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 THE PUEBLO OF LAGUNA'S MOTION TO DISMISS

Plaintiff Atlantic Richfield Company hereby submits its response in opposition to Defendant the Pueblo of Laguna's (the "Pueblo") Motion to Dismiss.

INTRODUCTION

The Pueblo's Motion to Dismiss is premised on two fundamental errors that permeate every argument it makes: (1) that its immunity waiver is limited to indemnity claims and to a ten-year period; and (2) that one cannot assume CERCLA liability by contract. The first is a misinterpretation of the Agreement to Terminate Leases ("Settlement Agreement").[1] The second is simply wrong as a matter of law.

[1] Attached as Ex. A to Atlantic Richfield's Compl. [Doc. No. 1-2].

The Pueblo "expressly waive[d] its sovereign immunity *as to any claims or actions* brought by [Atlantic Richfield] under this Agreement."[2] And the Pueblo did so for the singular purpose of providing Atlantic Richfield "an effective means of securing judicial or other relief in the event of a breach by The Pueblo of its obligations under this Agreement."[3] One of the Pueblo's obligations under the Settlement Agreement was to "assume *full and complete responsibility and liability under all applicable laws*" for "the cleanup, reclamation or other environmental remedial action at the Mine."[4] That obligation includes liability for the CERCLA cleanup that the United States is currently trying to force Atlantic Richfield to conduct and finance by itself. To enforce the Settlement Agreement, Atlantic Richfield is entitled to sue the Pueblo for breach of contract and under CERCLA. Atlantic Richfield has pleaded sufficient facts to support these claims. Accordingly, the Pueblo's Motion should be denied.

FACTS

The Jackpile-Paguate Uranium Mine Site ("Jackpile Site") lies on the Pueblo's reservation. (Compl. ¶ 2.) From 1951 through 1982, Atlantic Richfield prospected and then mined uranium at the Jackpile Site under a series of prospecting and lease agreements with the Pueblo. (*Id.* ¶¶ 58-64, 71.) These agreements required Atlantic Richfield to pay the Pueblo royalties. The royalties totaled many millions of dollars—between $5 and $10 million every year from 1976 to 1980 alone. (*Id.* ¶ 65.)

As the close of mining operations approached, Atlantic Richfield developed a series of comprehensive remediation plans that it was prepared to implement at the Jackpile Site. (*Id.*

[2] Settlement Agreement at 4, ¶ 5(a) (emphasis added).

[3] *Id.*

[4] *Id.* at 2, ¶ 3(a)(i) (emphasis added).

¶ 72.) The Pueblo decided, however, that it would prefer to assume responsibility for reclaiming the Jackpile Site itself using funds provided by Atlantic Richfield. (*Id.* ¶ 73.) Over a period of years, Atlantic Richfield negotiated with the Pueblo and the United States to determine what remedial measures should be taken and the cost of performing that work. (*Id.* ¶ 75.) The negotiations resulted in the Settlement Agreement, under which Atlantic Richfield paid the Pueblo $43.6 million to fund the Jackpile Site's remediation—almost $9 million more than the Government's estimate of what the cleanup should cost. (*Id.* ¶¶ 85-86.)

In consideration of Atlantic Richfield's payment, the Pueblo made several commitments in the Settlement Agreement. First, the Pueblo agreed to waive its sovereign immunity:

> 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 … 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.[5]

(Settlement Agreement at 4, ¶ 5(a).)

Second, the Pueblo agreed, "with the approval of the Secretary of the Interior," to "[a]ssume full and complete responsibility and liability under all applicable laws … 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

[5] The Settlement Agreement here refers to "Anaconda." 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.)

programs." (*Id.* at 2, ¶ 3(a).) Atlantic Richfield contends that the Pueblo has breached this provision of the Agreement.

Third, and separately, the Pueblo agreed to "[i]ndemnify and hold Anaconda harmless from, and reimburse Anaconda … for any amounts paid or expenses incurred … 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 … any liability or obligation which exists or arises under [CERCLA]." (*Id.* at 3, ¶ 3(b).) Atlantic Richfield does not assert any claims under this provision of the Agreement.

The same year the parties entered the Settlement Agreement, the United States completed an Environmental Impact Statement and Record of Decision ("ROD") for the Jackpile Site. (Compl. ¶¶ 90-92.) The ROD established the requirements for cleaning up the Jackpile Site. (*Id.* ¶ 92.) Then, in 1987, the Pueblo and the United States entered a "Cooperative Agreement … to perform the management, coordination and administration" of the environmental remediation work contemplated for the Jackpile Site. (*Id.* ¶ 95.)

