3)(B) claim because it resolved some or all of its liability to the United States for a response action in the Settlement Agreement.

CERCLA § 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution " under this section. 42 U.S.C. § 9613(f)(3)(B). This broad provision applies to *any* administrative settlement, with *any* branch of the federal government or a state, resolving *any* amount of a party's liability for the costs of a response action. *See Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013). Thus, an administrative settlement need not resolve a party's CERCLA liability in order to give rise to a § 113(f)(3)(B) claim. *Id.* ("§ 113(f)(3)(B) does not require that a party have settled its liability under CERCLA in particular to be eligible for contribution.").[14]

The United States has repeatedly endorsed this position. For example, in an amicus brief it filed in the *Trinity* case, the Government argued that "[t]he district court erred by reading into this provision a requirement that a qualifying § 113(f)(3)(B) settlement specifically address Trinity's CERCLA liability to the State." Br. of United States as Amicus Curiae Supp. Appellant, *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, No. 12-2059, 2012 WL 5817286, at *15 (3d Cir. Nov. 13, 2012). The Government went on to explain that "[t]his requirement is found nowhere in § 113(f)(3)(B), which does not mention CERCLA at all and requires only that

[14] *See also Exxon Mobil Corp. v. United States*, No. CIV.A. H-10-2386, 2015 WL 3513949, at *20 (S.D. Tex. June 4, 2015) ("Congress did not limit § 113(f)(3)(B) to administrative settlements specifically resolving CERCLA liability."); *ASARCO LLC v. Atl. Richfield Co.*, 73 F. Supp. 3d 1285, 1292 (D. Mont. 2014) ("If Congress intended to narrow the scope of § 113(f)(3)(B) to cover only settlements that expressly resolve CERCLA liability, it could have done so ….").

the settlement resolve liability 'for some or all of a response action or for some or all of the costs of such action.'" *Id.* (quoting 42 U.S.C. § 9613(f)(3)(B)).[15] Accordingly, so long as the Settlement Agreement resolved any portion of Atlantic Richfield's liability to the United States for any cleanup activity that qualifies as a "response action" under CERCLA, Atlantic Richfield is entitled to pursue a § 113(f)(3)(B) claim.

a) The Settlement Agreement is an "administrative settlement" with the United States.

The Government contends that the Settlement Agreement does not qualify as an administrative settlement because the Secretary of the Interior "had not yet been delegated settlement authority under CERCLA" when he signed the agreement. (U.S. Mot. at 19-20.) But this argument is irrelevant because § 113(f)(3)(B) does not require resolution of CERCLA liability. The Settlement Agreement comfortably fits within the framework of § 113(f)(3)(B). First, the Agreement was signed by DOI—an agency of the United States Government—and "CERCLA does not differentiate between the various agencies of the United States." *City of Colton v. Am. Promotional Events, Inc.*, No. ED CV 09-1864 PSG, 2010 U.S. Dist. LEXIS 109354, at *19 (C.D. Cal. Aug. 10, 2010); *see also* 42 U.S.C. § 9601(27) (defining "United States"). Second, at a minimum, the Settlement Agreement resolved Atlantic Richfield's

[15] The only jurisdiction to have limited the application of § 113(f)(3)(B) to settlements of CERCLA liability is the Second Circuit. *See Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 95 (2d Cir. 2005); *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85 (2d Cir. 2009). However, even that court has retreated from this position. In *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, the court referred to the "*Consolidated Edison/W.R. Grace* problem," and quoted a United States amicus brief for the principle that "[t]he settlement of federal and state law claims other than those provided by CERCLA fits within section 113(f)(3)(B) as long as the settlement involves a cleanup activity that qualifies as a 'response action' within the meaning of CERCLA § 101(25) …." 596 F.3d 112, 126 n.15 (2d Cir. 2010). The court acknowledged that "there is a great deal of force to this argument given the language of the statute." *Id.*

liability for the Jackpile mine reclamation project—unquestionably a project that entailed multiple activities within the definition of "response action" under the "wide umbrella created by §§ 101(23)-(25)." *ASARCO*, 2014 WL 6736924 at *6. The statutory definition of "response" means "remove, removal, remedy, and remedial action," and includes "the cleanup or removal of released hazardous substances from the environment," as well as "those actions consistent with [a] permanent remedy …." 42 U.S.C. § 9601(23)-(25). There can be no dispute that the reclamation work qualifies under this broad standard. (*See* EPA Site Report at 2-3.)

