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

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

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Plaintiff seeks cost recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") section 107(a), 42 U.S.C. § 9607(a), and contribution under CERCLA section 113(f), *id.* § 9613(f), for costs Plaintiff alleges it incurred to address contamination at a former uranium mine located on the Pueblo of Laguna Reservation in Cibola County, New Mexico (the "Jackpile Site" or "Site"). *See* Compl. ¶¶ 164-96. Plaintiff also seeks a declaratory judgment as to the United States' liability for future costs at the Site. *See id.* ¶¶ 197-202. As the United States argued in its motion to dismiss, Plaintiff's CERCLA section 107(a) cost recovery claim for its recently-incurred costs is without merit, Plaintiff cannot meet the requirements of section 113(f)(1) to bring a contribution claim, and Plaintiff's section 107(a) and 113(f)(3)(B) claims to recover costs associated with the 1986 Agreement to Terminate Leases are time-barred. Additionally, Plaintiff's claim for a declaratory judgment is

premature at this time. Thus, Plaintiff's claims against the United States must be dismissed in their entirety.

STANDARD OF REVIEW

The United States moved to dismiss Plaintiff's claims against it under Federal Rule of Civil Procedure 12(b)(1) and (6). *See* United States' Motion to Dismiss and Memorandum in Support ("US Mot.") 1, 8-10. "The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). The complaint must be plausible on its face, and threadbare recitals of causes of action do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under Rule 12(b)(1), the court must dismiss a complaint if the plaintiff has failed to establish subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1); *see also Basso v. Utah Power & Light, Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Plaintiff contends that the United States' reliance on Rule 12(b)(1) is misplaced. Atlantic Richfield Company's Response in Opposition to United States' Motion to Dismiss ("Plaintiff's Opp.") 3, n.2. In its motion to dismiss, the United States cited 28 U.S.C. § 2401(a) and 42 U.S.C. § 9613(h). *See* US Mot. 23, 25 n.8. Both provisions concern the Court's jurisdiction. *See Urabazo v. United States*, 1991 WL 213406, at *1 (10th Cir. Oct. 21, 1991) ("The Plaintiff's failure to sue within [section 2401(a)'s] period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action."); 42 U.S.C. § 9613(h) ("No Federal court shall have jurisdiction . . . ."). Thus, the United States' recitation of the standard of review under 12(b)(1) was not misplaced. In any event, all of Plaintiff's claims against the United States can be dismissed under Rule 12(b)(6), as explained below.

ARGUMENT

I. PLAINTIFF'S CERCLA SECTION 107(a) CLAIMS AGAINST THE UNITED STATES MUST BE DISMISSED.

Plaintiff has not incurred "necessary" response costs to address the problem of hazardous substances at the Site, and yet brings CERCLA section 107(a) claims to recover "necessary" response costs. CERCLA "encourage[s] private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 847 (10th Cir. 1993); 42 U.S.C. § 9607(a). But instead of spending money to clean up the Jackpile Site, Plaintiff is instead spending money to develop litigation, which expenditures are not necessary response costs under CERCLA. *Young v. United States*, 394 F.3d 858, 865 (10th Cir. 2005) ("While costs for initial investigation and monitoring might be compensable if linked to an actual effort to contain or cleanup an actual or potential release of hazardous substances, costs incurred solely for litigation are not.").

Plaintiff insists that section 107(a) does not require *any* expenditure on cleanup before cost recovery. To the contrary, under section 107(a), private parties may recover only "necessary costs of response *incurred*," and only so long as those costs are "consistent with the National Contingency Plan" ("NCP"). 42 U.S.C. § 9607(a)(4)(B) (emphasis added). For a section 107(a) "private party response action" to be "consistent with the NCP," it must be in "substantial compliance with [] applicable requirements" *and* "result[] in a CERCLA-quality cleanup." 40 C.F.R. § 300.700. Plaintiff has not adequately alleged that it has incurred such costs. By its own allegations, Plaintiff has made no effort to clean up the Site, refuses to spend any money to do so, and has hired experts only to attempt to prove that it need not engage in cleanup. Compl. ¶¶ 157, 161, 163. Nothing in the Complaint indicates that Plaintiff's costs were incurred responding to the presence of hazardous substances at the Site; rather, it appears such

costs were incurred preparing for litigation—and such costs are not necessary costs of response. *See Young*, 394 F.3d at 863 (response costs are only "necessary" if closely tied to containing or cleaning up hazardous substances). Courts have dismissed cost recovery claims for unnecessary investigatory costs and litigation costs like those at issue here without awaiting further fact development, and this Court should similarly dismiss Plaintiff's claims. *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 709 (D.N.J. 1988); *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 802 F. Supp. 943, 945 (W.D.N.Y. 1992).

Plaintiff also points to costs incurred under the Agreement to Terminate Leases. As an initial matter, the Complaint fails to allege that Plaintiff is seeking its settlement costs paid under the Agreement to Terminate Leases under CERCLA section 107(a). Such a claim, even if it had been properly alleged, is time-barred under CERCLA section 113(g)(2). *See* 42 U.S.C. § 9613(g)(2) (cost recovery actions must be brought within three years "after completion of the removal action" or six years "after initiation of physical on-site construction").