But the Pueblo failed to remediate the Jackpile Site. The Pueblo deviated from the ROD in numerous ways, resulting in a cleanup attempt that the Pueblo's own consultant determined to be deficient. (*Id.* ¶¶ 130-42.) Then, rather than fulfilling its obligation to remediate the Jackpile Site, the Pueblo began encouraging the United States Environmental Protection Agency ("EPA") to force Atlantic Richfield to shoulder the Pueblo's remediation obligations. (*Id.* ¶ 157.) This strategy has worked for the Pueblo so far, leading EPA to demand that Atlantic Richfield conduct a remedial investigation and feasibility study for the Jackpile Site. (*Id.* ¶ 163.) Atlantic

Richfield has been harmed as a result, and likely will continue to be harmed if the relief it seeks is not granted. (*Id.* ¶¶ 163, 220-23, 230.)

LEGAL STANDARDS

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 & Cty. 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). Under this standard, granting a motion to dismiss remains "a harsh 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.

A Rule 12(b)(1) motion, by contrast, does not trigger a plausibility analysis. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1168 (10th Cir. 2012) ("[J]urisdiction is not defeated by the possibility that averments might fail to state a cause of action on which petitioners [can] actually recover." (alterations omitted)). Instead, the district court may determine jurisdictional facts, has "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing," and may refer to evidence outside the pleadings without converting the motion into one for summary judgment. *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010).

Federal law governs the Settlement Agreement's interpretation and enforcement. *See United States v. Seckinger*, 397 U.S. 203, 209-10 (1970); *Smith v. Cent. Ariz. Water*

Conservation Dist., 418 F.3d 1028, 1034 (9th Cir. 2005) ("Federal law governs the interpretation of contracts entered into pursuant to federal law and to which the government is a party.").

ARGUMENT

I. THE PUEBLO WAIVED SOVEREIGN IMMUNITY.

The Pueblo's waiver of sovereign immunity could not be more clear: "The Pueblo hereby expressly waives its sovereign immunity as to any claims or actions brought by Anaconda under this Agreement." (Settlement Agreement at 4, ¶ 5(a).) This provision surely satisfies the requirement that, "[t]o relinquish its immunity, a tribe's waiver must be clear." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, (2001).

Despite the Settlement Agreement's undeniable clarity, the Pueblo argues that its waiver of immunity was limited to claims brought within ten years after the Settlement Agreement's effective date. But the paragraph of the Settlement Agreement containing the immunity waiver states only that "the term of the *indemnification* agreement shall be for ten (10) years from the effective date of this Agreement." (Settlement Agreement at 4, ¶ 5(a) (emphasis added).) Atlantic Richfield asserts no indemnity claims in this case. Rather, Atlantic Richfield seeks to enforce the Pueblo's separate obligation to "[a]ssume full and complete responsibility and liability under all applicable laws … for: (i) the cleanup, reclamation or other environmental remedial action at the Mine." (*Id.* at 2, ¶ 3(a).)[6]

The Settlement Agreement imposes no time limit on the Pueblo's immunity waiver for claims enforcing the assumption of liability clause. The Settlement Agreement easily could have

[6] As explained in Sections II and III, *infra*, the Pueblo fails in its efforts to re-characterize Atlantic Richfield's CERCLA and contract claims as claims to enforce the Settlement Agreement's indemnity provision.

said that "the term of the Pueblo's waiver of immunity shall be for ten years." But it did not. Only the term of the indemnification agreement is limited to ten years. (*Id.* at 4, ¶ 5(a).) The Pueblo's unbounded agreement to assume environmental liability for the site is a separate and distinct obligation from its agreement to indemnify Atlantic Richfield. *See United States v. Sunoco, Inc.*, 637 F. Supp. 2d 282, 287-88 (E.D. Pa. 2009) ("An agreement to defend and hold harmless … has a legal meaning that is distinct from assumption of liability."); *Bouton v. Litton Indus., Inc*., 423 F.2d 643, 651 (3d Cir. 1970) ("[O]ne who assumes a liability, as distinguished from one who agrees to indemnify against it, takes the obligation of the transferor unto himself ...."). The time limit on indemnity claims therefore does not apply to claims based on the assumption of liability provision.

The only question, then, is whether Atlantic Richfield's claims are "brought … under this Agreement" for purposes of the immunity waiver. Atlantic Richfield's claims six through eight explicitly seek to enforce the Settlement Agreement's assumption of liability provision. (Compl. ¶¶ 205, 215, 225.) There is no question that these claims are brought under the Settlement Agreement.