Because an administrative settlement does not have to resolve CERCLA liability in order to satisfy the requirements of § 113(f)(3)(B), it does not matter whether the Secretary of the Interior had been delegated CERCLA settlement authority. That Atlantic Richfield "resolved its liability to the United States … for some or all of a response action" through the Settlement Agreement is sufficient.

b) The Settlement Agreement is a CERCLA settlement.

Although not a requirement of § 113(f)(3)(B), the Settlement Agreement resolved CERCLA liability in any event. The United States does not argue that the releases and covenants that the Secretary of the Interior granted to Atlantic Richfield are insufficient to cover CERCLA. Nor could it, as any natural reading of an agreement not "to obligate [Atlantic Richfield] to engage in cleanup, reclamation, or other environmental remedial action" would include CERCLA liability. Instead, the Government argues that the Secretary of the Interior

lacked the authority to settle CERCLA liability—*until six weeks after the agreement was executed*.[16] (U.S. Mot. at 19.) This argument is meritless.

The purported authority the Government relies on—Executive Order 12316, 46 Fed. Reg. 42,237 (Aug. 14, 1981)—addresses neither CERCLA settlement authority nor administrative settlements generally. (*See id*.) Further, as the United States acknowledges, Congress amended CERCLA prior to the execution of the Settlement Agreement, adding among other things § 113 and § 122, "which expanded the President's settlement authority." (*Id*.) The President's new settlement authority under § 122 was not expressly delegated to a single agency or department, and the Government fails to explain why the Secretary of the Interior—the head of an executive department, a Cabinet member, and a Federal trustee for natural resources—would lack the authority to enter into a CERCLA settlement on behalf of the United States. The Government's delegation argument is especially unpersuasive where the settlement relates to the reclamation of Indian land, a subject indisputably within the Secretary's purview, and because the newly added § 113(f)(3)(B) refers to settlements with the "United States" generally, rather than with "the President."

[16] The United States also appears to argue (in one sentence) that it was not a party to the Settlement Agreement. (U.S. Mot. at 18.) This hardly merits a response. The United States made independent promises under the agreement and signed it. (*See* Settlement Agreement at 6; *see also* EPA Site Report at 2 ("The Pueblo of Laguna, the Bureau of Land Management, the Bureau of Indian Affairs and Anaconda/ARCO entered into an agreement for site cleanup in 1986.").)

c) If the Settlement Agreement does not qualify under § 113(f)(3)(B), Atlantic Richfield can recover these costs under § 107(a).

Finally, even if the Settlement Agreement did not qualify as an administrative settlement under § 113(f)(3)(B), Atlantic Richfield could simply recover the costs it incurred under the agreement through its § 107 claims.

As one court explained, if an agreement qualifies as an administrative settlement under § 113(f)(3)(B), the plaintiff "may not bring a § 107(a) claim for the cleanup costs it incurred in complying with [that agreement]." *Exxon Mobil Corp.*, 2015 WL 3513949, at *19. However, if the plaintiff entered a non-qualifying agreement "it could seek its cleanup costs under § 107(a)." *Id.*; *see also W.R. Grace & Co.*, 559 F.3d at 93-94 (response costs incurred pursuant to a state consent order that did not satisfy § 113(f)(3)(B) recoverable under § 107(a)). This result makes perfect sense. Barring PRPs who incur cleanup costs under a non-qualifying settlement from asserting any CERCLA claim would "penalize cooperative cleanup efforts" and be inconsistent with "the goal of CERCLA … 'to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.'" *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 226 (3d Cir. 2010) (quoting *Key Tronic Corp.*, 511 U.S. at 819 n.13). Accordingly, the United States has advocated for this rule on multiple occasions.[17] Thus, even if the United States were to succeed on its § 113(f)(3)(B) arguments, Atlantic Richfield would be able to recover its settlement costs, which are "response costs," through its § 107(a) claims.