A. None of Plaintiff's Claimed Costs Are "Necessary Costs Of Response" "Consistent With the NCP" Recoverable Under Section 107(a).

Plaintiff's section 107(a) claims fail because Plaintiff has not incurred any "necessary costs of response . . . consistent with the NCP." 42 U.S.C. § 9607(a)(4)(B). Plaintiff contends that it has paid for preliminary investigations, document production and administrative comments, and new actions not alleged in the Complaint. Plaintiff's Opp. 4, 10, 12. The costs that Plaintiff claimed in the Complaint do not qualify for recovery under section 107(a) because they were generated for purposes of litigation and not cleanup of the Site. *See Young*, 394 F.3d at 865; *see also Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1188-89 (D.S.C. 1992) (testing costs not "necessary" where not incurred at government direction and plaintiffs "offered

no evidence or explanation of what their response entails, past the initial testing"). Any costs not alleged in the Complaint should not be considered.

1. Plaintiff's preliminary investigation costs are not necessary response costs, or consistent with the NCP, because they have no relationship to a cleanup of the Site.

Plaintiff's preliminary investigation costs are not recoverable under *Young*. In *Young*, the Tenth Circuit decided that the plaintiffs' preliminary investigation costs were not necessary response costs where the plaintiffs' own admissions made it clear that those costs bore no relationship to the "cleanup of hazardous releases." *Id*. at 684. Although the plaintiffs had undertaken "site investigation, soil sampling, and risk assessment," their costs were not recoverable because the plaintiffs did "not intend to spend any money to clean[] up the contamination on their property." *Id*. at 864. Rather, the plaintiffs incurred costs in "preparing for and undertaking [] litigation." *Id*. at 865. After concluding that the plaintiffs' costs were not necessary response costs under CERCLA because they were not tied to any actual cleanup, the Tenth Circuit similarly concluded that the costs were not consistent with the NCP "for essentially the same reasons." *Id*. at 864.

Contrary to Plaintiff's contention, Plaintiff's Opp. 7, this case is similar to *Young*. The Complaint demonstrates that Plaintiff has no intention of spending money to contain or clean up hazardous substances at the Site. *See* Compl. ¶¶ 157, 161, 163. As further alleged in the Complaint, Plaintiff did not begin its "analysis" of the Site until after EPA informed Plaintiff of its potential liability, and Plaintiff hired its experts to support its negotiations with EPA rather than to further a cleanup. Compl. ¶¶ 160, 161, 163. Plaintiff had the opportunity to contribute to an investigation of the Site that would lead to cleanup, but has never taken that opportunity. Instead, Plaintiff has rebuffed EPA's request that Plaintiff fund or perform a remedial

investigation and feasibility study ("RI/FS"), which is one of the first steps in a site cleanup. *See* Compl. ¶¶ 157, 163.

Plaintiff claims that *Young* is distinguishable because it has not "abandoned" the Site or refused money for cleanup. In support, Plaintiff cites its letters to EPA offering "to work alongside" other parties. Plaintiff's Opp. 7. These letters were not referenced in the Complaint, are not matters of public record, and therefore cannot be considered in deciding this motion to dismiss. *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006). Even if this Court were to consider the letters, they would not save Plaintiff's claims. Plaintiff did not offer to "work alongside" other parties, but instead refused to either perform work or to contribute any money towards cleanup and insisted that other parties pay for all of the future cleanup costs at the Site. July 16, 2014 Letter from Plaintiff to EPA, Plaintiff's Opp., Lucari Decl., Attach. 1 (Plaintiff "should [not] be conducting the RI/FS"); Aug. 13, 2014 Letter from Plaintiff to EPA, Plaintiff's Opp., Lucari Decl., Attach. 2 (refusing to submit a good-faith offer to fund the RI/FS). Plaintiff also points to the 1986 Agreement to Terminate Leases. Plaintiff's Opp. 7. Whatever money Plaintiff paid in 1986 under the Agreement to Terminate Leases is, however, immaterial to whether its *recently-incurred* claimed costs are related to an effort to respond to hazardous substances at the Site and were not, instead, incurred in preparation for litigation.[1]

Plaintiff maintains that its investigations were "necessary response" activities because they "were used to identify [potentially responsible parties, or] PRPs," specifically, the Pueblo of Laguna, Laguna Construction Company ("LCC"), and the U.S. Department of the Interior

[1] ARCO's entire argument that "actual cleanup" commenced in 1986 is irrelevant to whether its costs for preliminary investigations, administrative comments and document production are recoverable because ARCO does not allege that those costs are related to the 1986 reclamation. Plaintiff's Opp. 8-9; Compl. ¶¶ 160-163.

("DOI"). Plaintiff's Opp. 11. However, both Plaintiff and EPA already knew that those parties were involved with the Site. Compl. ¶¶ 61, 65, 70, 81, 159. Contrary to Plaintiff's portrayal, in EPA's August 29, 2014 letter, EPA did not invite Plaintiff to identify those known parties as liable parties, but allowed Plaintiff "to submit any liability arguments." Aug. 29, 2014 Letter from EPA to Plaintiff, Plaintiff's Opp., Lucari Decl., Attach. 5.[2] Plaintiff's legal analyses undertaken in response to this invitation did nothing towards cleaning up the Site.