So, too, Atlantic Richfield brings its CERCLA claims under the Settlement Agreement. The Settlement Agreement's assumption of liability provision is the means by which the Pueblo stepped into Atlantic Richfield's shoes, thereby taking on Atlantic Richfield's CERCLA liability. Put differently, Atlantic Richfield's CERCLA claims are but another method of enforcing the Pueblo's assumption of environmental liability for the Jackpile Site. The Settlement Agreement also underpins the Pueblo's CERCLA liability because the Agreement makes the Pueblo an "arranger" under CERCLA. 42 U.S.C. § 9607(a)(3) (including as a potentially responsible party

"any person who by contract, agreement, or otherwise arranged 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"). The Pueblo has failed to live up to its obligation to assume CERCLA liability for the site; Atlantic Richfield's CERCLA claims are "brought under" the Settlement Agreement for a "breach by The Pueblo of its obligations" to assume that liability. (Settlement Agreement at 4, ¶ 5(a).) The Pueblo thus cannot avoid the waiver of immunity it gave to Atlantic Richfield in the Settlement Agreement.

II. THE PUEBLO CONTRACTUALLY ASSUMED CERCLA LIABILITY IN THE SETTLEMENT AGREEMENT.

A. A Party May Assume CERCLA Liability By Contract.

Much of the Pueblo's Motion depends on the false premise that a party cannot assume CERCLA liability. The Pueblo contends that it would be a "legal impossibility" for it to "'stand' in the 'shoes'" of Atlantic Richfield because "a party cannot divest itself of CERCLA liability." (Pueblo Mot. at 26.) In so arguing, the Pueblo confuses its *assumption* of Atlantic Richfield's liability with Atlantic Richfield *eliminating* its own liability. While it is undisputed that a party cannot "divest itself" of its CERCLA liability, it does not follow that another party cannot assume CERCLA liability by contract. Rather, "CERCLA case law is clear that parties may assume liability through agreement …." *United States v. NCR Corp.*, 840 F. Supp. 2d 1093, 1097 (E.D. Wis. 2011); *see also Karras v. Teledyne Indus., Inc.*, 191 F. Supp. 2d 1162, 1169-70 (S.D. Cal. 2002) (CERCLA "does not foreclose entities from attaining PRP status by contract,"

which requires them to "stand in the shoes of PRPs because they have undertaken the liability for clean-up.").[7]

The Pueblo's error arises from an overbroad reading of CERCLA § 107(e)(1), which provides that a potentially responsible party ("PRP") may not divest itself of CERCLA liability by contract, while recognizing that PRPs may allocate liability amongst themselves through agreements to insure, hold harmless, or indemnify each other. 42 U.S.C. § 9607(e)(1); *see United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993) ("[A]lthough responsible parties may not altogether transfer their CERCLA liability, they have the right to obtain indemnification for that liability."); *Buffalo Color Corp. v. Alliedsignal, Inc.*, 139 F. Supp. 2d 409, 419 (W.D.N.Y. 2001) ("Section 107(e)(1) of CERCLA … allow[s] private parties to contract with each other concerning indemnification and contribution, with the caveat that, notwithstanding the terms of such contracts, all responsible parties remain fully liable to the government."). Section 107(e)(1) does not address assumption of liability agreements, and contrary to the Pueblo's repeated assertions, parties may assume direct CERCLA liability without running afoul of § 107(e)(1) so long as the original PRP remains liable to the Government under the statute.

For example, in *United States v. NCR Corp.*, the court rejected the exact argument the Pueblo asserts here. The court explained:

[7] Courts routinely enforce agreements between companies to contractually assume CERCLA liability through business transactions, independent of merger or other successor liability. *See, e.g., PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 176 (4th Cir. 2013); *White Consol. Indus., Inc. v. Westinghouse Elec. Corp.*, 179 F.3d 403, 409 (6th Cir. 1999); *Aluminum Co. of Am. v. Beazer E., Inc.*, 124 F.3d 551, 565 (3d Cir. 1997).