[17] *See, e.g.*, Br. of United States as Amicus Curiae Supp. Appellant, *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, No. 12-2059, 2012 WL 5817286, at *27 (3d Cir. Nov. 13, 2012) ("If … Trinity does not have a § 113(f)(3)(B) claim, then Trinity may pursue its response costs pursuant to § 107(a)."); Br. of United States as Amicus Curiae Supp. Appellant, *Niagara Mohawk Power Co. v. Chevron U.S.A., Inc.*, No. US2C2008-3843-13, 2008 WL 10610074, at *24 (2d Cir. Dec. 29, 2008) ("If this Court rules that Niagara lacks a section 113 claim, then the Court should also rule that Niagara does have a right to bring an action under section 107(a)….").

2. Atlantic Richfield's § 113(f)(3)(B) claim is not barred by the statute of limitations.

The United States next argues that, even if the Settlement Agreement is a valid and enforceable administrative settlement, Atlantic Richfield's contribution claim nonetheless should be dismissed because the agreement was executed more than three years ago. (*See* U.S. Mot. at 20-23.) Atlantic Richfield agrees that either a three- or six-year statute of limitations applies to its CERCLA claims. *See* 42 U.S.C. § 9613(g)(2). However, equitable exceptions—including equitable tolling and equitable estoppel—apply to CERCLA claims, and they are particularly appropriate here under the unique facts of this case.

The doctrine of equitable tolling "permits a plaintiff to sue after the statutory time period has expired if he or she has been prevented from doing so due to inequitable circumstances." 54 C.J.S. Limitations of Actions § 134; *see also* 51 Am. Jur. 2d Limitation of Actions § 153 (Equitable tolling "permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed."). "The decision whether to equitably toll the limitations period rests within the sound discretion of the district court." *Bennett v. Quark, Inc.*, 258 F.3d 1220, 1226 (10th Cir. 2001).

Equitable estoppel is a related, but distinct, doctrine. "'Equitable estoppel' precludes a defendant, because of his own inequitable conduct … from invoking the statute of limitations. The doctrine of 'equitable tolling,' on the other hand, applies most commonly when the plaintiff despite all due diligence … is unable to obtain vital information bearing on the existence of his claim." *Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 278-79 (D.C. Cir. 2003) (citations omitted). Courts flexibly apply these doctrines because their purpose is "the circumvention of

unbending rules when strict fidelity to them would work an injustice." *Ortega Candelaria v. Orthobiologics LLC*, 661 F.3d 675, 679 (1st Cir. 2011).

Neither doctrine requires intentional deception. For equitable tolling, a plaintiff may claim to have been "actively misled," but it is enough that "a plaintiff has been lulled into inaction by a defendant," or "has in some extraordinary way been prevented from asserting his or her rights." *United States v. Clymore*, 245 F.3d 1195, 1199 (10th Cir. 2001); *see also Mosley v. Pena*, 100 F.3d 1515, 1518 (10th Cir. 1996) (similar). "Such 'extraordinary event[s]' include conduct by a defendant that caused the plaintiff to refrain from filing an action during the applicable period." *Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007). Similarly, a litigant need not "prove intent to deceive in order to claim equitable estoppel." *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1429 (10th Cir. 1996). All that is required is proof that the defendant "dissuaded [plaintiff] from taking legal action." *Id.*; *accord Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1071 (7th Cir. 1978) ("[A]ll that is necessary for invocation of the doctrine of equitable estoppel is that the plaintiff reasonably rely on the defendant's conduct or representations in forbearing suit.").

Equitable exceptions to statutes of limitation apply to "suits against the United States," *Million v. Frank*, 47 F.3d 385, 389 (10th Cir. 1995), and these equitable doctrines are "read into every federal statute of limitation." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *see also McQuiggin v. Perkins*, 133 S. Ct. 1924, 1941 (2013). Accordingly, courts have uniformly held that equitable tolling applies to CERCLA claims. *See, e.g., U.S. v. Halliburton Energy Servs., Inc.*, No. H-07-3795, 2009 WL 3260540, at *8 (S.D. Tex. Oct. 6, 2009); *see also Lyondell Chem. Co. v. Albemarle Corp.*, No. 1:01-CV-890, 2005 U.S. Dist. LEXIS 47457, at *35 (E.D. Tex.