Indeed, this case is far removed from the facts in *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994). In *Key Tronic*, EPA was unaware of the Air Force's disposal of wastes at the CERCLA site, and the plaintiff, Key Tronic, had "track[ed] down" this "other responsible solvent polluter[]" through efforts that "might well [have been] performed by engineers, chemists, private investigators, or other professionals." *Id*. Based on those facts, the Supreme Court decided that the costs of Key Tronic's investigation were "costs of response" because they "significantly benefited the entire cleanup effort and served a statutory purpose apart from the reallocation of costs." *Id*. The facts here, however, are significantly different. Plaintiff does not allege that it uncovered a new liable party through its investigations. The investigations have not benefited the "entire cleanup effort" because, by Plaintiff's own allegations, Plaintiff has made no effort to clean up the Site. To the extent that Plaintiff's analyses specifically targeted the roles of the Pueblo of Laguna, LCC, and DOI—all of whom were already known to EPA—Plaintiff appears to have been making its case against its own liability, not finding other solvent polluters to assist in the cleanup.

[2] This document was also not referenced in the Complaint, not a matter of public record, and cannot be considered at the motion to dismiss stage.

Plaintiff also misconstrues the United States' argument as one about timing. Plaintiff's Opp. 4 ("[T]he United States routinely brings claims to recover preliminary response costs before commencing formal remediation activities[.]"), 9 (arguing that preliminary costs need not be compliant with all detailed NCP requirements). The United States is not arguing that Plaintiff has failed to allege response costs consistent with the NCP because no cleanup has yet been *completed*. The United States is arguing that Plaintiff has failed to properly allege a 107(a) claim because Plaintiff has not alleged costs that are sufficiently tied to any containing or cleaning up of hazardous substances and, under Tenth Circuit law, such costs cannot be considered "necessary" or "consistent with the NCP." *Young*, 394 F.3d 864-65.[3]

[3] Not one of the cases Plaintiff cites in support of its argument that its preliminary investigation costs are consistent with the NCP addresses the regulatory criterion that a section 107(a) action must "result in a CERCLA-quality cleanup." 40 C.F.R. § 300.700. To the extent that the cases discuss consistency with the NCP at all, they primarily focus on whether preliminary investigation costs fulfill the other criterion of consistency—whether the actions are in "substantial compliance with [] applicable requirements." *Donahey v. Bogle*, 987 F.2d 1250, 1255 (6th Cir. 1993) (addressing "compliance with the NCP"), *vacated sub nom. Livingstone v. Donahey*, 512 U.S. 1201 (1994) (remanding for further consideration in light of *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994); *Carlyle Piermont Corp. v. Fed. Paper Bd., Co.*, 742 F. Supp. 814, 821 (S.D.N.Y. 1990) (same); *see also Village of Milford v. K-H Holding Corp.*, 390 F.3d 926, 934 (6th Cir. 2004) (citing *Donahey*); *Containerport Group, Inc. v. Am. Financial Group, Inc.*, 128 F.Supp.2d 470, 481 (citing *Donahey*).

Some of the cases do not address consistency with the NCP, but analyze whether preliminary investigation costs can be "response" costs. *Marriott Corp. v. Simkins Indus., Inc.*, 825 F. Supp. 1575, 1581 (S.D. Fla. 1993) (addressing the definition of "response" costs); *Containerport Group, Inc. v. Am. Financial Group*, 128 F.Supp.2d 470, 481 (S.D. Ohio 2001) (same); *Johnson v. James Langley Operating Co., Inc.*, 226 F.3d 957, 962 (8th Cir. 2000) (same); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (same); *see also Artesian Water Co. v. New Castle County*, 851 F.2d 643, 651 (3d Cir. 1988) (relying on *Wickland*); *Bowen Eng. v. Estate of Reeve*, 799 F. Supp. 467, 476 (D.N.J. 1992) (citing *Artesian Water*). These cases are simply not relevant to whether Plaintiff's costs "resulted in a CERCLA-quality cleanup"—again, Plaintiff has not alleged any necessary response costs tied to addressing hazardous substances at the Site, let alone a CERCLA-quality cleanup.

Moreover, only private party plaintiffs must allege that their response costs are "consistent with the NCP." 42 U.S.C. § 9607(a)(4)(B). United States enforcement actions are governed by a different section, and the United States is not required to prove (footnote cont'd)

2. *Plaintiff's costs incurred in submitting comments and responding to an information request are not necessary costs of response because they are not tied to an actual cleanup.*

Plaintiff further argues that its costs of responding to EPA's proposed listing of the Jackpile Site on the National Priorities List ("NPL") and EPA's section 104(e) request for information are "necessary" response costs. Plaintiff's Opp. 10. These costs are not, however, recoverable under section 107(a). As to Plaintiffs' comments on the proposed NPL listing, nowhere does Plaintiff explain how submitting these comments in any way served to remedy or respond to the presence of hazardous substances at the Site.

Plaintiff later produced documents to EPA to comply with EPA's request for information under section 104(e). Compl. ¶ 160. Plaintiff has, however, again failed to explain how simply providing EPA with information that it is required by law to provide was in furtherance of an actual cleanup at the Site.