> [A]lthough § 107(e)(1) would preclude a party from *eliminating* liability through a liability transfer agreement, it does not preclude parties from *creating* additional liability…. CERCLA precludes efforts to divest liability…. But that is not the same as saying that CERCLA prohibits a non-liable party from entering an agreement to take on direct liability *in addition to* that of the already-liable party: the only condition CERCLA imposes is that the directly liable party must remain liable. It might be argued that such an agreement would have no purpose: if the seller cannot escape direct liability, then what is the point of "transferring" liability to the buyer if the seller still remains on the hook for that liability? It is true that the primary value in such an arrangement might manifest itself in the indemnification provision that makes the buyer compensate the seller for any liability, rather than the assumption of direct liability itself. But by making the buyer *itself* directly liable, the seller has obtained something of value: an additional defendant to help share the burden of defense. Where there was one defendant there are now two…. [N]ot only is an assumption agreement allowed by CERCLA (subject to the conditions noted above), such an agreement also makes commercial sense.

840 F. Supp. 2d at 1097 (emphasis in original).

Similarly, in *Caldwell Trucking PRP v. Rexon Technology Corp.*, the Third Circuit held that the defendant had contractually assumed the CERCLA liability of a third party, and was thus "directly liable" for the third party's environmental obligations. 421 F.3d 234, 241 (3d Cir. 2005). Like the Pueblo here, the defendant in *Caldwell Trucking* "insist[ed] that it agreed only to indemnify [the third party] rather than stand in its shoes and assume [its CERCLA] obligation[s]." *Id*. at 244. In rejecting this argument, the court noted the "expansive scope" of the assumption provision, and explained that such a provision is distinct from, and broader than, an agreement providing only for indemnification. *Id.* at 243; *see also Sunoco*, 637 F. Supp. 2d at 289 ("The agreement to defend and indemnify … is distinct from a situation in which Sunoco agreed to assume AR's liabilities as if it were AR."). Thus, while a potentially liable party "may not divest itself of liability for its pollution activity," an otherwise non-liable party may nonetheless contractually *assume* CERCLA liability. *Caldwell*, 421 F.3d at 242.

B. The Pueblo Assumed Atlantic Richfield's CERCLA Liability In The Settlement Agreement.

Here, as in *NCR* and *Caldwell Trucking*, the Pueblo contractually agreed to assume CERCLA liability. Specifically, the assumption of liability clause provides that:

> The Pueblo … will … [a]ssume full and complete responsibility and liability under all applicable laws … 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 ….

(Settlement Agreement at 2-3, ¶ 3(a).)

Despite the sweeping language of this provision, the Pueblo maintains that it does not encompass CERCLA liability. The tribe presents two primary arguments to support this position. First, the Pueblo notes that CERCLA is not expressly mentioned in Paragraph 3(a), and argues that "[b]y 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)." (Pueblo Mot. at 25; *see also id.* at 39 ("CERCLA is addressed in ¶ 3(b) but omitted from ¶ 3(a).") and 41 ("CERCLA is … conspicuously absent from ¶ 3(a) ….").) This argument is unpersuasive and not really even understandable. Paragraph 3(a) does not provide a list of laws from which CERCLA was "omitted" or "conspicuously absent." Rather, the provision simply and unambiguously states that the Pueblo's assumption of environmental liabilities applies to "all applicable laws." The Pueblo's attempt to read into this provision an exception for CERCLA is belied by the express wording of the agreement, basic principles of contract interpretation, and common sense.

Second, the Pueblo contends that Paragraph 3(a) was intended to *limit* its liability to the work described in the ROD for the Jackpile Site rather than to create liability for environmental cleanup generally. (*See* Pueblo Mot. at 25, 38, and 41.) But the text of the Settlement Agreement does not include such a limitation. The Pueblo's interpretation is again foreclosed by Paragraph 3(a)'s plain language, which extends liability to the Pueblo for "the cleanup, reclamation *or other environmental remedial action* at the Mine," as well as for "conducting all *other related and necessary activities*." (Settlement Agreement at 2-3, ¶ 3(a) (emphasis added).) A "remedial action" is a CERCLA defined term, which means a "permanent remedy" to be implemented "in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24). The inclusion of CERCLA-specific language in Paragraph 3(a) leaves no doubt that this provision was intended to include CERCLA liability. Moreover, the text of this provision simply cannot be reconciled with the Pueblo's unsupported contention that "the subject matter of [Paragraph 3(a)] is limited to the reclamation earthmoving and revegetation project defined by the Record of Decision …." (Pueblo Mot. at 42.)[8]

In short, a party may assume CERCLA liability by contract. Here, the expansive language of Paragraph 3(a) of the Settlement Agreement is broad enough to cover all environmental liabilities—including CERCLA liability. Thus, while the assumption provision does not shield Atlantic Richfield from CERCLA liability to the Government, it unequivocally

[8] Even if the Pueblo's liability was limited to performing the ROD, determining whether the Pueblo actually satisfied the ROD's requirements would present a fact question that could not be resolved at this stage. *See supra*, Sec. III.B.

created CERCLA liability in the Pueblo. Accordingly, regardless of whether the Pueblo would otherwise qualify as a PRP, the tribe voluntarily "stepped into the shoes" of Atlantic Richfield, and is therefore equally liable under the statute.