Mar. 11, 2005) ("Given the nature of CERCLA cases in general, and this case in particular, equitable tolling is particularly appropriate.").

Here, barring Atlantic Richfield's contribution claims would work a significant injustice and would not further the purposes of CERCLA in promoting prompt and cooperative responses. The United States "actively misled" or, at a minimum, "lulled Atlantic Richfield into inaction" through its releases and covenants that absolved Atlantic Richfield from future liability for the cleanup of the Jackpile Site, and its many years of inactivity that followed. Specifically, the Settlement Agreement provides that, in exchange for the payment of $43.6 million, the United States would:

> refrain from asserting against Anaconda … any claims or actions under the leases, or for damage to The Pueblo's natural resources, or from otherwise attempting to obligate Anaconda to engage in cleanup, reclamation or other environmental remedial action at the Mine.[18]

(Settlement Agreement at 6.)[19]

Atlantic Richfield agreed to pay its share of the remediation costs up front based in part on the United States' representations that it would not require Atlantic Richfield to conduct or fund additional cleanup at the site. Anaconda (and later Atlantic Richfield) had no way of

[18] Atlantic Richfield is Anaconda's successor (Compl. ¶ 23), and the Settlement Agreement expressly provides that its terms "shall enure to the benefit of, and bind all successors and assigns of the parties [t]hereto." (Settlement Agreement at 5, ¶ 13.)

[19] Atlantic Richfield also was "actively misled" and "lulled into inaction" by the Pueblo and LCC. The Pueblo agreed to oversee the Jackpile reclamation project and to assume all of Atlantic Richfield's liabilities in regard to "the cleanup, reclamation or other environmental remedial action at the Mine …." (Settlement Agreement at 2 ¶ 3(a)(i).) LCC performed extensive earth-moving activities at the site on behalf of the Pueblo, but failed to implement the ROD and mitigate the contamination, instead making the situation worse. (*See* Compl. ¶¶ 118-19, 129-34.) Instead of assuming responsibility for the CERCLA cleanup of the site, the Pueblo encouraged EPA to pursue Atlantic Richfield to perform the "do-over," second cleanup. (*See id*. ¶¶ 11, 157-59.)

knowing or reason to suspect that the United States would not honor its commitments, and thus reasonably believed that a contribution action was not necessary during the statutory period. Indeed, there was no reason to bring suit until the United States began demanding that Atlantic Richfield again pay for cleanup of the Jackpile Site. It was not until 2014, when EPA informed Atlantic Richfield that it must fund an RI/FS—and the Pueblo refused to assume responsibility for the CERCLA cleanup of the site—that it became clear Atlantic Richfield had contribution claims against Defendants.[20] Since that time, Atlantic Richfield has diligently pursued its rights—investigating site conditions, communicating with EPA, and ultimately filing this action in January 2015.

One of the central purposes of statutes of limitations is to provide finality. Here, however, stringent application of the statute of limitations would do the opposite: subject Atlantic Richfield to new liability for past conduct that it reasonably believed was settled many years ago. It is irrelevant whether the United States intended to deceive Atlantic Richfield when it signed the Settlement Agreement. Atlantic Richfield reasonably relied on those promises and, as a result, decided that a contribution claim was not necessary. Now, after the statutory period has run, the Government has changed its position and repudiated its commitments. This is precisely the type of extraordinary situation where applying the statute of limitations would create an inequitable result. Accordingly, the statute of limitations on Atlantic Richfield's

[20] Even when EPA served its CERCLA § 104(e) requests on Atlantic Richfield in May 2010, there was no indication that the United States intended to violate its releases and covenants by seeking additional funds from Atlantic Richfield. (*See* Attach. 4 to Lucari Decl. at 1 ("This information request is not a determination that your company is responsible or potentially responsible for contamination that occurred at the Site. The EPA is sending this letter as part of its investigation of the Site and does not expect your company to pay for or perform any site-related activities at this time.").)

contribution claim should be equitably tolled, or in the alternative, the United States should be equitably estopped from asserting a statute of limitations defense.