3. Plaintiff's new allegations of costs not listed in its Complaint should not be considered.

Finally, Plaintiff alleges in its brief that it incurred other costs not listed in the Complaint. These allegations should not be considered in deciding the United States' Motion to Dismiss. A Complaint must be sufficient on its face, and Plaintiff's Complaint is not. *See Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994) (holding that to withstand a 12(b)(6) motion, "the allegations within the four corners of the complaint" must be sufficient); *see also Sudduth v. Citimortgage, Inc.*, 79 F.Supp.3d 1193 (D. Colo. 2015) ("Plaintiffs cannot amend their complaint

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that its response actions are in "substantial compliance" with NCP requirements or "result in a CERCLA-quality cleanup." *Id.* § 9607(a)(4)(A); 40 C.F.R. § 300.700(c)(3)(i).

by adding factual allegations in response to" a motion to dismiss). If Plaintiff is allowed to file an amended complaint, the United States will evaluate new allegations at that time. However, given Plaintiff's insistence that it is not liable for any CERCLA cleanup costs, it is unlikely that any additional costs it incurred are "necessary costs of response" incurred to contain or clean up hazardous substances at the Site.

B. This Court Can and Should Dismiss the Complaint.

Plaintiff's attempt to stave off a decision on the validity of its CERCLA section 107(a) claim until summary judgment must fail because the Complaint is insufficient on its face. Contrary to Plaintiff's portrayal, courts can and do dismiss complaints for failing to state a claim because the costs alleged do not meet the requirements of section 107(a). *See T & E Indus., Inc.*, 680 F. Supp. at 709 (dismissing section 107(a) claims for litigation costs and attorneys' fees); *Alloy Briquetting Corp.*, 802 F. Supp. at 945 (dismissing section 107(a) claim for attorneys' fees); *see also Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1476 (D. Colo. 1991) (deciding that plaintiffs had failed to adequately allege any recoverable response costs, in part because litigation costs are not recoverable under section 107(a), but granting leave to amend the complaint). Had Plaintiff alleged costs that could meet section 107(a) requirements under some set of facts, then fact development would be warranted. But Plaintiff has failed to even properly plead that it incurred "necessary costs of response" that are "consistent with the NCP," and, therefore, its Complaint must be dismissed.

C. Plaintiff Cannot Recover Its 1986 Settlement Costs Under Section 107(a).

Plaintiff argues that it can recover under CERCLA section 107(a) the $43.6 million it paid to the Pueblo of Laguna under the Agreement to Terminate Leases even if the Court determines that Plaintiff's attempt to recover its settlement costs under CERCLA section

113(f)(3)(B) must be dismissed (which, as discussed below, it should). *See* Plaintiff's Opp. 22; *see also* Part II.B, *infra*. This argument is without merit because any such claim, even if plausible, would be time-barred under CERCLA section 113(g)(2). 42 U.S.C. § 9613(g)(2).

Under section 113(g)(2), cost recovery actions must be brought within three years "after completion of the removal action" or six years "after initiation of physical on-site construction" of a remedial action. 42 U.S.C. § 9613(g)(2). As the United States noted in its motion to dismiss, the United States does not concede that the Pueblo of Laguna's mine reclamation activities constitute a response action under CERCLA.[4] However, even if they did, the Complaint alleges that reclamation activities began sometime after the Agreement to Terminate Leases was signed in 1986, and were ongoing in 1990. *See* Compl. ¶¶ 107, 110. Assuming that the reclamation work could be considered a remedial action, any CERCLA section 107(a) action would thus be time-barred if not filed by 1996—*i.e.*, six years after the last possible date that could constitute "initiation of physical on-site construction"—at the latest. If, on the other hand, the reclamation work could be considered a removal action, any CERCLA action would be time-barred unless filed by 1998—*i.e.*, three years after the time that the Complaint alleges work required by the Agreement was complete. *See* Compl. ¶ 117 (alleging that reclamation work was completed in 1995 "two years ahead of schedule and several million dollars below budget"); *see also id.* ¶ 116 (referring to "the reclamation period"). Thus, any attempt by Plaintiff to recover the $43.6 million paid under the Agreement to Terminate Leases under CERCLA section 107(a) is untimely under CERCLA section 113(g)(2).

[4] The EPA Site Report that Plaintiff cites in support of its contention that the mine reclamation constitutes a "response action," Plaintiff's Opp. 8, is merely a staff-level periodic update report made publicly available in order to provide the public with information regarding progress at the Site. It is not a statement of the United States' position as to whether any given activity at the Site is a CERCLA response action.

II. PLAINTIFF'S CONTRIBUTION CLAIM MUST BE DISMISSED.

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

In response to the United States' motion to dismiss Plaintiff's CERCLA section 113(f)(1) contribution claim, which CERCLA allows only "during or following" a civil action, 42 U.S.C. § 9613(f)(1), Plaintiff argues that its claim should not be dismissed because the United States "*will* [file a section 107 counterclaim] 'during' this action" and because the United States "has already indicated that it *will* be filing a § 107(a) cost recovery claim." Plaintiff's Opp. 15-16 (emphasis added). What the United States "will" do in the future is not relevant to whether Plaintiff's Complaint states a claim under CERCLA section 113(f)(1).[5] Rule 8 of the Federal Rules of Civil Procedure requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to the relief . . . ." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), the court must determine whether the complaint is "plausible on its face." *Ashcroft*, 556 U.S. at 678. Plainly, without a pending action civil action against Plaintiff, Plaintiff cannot state a plausible claim to relief under CERCLA section 113(f)(1).