III. ATLANTIC RICHFIELD STATES CLAIMS AGAINST THE PUEBLO UNDER CERCLA AND FOR BREACH OF THE SETTLEMENT AGREEMENT.

A. Atlantic Richfield Can Sue The Pueblo Under CERCLA.

The Pueblo presents three discernable arguments for why it believes Atlantic Richfield's CERCLA claims should be dismissed.[9] Primarily, the Pueblo asserts that CERCLA claims are only covered under Paragraph 3(b) of the Settlement Agreement. As discussed above—and as is immediately apparent from the plain language of the Settlement Agreement itself—this argument is meritless. The Pueblo next argues (1) that the assumption of liability clause is invalid because a party may not assume CERCLA liability as a matter of law, and (2) that Indian tribes are categorically exempt from CERCLA liability. The Pueblo is wrong on both counts.

1. The Pueblo is liable under CERCLA by virtue of its express assumption of CERCLA liability.

As explained above, a party may assume CERCLA liability by contract. Here, everyone agrees that Atlantic Richfield is a PRP with regard to the Jackpile Site. The Pueblo expressly assumed Atlantic Richfield's responsibility and liability for the cleanup, reclamation, and other environmental remedial action at the site under all applicable laws. (Settlement Agreement at 2-3, ¶ 3(a).) Therefore, at a minimum, the Pueblo has "stepped into the shoes" of Atlantic

[9] Atlantic Richfield asserts three categories of CERCLA claims against Defendants: cost-recovery claims under § 107(a); contribution claims under § 113(f); and a claim for declaratory relief under § 113(g)(2). Atlantic Richfield's Response in Opposition to the United States' Motion to Dismiss explains how it has alleged the facts necessary to support these claims. To avoid repetition and for brevity, those arguments are incorporated herein by this reference. This response addresses only those unique defenses asserted by the Pueblo in its Motion.

Richfield and is liable under the statute to the same extent as Atlantic Richfield. Moreover, by assuming Atlantic Richfield's liability "under all applicable laws," the Pueblo necessarily waived the right to assert statutory defenses to CERCLA liability not available to Atlantic Richfield. *See United States v. Mezzanatto*, 513 U.S. 196, 200-01 (1995) ("[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties.").

2. Indian tribes are not exempt from CERCLA liability.

The Pueblo's argument that Indian tribes are categorically excluded from CERCLA liability is both irrelevant and wrong as a matter of law. It is irrelevant because, regardless of whether a tribe may be liable under CERCLA in its own right, the Pueblo has assumed *Atlantic Richfield's* liability under CERCLA, and the tribe is therefore liable by virtue of Atlantic Richfield's statutory liability.[10] But even if the Pueblo had not assumed Atlantic Richfield's CERCLA liability, the tribe still could be sued under the statute.

CERCLA provides for strict liability for four categories of "persons": (1) current owners or operators of facilities where hazardous substances were disposed of; (2) owners or operators of such facilities at the time of a disposal; (3) persons who arranged for the disposal of hazardous substances at such facilities; and (4) persons who transported hazardous substances at such facilities. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009); 42 U.S.C. § 9607(a)(1)-(4). Atlantic Richfield has alleged sufficient facts to demonstrate that the Pueblo qualifies as an "owner," "operator," and "arranger" for purposes of CERCLA liability.

[10] For this reason, if the Court finds that the Pueblo has assumed Atlantic Richfield's CERCLA liability, it may deny the Pueblo's Motion without reaching the issue of whether Indian tribes generally are subject to CERCLA liability.

(*See* Compl. ¶¶ 164-88.) The Pueblo does not dispute this, but rather maintains that, because CERCLA does not expressly list Indian tribes within the statutory definition of "person," a tribe cannot be liable under CERCLA. (Pueblo Mot. at 17-22.) As explained below, this tenuous position relies on ambiguous statutory language, is refuted by the application of established principles of statutory interpretation, and is inconsistent with CERCLA's remedial purpose.

a) The statutory language is ambiguous.

CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). While the definition does not directly address Indian tribes, at least one section of the statute refers to Indian tribes as "persons." *See id*. § 9607(j) ("Recovery by any *person* (including the United States or any State or *Indian tribe*) …." (emphasis added)). Given this reference to Indian tribes as "persons," it is reasonable to conclude that the omission of tribes from the definition of "person" in § 101(21) was inadvertent rather than intentional. This conclusion is all the more reasonable given the universal criticism that "CERCLA is not a paradigm of clarity or precision … [due to] inartful drafting and numerous ambiguities attributable to its precipitous passage." *Artesian Water Co. v. Gov't of New Castle Cty.*, 851 F.2d 643, 648 (3d Cir. 1988).[11]

[11] *Accord Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986) (noting CERCLA provisions are "not … model[s] of legislative draftsmanship," and its statutory language is "at best inartful and at worst redundant"); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992) (referencing CERCLA's "notorious lack of clarity"); *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) ("It has become de rigueur to criticize CERCLA as a hastily passed statute that is far from a paragon of legislative clarity."); *Uniroyal Chem. Co., Inc. v. Deltech Corp.*, 160 F.3d 238, 246 (5th Cir. 1998) ("A multitude of courts have roundly criticized the statute as vague, contradictory, and lacking a useful legislative history.").

In addition to the express reference to tribes as "persons" in CERCLA § 107(j), the Supreme Court has referred to Indian tribes as "persons" in the context of § 107(a)(4). Specifically, in *United States v. Atlantic Research Corporation*, 551 U.S. 128 (2007), the Court states:

- "Atlantic Research believes that subparagraph (B) provides a cause of action to anyone except the United States, a State, or an Indian tribe—*the persons* listed in subparagraph (A)." *Id.* at 135 (emphasis added).
- "In light of the relationship between the subparagraphs, it is natural to read the phrase 'any other person' by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe. The phrase 'any other person' therefore means *any person other than those three*." *Id.*
- "The phrase 'any other person' performs a significant function simply by clarifying that subparagraph (B) excludes *the persons enumerated in subparagraph (A)* [i.e., the United States Government or a State or an Indian tribe]." *Id.* at 137 (emphasis added).

The obvious implication from these references is that the Court understands Indian tribes to be "persons" under the statute.[12]

[12] The Pueblo relies on a single, out-of-circuit, district court case to support its argument that Indian tribes are excluded from CERCLA liability. (*See* Pueblo Mot. at 17-21.) In *Pakootas v. Teck Cominco Metals, Ltd.*, the court held that CERCLA's definition of "person" does not include Indian tribes. 632 F. Supp. 2d 1029, 1032-33 (E.D. Wash. 2009). *Pakootas* was wrongly decided. The court did not consider the reference to tribes as "persons" in the statute, did not adequately consider whether tribes would fit into the categories of "persons" listed in § 101(21), and—because it erroneously concluded that the statute was not ambiguous—chose not to address several key arguments. *See id.* at 1033-35. Of course, *Pakootas* is not binding on this Court. *See Camreta v. Greene*, 131 S.Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."). The Tenth Circuit has noted, but not decided, the issue of whether tribes qualify as "persons" under CERCLA. *Berrey v. Asarco Inc.*, 439 F.3d 636, 643-45 (10th Cir. 2006). Therefore, it remains an open question.

b) The rule of *in pari materia* should be applied.

In addition to the reference to Indian tribes as "persons" within the statute, tribes may be considered "persons" by virtue of their inclusion within the broader category of "municipalities," which is within the definition of "persons" in § 101(21). This conclusion is supported by the doctrine of *in pari materia*.

In pari materia is a rule of statutory construction that allows a court to look to the wording of related statutes in order to ascertain the meaning of the statute in question. *See, e.g.*, *United States v. Fillman*, 162 F.3d 1055, 1057 (10th Cir. 1998) ("[W]e may look at related statutes, that is, those laws that are *in pari materia* … in order to ascertain Congress' intent.") This rule "is but a logical extension of the principle that individual sections of a single statute should be construed together, for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). Courts have applied the *in pari materia* doctrine to interpret CERCLA by examining other environmental statutes. *See, e.g.*, *United States v. Carr*, 880 F.2d 1550, 1553 (2d Cir. 1989) ("Since CERCLA's use of the term 'in charge' was borrowed from section 311 of the Clean Water Act, and the two sections share the same purpose, the parallel provisions can, as a matter of general statutory construction, be interpreted to be *in pari materia*."); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1070 (D. Colo. 1985) ("CERCLA must be construed in light of previous statutes relating to environmental pollution, notably the Resource Conservation and Recovery Act ….").