III. ATLANTIC RICHFIELD IS ENTITLED TO PURSUE DECLARATORY RELIEF UNDER CERCLA § 113(g)(2).

Finally, the United States argues that Atlantic Richfield's claim for declaratory relief must be dismissed because "the right to pursue a declaratory judgment under section 113(g)(2) depends on establishing the existence of a valid underlying cause of action under CERCLA." (U.S. Mot. at 24.)[21] The Court need not reach this argument if it determines that Atlantic Richfield has stated a claim under § 107(a), § 113(f)(1), or § 113(f)(3)(B). In that event, Atlantic Richfield would have a "valid underlying cause of action" and there would be no dispute that it is entitled to request declaratory relief as well.

If the Court does reach this argument, however, it should reject it. The Tenth Circuit allows claims for declaratory relief for future costs even in the absence of recoverable past costs. In *Tinney*, the court explained:

> In holding that consistency with the NCP is an element of a private cost recovery claim, we recognize that there are some circumstances in which a CERCLA plaintiff may be entitled to a declaration of the defendant's liability even though the plaintiff has not yet established that all of its claimed response costs were incurred consistent with the NCP. *These include cases … in which the plaintiff seeks only a declaration of the defendant's liability for future costs incurred consistent with the NCP*.

933 F.2d at 1513 (emphasis added).

The United States attempts to explain away *Tinney* as "merely … dicta." (U.S. Mot. at 24 n.7.) Dicta are "statements and comments in an opinion concerning some rule of law or legal

[21] Atlantic Richfield does not contend that the Declaratory Judgment Act, 28 U.S.C. § 2201, provides an independent cause of action.

proposition not necessarily involved nor essential to determination of the case in hand." *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995). But in *Tinney*, the court prefaced this language by saying it was part of its "holding." 933 F.2d at 1513. Moreover, this statement was essential to the court's decision because it limited the scope of its holding—disallowing the Tinney plaintiff's declaratory claim—to situations where no future costs would be incurred. *See United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) ("Courts often limit the scope of their holdings, and such limitations are integral to those holdings."). This rule was "essential to the determination of the case at hand," and therefore part of the court's holding. *See Rohrbaugh*, 1130 F.3d at 1184.

The Government also attempts to limit *Tinney*'s holding to situations where the claimant has established that some, but not all, of its past costs are recoverable. (U.S. Mot. at 24 n.7.) If that were the rule in *Tinney*, the court's statements would have been superfluous because there is no debate that even one dollar of recoverable past costs entitles a CERCLA claimant to pursue declaratory relief for future costs. *See Colton*, 614 F.3d at 1006-07 (discussing the circuits' "divergent approaches" to whether a CERCLA plaintiff can sue for a declaration of future costs without recoverable past costs). Moreover, this argument contradicts *Tinney*'s express holding that a plaintiff may be entitled to declaratory relief when it "seeks *only* a declaration of the defendant's liability for future costs," in other words, without *any* claim for past costs. 933 F.2d at 1513 (emphasis added).

Because the Tenth Circuit has held a CERCLA plaintiff who has not incurred any past costs still may pursue declaratory relief for allocation of future costs, Atlantic Richfield may pursue such a claim here. Thus, even if the Court determines that Atlantic Richfield has no valid

claim for past costs under § 107(a) or § 113(f), this lawsuit still should proceed for a determination of the parties' respective shares of responsibility for the future costs of cleaning up the Jackpile Site.

CONCLUSION

Based on the foregoing reasons and authorities, the Court should deny the United States' Motion to Dismiss in its entirety, and grant Atlantic Richfield such other and further relief as the Court deems just and proper.

Respectfully submitted this 11th day of August, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 11, 2015, the foregoing **ATLANTIC RICHFIELD COMPANY'S RESPONSE IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS** was served via the Court's ECF system upon:

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