B. Plaintiff's CERCLA Section 113(f)(3)(B) Contribution Claim, Even if Plausible, Would Be Time-Barred.

Plaintiff's CERCLA section 113(f)(3)(B) claim, which requires that Plaintiff have "resolved liability to the United States . . . for some or all of a response action . . . in an administrative . . . settlement[,]" 42 U.S.C. § 9613(f)(3)(B), even if plausible, is time-barred. The Court can avoid the difficult arguments involving whether the Agreement to Terminate Leases constitutes an "administrative settlement" that resolves liability to the United States under

[5] Certainly, the United States will not file a counterclaim if all claims against it are dismissed, and the timing of any future enforcement action by EPA against Plaintiff should be left to EPA's discretion rather than forced into this case "in the interests of efficiency and inevitability." Plaintiff's Opp. 17.

CERCLA section 113(f)(3)(B), *see* US Mot. 18-20, Plaintiff's Opp. 17-22, and simply dismiss Plaintiff's CERCLA section 113(f)(3)(B) claim as time-barred. *See* US Mot. 20-23. Indeed, Plaintiff concedes that CERCLA's limitations provisions would bar the claim but for the application of equitable tolling or equitable estoppel, but Plaintiff has not established entitlement to either. And to the extent that the Court finds 28 U.S.C. § 2401(a) to be the applicable statute of limitations, notwithstanding Plaintiff's concession that CERCLA applies, Plaintiff's claim is also barred under that provision.

1. Plaintiff's 113(f)(3)(B) claim is time-barred under CERCLA.

Plaintiff concedes that its CERCLA section 113(f)(3)(B) claim, which seeks contribution for the amount Plaintiff's predecessor paid under the 1986 Agreement to Terminate Leases, would be time-barred under CERCLA's limitations periods but for the application of the doctrines of equitable tolling or equitable estoppel. *See* Plaintiff's Opp. 23. Neither doctrine applies here.

Equitable relief from statutes of limitation is extraordinary, and is applied only sparingly by federal courts. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). "Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, . . no more favorable tolling doctrine may be employed against the Government than is employed in a suit between private litigants." *Irwin*, 498 U.S. at 96.

The doctrine of equitable estoppel "may bar a defendant from enforcing a statute of limitation when its own deception prevented a reasonably diligent plaintiff from bringing a

timely claim." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 830 (2013) (Sotomayor, J., concurring). "[W]inning an equitable estoppel argument against the government is a tough business." *Wade Pediatrics v. Dep't of Health & Human Servs.*, 567 F.3d 1202, 1206 (10th Cir. 2009); *see also Office of Personnel Management v. Richmond*, 464 U.S. 414, 426 (1990) (discussing the Supreme Court's "strict approach to estoppel claims involving public funds"). In the Tenth Circuit, a party must establish four basic elements:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Barnes v. United States, 776 F.3d 1134, 1149 (10th Cir. 2015) (citation and quotation omitted). Additionally, the Tenth Circuit requires "a showing of 'affirmative misconduct' on the part of the government." *Id. See also Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant.").

Plaintiff attempts to establish that it has met its high burden of demonstrating entitlement to equitable tolling and equitable estoppel by suggesting that "[i]t was not until 2014, when EPA informed Atlantic Richfield that it must fund an RI/FS . . . that it became clear Atlantic Richfield had contribution claims against Defendants" and that the United States "lulled Atlantic Richfield into inaction through its releases and covenants that absolved Atlantic Richfield from future liability . . . ." Plaintiff's Opp. 25, 26. But purely "future liability" does not form the basis of a contribution claim; it is only when a person has already *resolved* liability for some or all costs of response that a contribution claim arises. 42 U.S.C. § 9613(f)(3)(B); *United States v. Atl. Research*, 551 U.S. 128, 138 (2007) (a claim for contribution under CERCLA, like a claim for contribution under common law, is the "right to collect from others . . . *after* the tortfeasor has

paid more than his or her proportionate share") (emphasis added). "A Plaintiff need not know the full extent of his injuries before the statute of limitations begins to run." *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994).