As in CERCLA, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, and the Safe Drinking

Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26, all define "person" without expressly including Indian tribes. And in each of these three statutes—as in CERCLA—the term "municipalities" is included within the definition of "person." However, where the term "municipality" *is not* defined in CERCLA, it *is* defined in each of these other environmental statutes. And in each instance, the definition of "municipality" includes "Indian tribe." *See* RCRA, 42 U.S.C. § 6903(13)(A) (defining "municipality" as "a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or *an Indian tribe or authorized tribal organization* …." (emphasis added)); CWA, 33 U.S.C. § 1362(4) (defining "municipality" as "a city, town, borough, county, parish, district, association or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an *Indian tribe or an authorized Indian tribal organization* …." (emphasis added)); SDWA, 42 U.S.C. § 300f(10) (defining "municipality" as "a city, town or other public body created by or pursuant to State law, or an *Indian Tribe*." (emphasis added)).

Applying the doctrine of *in pari materia*, it is apparent that Congress would have understood Indian tribes to have been included within the definition of "municipality," and would thus qualify as "persons" under CERCLA. It was a mere oversight for Congress not to include a definition for "municipality" in CERCLA, and that oversight does not establish an affirmative intent to exclude tribes from liability under the statute.

c) CERCLA should be liberally construed.

Although CERCLA is ambiguous and poorly written, the statute "should be construed liberally to carry out its [remedial] purpose." *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d

564, 570 (10th Cir. 1996); *see also City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 447 (9th Cir. 2011) (similar). CERCLA "was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington N.*, 556 U.S. at 602. To permit Indian tribes to evade CERCLA liability under any set of facts—based merely on the omission of a definition for the term "municipality"—would be inconsistent with these goals and liberal construction of the statute to achieve them.

In sum, while the definition of "person" in § 101(21) does not expressly list Indian tribes, tribes are referred to as "persons" elsewhere in the statute, tribes can be considered within the broader term "municipalities," and the broad remedial purpose of the statute weighs in favor of the conclusion that Congress did not intend to categorically exclude tribes from CERCLA liability. Indian tribes are subject to the same environmental obligations as any other "person" under CERCLA—whether it be the federal government, a state, or a private party. Any other reading of the statute would lead to anomalous and inequitable results.

B. Atlantic Richfield Can Sue The Pueblo For Breach Of Contract.

To plead a breach of contract claim under federal law, a plaintiff must allege: "(1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach." *Red Lake Band of Chippewa Indians v. U.S. Dep't of Interior*, 624 F. Supp. 2d 1, 12 (D.D.C. 2009) (citing *Pryor v. United States*, 85 Fed.Cl. 97, 104 (Fed. Cl. 2008) and *San Carlos Irrigation and Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989)). Atlantic Richfield has plausibly alleged all of these elements.

Valid Contract. Atlantic Richfield has alleged the existence of a valid contract—the Settlement Agreement. (Compl. ¶¶ 76-89, 205, Ex. A.) The Pueblo does not question the Settlement Agreement's validity, so this element is undisputed.

Duty or Obligation. Atlantic Richfield has alleged that the Pueblo is responsible for an obligation or duty arising out of the Settlement Agreement. (*Id*. ¶¶ 79, 205-06.) Paragraph 3(a) of the Settlement Agreement is unambiguous and broad: The Pueblo agreed, "with the approval of the Secretary of the Interior," to "[a]ssume full and complete responsibility and liability under all applicable laws … for: (i) the cleanup, reclamation or other environmental remedial action at the Mine." (Settlement Agreement at 2, ¶ 3(a).) There is no support in that text for the Pueblo's self-serving argument that Paragraph 3(a) simply "sets out the Pueblo's obligation to conduct the reclamation work as described in the Record of Decision." (Pueblo Mot. at 38.)

The Pueblo's two additional arguments regarding the scope of its obligations also fail. First, the Pueblo's interpretation of Paragraph 2(a) of the Settlement Agreement as a limitation on Paragraph 3(a) is unsupported by the text. Paragraph 2(a) describes the Pueblo's agreement that "[t]o the extent required," it would use the $43.6 million payment from Atlantic Richfield for "reclamation and related purposes as prescribed by the Record of Decision." (Settlement Agreement at 1-2, ¶ 2(a).) Paragraph 2(a) does not, however, limit in any way or even refer to Paragraph 3(a). Second, as discussed previously, Paragraphs 3(a) and 3(b), the assumption of liability and indemnification provisions, are separate and distinct obligations. *See Sunoco*, 637 F. Supp. 2d at 287-88; *Bouton*, 423 F.2d at 651. Thus, Atlantic Richfield's interpretation of Paragraph 3(a) does not render Paragraph 3(b) "unnecessary" as the Pueblo claims. (Pueblo Mot. at 36.)