Here, Plaintiff's predecessor knew all facts relevant to its CERCLA section 113(f)(3)(B) contribution claim from the time that claim accrued. Any CERCLA section 113(f)(3)(B) claim based on the Agreement to Terminate Leases would have first accrued upon entry of the Agreement in December 1986. Plaintiff's predecessor obviously knew about the Agreement when it signed the Agreement in 1986. Plaintiff's predecessor also knew the facts related to the United States' alleged status as a liable party under CERCLA because Plaintiff's predecessor had actively participated in the uranium market starting in 1951 when it began prospecting on the Laguna Reservation, entered into lease agreements starting in 1952, entered into contracts with the Atomic Energy Commission ("AEC") for the sale of milled uranium also starting in 1952, and sold uranium concentrate to the United States from 1952 to 1970. *See* Complaint ¶¶ 58-66; *see also id.* ¶¶ 33-47 (alleging facts related to AEC's "nationwide program to discover and acquire uranium ore and concentrate"); 67-71 (alleging the United States' involvement at the Site through DOI's Bureau of Land Management and United States Geological Service during the 1970s and 80s). Despite knowledge of the United States' alleged role in the uranium market and at the Jackpile Site specifically, Plaintiff's predecessor chose not to pursue a claim against the United States within three years following the 1986 Agreement.[6] Thus, Plaintiff cannot claim

[6] As explained in the United States' Motion to Dismiss and Memorandum in Support, the United States believes the three-year statute of limitations in CERCLA section 113(g)(3) applies to Plaintiff's 113(f)(3)(B) claim. *See* US Mot. 4-5; 20-22. However, to the extent the Court deems the six-year statute of limitations in CERCLA section 113(g)(2) applicable, Plaintiff also failed to file its contribution claims within that period.

that it was "unable to obtain vital information bearing on the existence of [its] claim," *Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 278-79 (D.C. Cir. 2003), or in some other "extraordinary way" was prevented from asserting it rights, *United States v. Clymore*, 245 F.3d 1195, 1199 (10th Cir. 2001), for purposes of equitable tolling, or that it was "ignorant of the true facts" for purposes of equitable estoppel, *Barnes*, 776 F.3d at 1149.[7]

Moreover, Plaintiff cannot rely on the signature of the Assistant Secretary of the Interior under the "approval" paragraph in support of its contention that the United States "actively misled" or "lulled Atlantic Richfield into inaction," Plaintiff's Opp. 25, for purposes of equitable tolling, and Plaintiff has not alleged that the United States engaged in "affirmative misconduct" as required in the Tenth Circuit to show entitlement to equitable estoppel. *Barnes*, 776 F.3d at 1149. Nothing in the "approval" paragraph can be construed even remotely as an attempt to persuade Plaintiff's predecessor to refrain from filing a contribution action to recover some of the $43.6 million that forms the basis of its contribution claim. *See* Compl., Ex. A at 6. The "approval" paragraph only purports to "release" future claims by the Secretary of the Interior and The Pueblo; it says nothing about any promise by Plaintiff's predecessor to refrain from seeking contribution from the United States. *See id.* The Agreement itself is also devoid of any such

[7] The Tenth Circuit cases Plaintiff cites are distinguishable. First, the portion quoted from *Roberts v. Barreras*, 484 F.3d 1236 (10th Cir. 2007), is describing equitable tolling under New Mexico state law. Federal law applies here. *See Hardin v. Straub*, 490 U.S. 536, 538 (1989) (timeliness governed by state law where no federal statute of limitations governs). Additionally, *Roberts* had to do with a prisoner being denied the ability to use the prison library in order to draft a complaint against the prison's employees. *Tiberi v. Cigna Corp.* also discusses equitable tolling under state law, and had to do with a contract dispute in which one party made representations about the future success of its business in order to persuade the other party to continue doing business without disclosing that the business was faltering. *See* 89 F.3d 1423 (10th Cir. 1996). Neither case is analogous to this case. Unlike in *Tiberi*, the facts underlying Plaintiff's contribution claim were known to Plaintiff at the time of the Agreement, and unlike in *Roberts*, Plaintiff does not allege or argue that it was physically restrained from pursuing its claim.

promise or attempt to persuade. *See id.* at 1-5. Thus, Plaintiff failed to diligently pursue its contribution claim within the limitations period, nothing "extraordinary" stood in Plaintiff's way of doing so, and the Agreement fails to establish that the United States actively engaged in any "misconduct" that induced Plaintiff into inaction. Accordingly, Plaintiff's attempt to invoke the doctrines of equitable tolling and equitable estoppel based on the Agreement to Terminate Leases fails. Plaintiff's CERCLA section 113(f)(3)(B) claim must be dismissed as time-barred.

2. Plaintiff's CERCLA section 113(f)(3)(B) claim is time-barred under 28 U.S.C. § 2401(a).

Plaintiff has conceded that CERCLA section 113(g) provides the appropriate statute of limitations and thus this Court should not even look to whether the statute of limitations in 28 U.S.C. § 2401(a) is applicable, *see* US Mot. 23. Should the Court nonetheless do so, Plaintiff's section 113(f)(3)(B) claim is also time-barred under that provision. Section 2401(a) forbids "every civil action" against the United States "unless the complaint is filed within six years after the right of action first accrues," 28 U.S.C. § 2401(a). Importantly, section 2401(a) is jurisdictional, and therefore the six-year time period cannot be equitably tolled or otherwise extended by the Court. *See Urabazo*, 1991 WL 213406, at *1 ("Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed. . . . The plaintiff's failure to sue within the period of limitations is not simply a waivable offense, it deprives the court of jurisdiction to entertain the action.") (quotations and citations omitted); *Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1192 (D.N.M. 2010) ("This general six-year statute of

limitations, unlike an ordinary statute of limitation, 'is a jurisdictional condition attached to the government's waiver of sovereign immunity.'") (citations omitted).[8]

III. PLAINTIFF'S CLAIM FOR DECLARATORY RELIEF MUST BE DISMISSED.

Plaintiff has failed to state a valid claim for relief for its past costs, and, thus, it cannot pursue its remaining claim for declaratory relief for future costs. CERCLA section 113(g)(2) allows courts to grant declaratory relief for "further response costs" in "an initial action for recovery of the costs referred to in section [107]." 42 U.S.C. § 9613(g)(2). Plaintiff has not sufficiently alleged that it is entitled to past costs, and, therefore, Plaintiff cannot pursue declaratory relief for "further" costs under section 113(g)(2). *City of Colton v. Am. Promotional Events, Inc.-West*, 614 F.3d 998 (9th Cir. 2010); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 958 (8th Cir. 2000), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991); *see also* US. Mot. 24-25.

Plaintiff does not even address the cases cited in the United States' Motion to Dismiss that squarely establish that a plaintiff cannot seek declaratory relief for future costs under section 113(g)(2) without a valid claim for past costs. The unrefuted reasoning of those cases is sound. Section 113(g)(2) "expressly provides" that in a section 107 action for past response costs, the court may grant declaratory relief for future (and "further") response costs. *Trimble v. Asarco,*

[8] These cases were not called into question by the Supreme Court's recent decision in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015). *Wong* held that 28 U.S.C. § 2401(b), the statute of limitations for the Federal Tort Claims Act, is not "jurisdictional," based on the "text," "context," and "legislative history" of that provision. *See id.* at 1632-33. The Supreme Court did not address (or even opine on) the jurisdictional nature of section 2401(a), which has a separate legislative history. *See generally, id.* at 1632-38. If the Court reaches this issue, the United States requests that it be given the opportunity to provide additional briefing on section 2401(a)'s jurisdictional nature.

Inc., 232 F.3d 946, 958 (8th Cir. 2000). These two sections "envision that, before suing, CERCLA plaintiffs will spend some money responding to an environmental hazard." *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991). Requiring past costs before awarding future costs serves CERCLA's purpose, which is "not simply to encourage private response, but rather to make the party seeking response costs choose a cost-effective course of action to protect public health and the environment and to achieve a CERCLA-quality cleanup." *Colton*, 614 F.3d at 1008. Unless a plaintiff establishes that his past costs are recoverable, the court should not adjudge whether to grant declaratory relief for future costs because that would "undermine the very purpose of declaratory relief, which is to economize on judicial time" because there would be no "assurance that the Plaintiff would ever meet its burden of proving" that any of its costs were recoverable. *Id*.

Plaintiff relies instead on a piece of dicta in a single case: *County Line Investment Company v. Tinney*, 933 F.2d 1508 (10th Cir. 1991). In *Tinney*, the court held that NCP-compliance is an element of a private cost recovery claim and affirmed the district court's grant of summary judgment against the plaintiffs on their claims for cost recovery *and* for declaratory relief for future response costs because they had failed to establish that any of their past response costs were consistent with the NCP. *Id*. at 1513. In dicta, the court also "recognized" that some declaratory relief may be available even if a plaintiff "had not yet established," at the time of briefing, that "all" of its response costs were consistent with the NCP. *Id*.

Plaintiff misreads this dicta in *Tinney* to argue that plaintiffs may seek declaratory relief under section 113(g)(2) in the absence of other valid CERCLA claims. The court suggested in *Tinney* that one situation in which a plaintiff could seek declaratory relief even if he "had not yet established that all of its claimed response costs were incurred consistent with the NCP" was

when the plaintiff "seeks only a declaration of the defendant's liability for future costs incurred consistent with the NCP." *Tinney* at 1513. Plaintiff contends that because the "only" precedes "a declaration" for future costs, a plaintiff may bring an action for declaratory relief for future costs alone, even without a cost recovery claim for past costs. But this reading disregards the first part of the paragraph. The Tenth Circuit was describing circumstances in which a declaratory judgment may be available even when the plaintiff "had not yet established" that "all" of its costs "were incurred" consistently with the NCP, not circumstances in which a plaintiff had failed to allege any claim for past costs at all. Indeed, in the two cases cited by the Tenth Circuit in support of its dicta in *Tinney*, the plaintiffs had brought section 107(a) claims for past costs. *See Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 996 (D.N.J. 1988), *rev'd in part on other grounds*, 1988 WL 125855 (D.N.J. Nov. 23, 1988) (Plaintiffs sought relief for "past and future response costs"); *T & E Indus. Inc.*, 680 F. Supp. at 698 (D.N.J. 1988) (Plaintiff sought relief for costs "already incurred").