***Breach*.** Atlantic Richfield has alleged that the Pueblo breached its obligations under the Settlement Agreement. Not only did the Pueblo fail to properly perform the environmental remediation for which they assumed liability (Compl. ¶¶ 118-54, 209), the Pueblo has actively encouraged EPA to shift the Pueblo's responsibilities to Atlantic Richfield in breach of its contractual obligations. (*Id*. ¶¶ 155-59, 209.) The Pueblo's response—that it carried out the "physically huge but conceptually narrow earthmoving and revegetation project" that it believes to be its only responsibility under the Settlement Agreement—does nothing more than present fact questions regarding what work the ROD required, whether the Pueblo actually performed that work, and whether the Settlement Agreement required more than the specific remedial actions described in the ROD. Such questions are, of course, inappropriate for a motion to dismiss.

Equally inapt is the Pueblo's assertion that Atlantic Richfield's contract claims "are in fact claims based on CERCLA." (Pueblo Mot. at 28.) To the contrary, in claims six through eight, Atlantic Richfield properly pleads breaches of the Settlement Agreement. With those breaches of contract properly pleaded, the Pueblo cannot defend by re-characterizing the breach of contract claims as CERCLA claims.

***Damages*.** Atlantic Richfield has alleged damages attributable to the Pueblo's failure to perform its obligations under the Settlement Agreement and its further efforts to shift its obligations to Atlantic Richfield. (Compl. ¶¶ 160-163; 220-21, 230.) The Pueblo neither questions nor disputes Atlantic Richfield's damages allegations.

The only remaining objection the Pueblo presents to Atlantic Richfield's contract claims is its assertion that the timing of Atlantic Richfield's claims "far exceeds any conceivably

applicable statute of limitations." (Pueblo Mot. at 48.) The Pueblo does not identify the applicable statute of limitations, but presumably it refers to New Mexico's six-year limitations period. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966) ("[S]tate statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise."); N.M.S.A. 1978, § 37-1-3(A) (1975) ("Actions founded upon any bond, promissory note, bill of exchange or other contract in writing shall be brought within six years."). "The statute of limitations on a breach of contract claim runs from the date the contract is breached," *Nashan v. Nashan*, 1995-NMCA-021, ¶ 29, 119 N.M. 625, 894 P.2d 402, but the limitations period does not accrue "until the plaintiff discovers, or should have discovered in the exercise of reasonable diligence, the facts that underlie his or her claim," *Whelan v. State Farm Mut. Auto. Ins. Co.*, 2014-NMSC-021, ¶ 16, 329 P.3d 646.

Atlantic Richfield filed this suit on January 21, 2015. Six years prior to that, on January 21, 2009, Atlantic Richfield had no reason to believe the Pueblo would breach or had breached its agreement to assume all environmental liability at the Jackpile Site. After performing its portion of the Settlement Agreement, Atlantic Richfield left the Jackpile Site and Defendants have had exclusive control over the site since that time. (Compl. ¶ 89.) Not until 2010, when EPA first requested information from Atlantic Richfield regarding the Jackpile Site, could there even be an argument that Atlantic Richfield should have suspected that the Pueblo either had breached the Settlement Agreement or intended to do so. (*Id.* at ¶ 160.) And even then, Atlantic Richfield could not have known that the Pueblo—instead of rightfully performing its remediation responsibilities under the Settlement Agreement—would refuse to perform the

CERCLA cleanup required by EPA and actively encourage EPA to shift the Pueblo's responsibilities to Atlantic Richfield.[13] There is therefore no basis to determine as a matter of law that the Pueblo breached the Settlement Agreement and Atlantic Richfield had knowledge of that breach, all before January 21, 2009.

CONCLUSION

Based on the foregoing reasons and authorities, the Court should deny the Pueblo's 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.

[13] EPA's CERCLA § 104(e) request gave no indication that the Pueblo would not continue performing and paying for the Jackpile Site's remediation and, indeed, could be read as suggesting the opposite. (*See* CERCLA § 104(e) Request [Attach. 4 to Lucari Decl., attached to Atlantic Richfield's Resp. to United States' Mot.] 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.").)

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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 THE PUEBLO OF LAGUNA'S MOTION TO DISMISS** was served via the Court's ECF system upon:

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