The best reading of the *Tinney* dicta is that when a plaintiff has incurred response costs but has not yet established that *all* of its past costs were consistent with the NCP, a declaration of liability for future costs may still be available, if the plaintiff seeks only those future costs incurred consistent with the NCP. In that situation, the fact issue of whether any costs were consistent with the NCP would remain open, and the plaintiff's claims for both cost recovery and declaratory relief would be preserved. This reading better comports with the cases relied on by the Tenth Circuit. *See Southland Corp.*, 696 F. Supp. at 996-1000 (stating that a plaintiff must establish that it "incurred" response costs in order to be granted a declaratory judgment, and that "the need for a factual determination on specific costs would preclude summary judgment on the issues of damages . . . [but not] for a declaration of liability); *T & E Indus. Inc.*, 680 F.Supp. at

698 (holding the defendant liable for future necessary and NCP-compliant response costs, but denying summary judgment on plaintiff's claim for past costs due to questions of fact regarding necessity and NCP-compliance for those costs). Nothing in *Tinney* even suggests that, contrary to the plain language of section 113(g)(2), a plaintiff can somehow obtain declaratory relief as to "further" response costs when it has not yet incurred any response costs at all. Plaintiff's claim for declaratory relief thus fails because Plaintiff has not adequately alleged that it has incurred any necessary response costs, let alone that those costs were consistent with the NCP.

IV. UNITED STATES' RESPONSE TO MOTIONS TO DISMISS BY PUEBLO OF LAGUNA AND LAGUNA CONSTRUCTION COMPANY

The United States hereby files this response in order to address two discrete issues raised by the Pueblo of Laguna's and LCC's Motions to Dismiss. First, both the Pueblo of Laguna and LCC argue that they are immune from the claims asserted against them by Plaintiff under principles of tribal sovereign immunity. *See* Pueblo of Laguna Motion 15-17; LCC Motion 13-19. The sovereign immunity asserted by the Pueblo of Laguna and LCC would not apply to any claim or counterclaim brought by the United States, should the United States assert such a claim at a future time. *See, e.g.*, *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1135 (11th Cir. 1999) ("[T]ribal sovereign immunity does not bar suits by the United States.") (quotation and citation omitted); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987) ("[I]t is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States."); *United States v. Yakima Tribal Court*, 806 F.2d 853,861 (9th Cir. 1986) ("The United States may sue Indian tribes and override tribal sovereign immunity.").

Second, the Pueblo of Laguna and LCC also argue that they cannot be liable under CERCLA because they do not fall within the statute's definition of "person." *See* Pueblo of Laguna Motion 17-22; LCC Motion 13-19. CERCLA defines "person" as including a "corporation" and "commercial entity," but does not include Native American tribes. 42 U.S.C. § 9601(21). The only court to address the status of tribes under CERCLA supports the Pueblo of Laguna's argument that tribes are not "persons" under the statute. *See Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029, 1032 (E.D. Wash. 2009) ("CERCLA's definition of 'person' is plain. It does not include 'Indian tribes.'"). No court, however, has addressed the CERCLA status of tribal corporations incorporated under section 17 of the Indian Reorganization Act, as LCC is. *See* LCC Motion, Ex. B; *see also* 25 U.S.C. § 477 (authorizing the Secretary of the Interior to issue a charter of incorporation to an Indian tribe conveying to the chartered entity—referred to as an "incorporated tribe"—the power to conduct various activities, including purchasing and owning property).

Several courts have evaluated whether a section 17 (or comparable) corporation is essentially a part (or arm) of its tribe and thus enjoys the same immunity from suit as the sovereign tribal government. *See, e.g., Bales v. Chickasaw Nation Industries*, 606 F. Supp. 2d 1299 (D.N.M. 2009) (Parker, J.) (finding that a tribal corporation chartered under section 3 of the Oklahoma Indian Welfare Act—which is analogous to section 17 of the Indian Reorganization Act—shares the tribe's sovereign immunity without the need for further review of the corporation's relationship to the tribe); *Amerind Risk Mgmt. Corp.* v. *Malaterre,* 633 F.3d 680, 685 (8th Cir. 2011) (finding that section 17 corporations "are entitled to tribal sovereign immunity"). However, the question of whether section 17 corporations categorically retain their tribal status has not been definitively decided by the Tenth Circuit.

In *Breakthrough Management Group v. Chukchansi Gold Casino & Resort*, the Tenth Circuit identified six factors that "are helpful in informing [the] inquiry" into whether a tribal economic entity acts "analogous to a governmental agency" or "more like [a] commercial business enterprise[], instituted solely for the purpose of generating profits for [its] private owners." *See* 629 F.3d 1173, 1184-88 (10th Cir. 2010) (citations and quotations omitted). In a footnote, the Tenth Circuit stated that it "need not opine definitely" on whether section 17 corporations should be treated differently than other tribal economic entities (because the party arguing the point had not raised it in its opening brief). *See id.* at 1185 n.8. However, the Tenth Circuit quoted a secondary source that supported the proposition that section 17 corporations retain their tribal status (and thus their immunity, absent a waiver) and that noted that "[c]ourts nonetheless have resorted generally to a multi-factor inquiry . . . to decide whether the corporation constitutes an 'arm of the tribe' . . . ." *Id.* (quoting Clay Smith, *Tribal Sovereign Immunity: A Primer*, 50 Advoc. 19, 20-21 (May 2007)).

Thus, while there is no controlling case law to determine whether a tribal corporation is or is not a "person" under CERCLA, or whether a further inquiry is needed when the tribal corporation is a section 17 corporation, *Breakthrough Management* identifies factors that the Tenth Circuit deems relevant to whether an entity acts "analogous to a governmental agency" or "more like [a] commercial business enterprise[]." *Breakthrough Mgmt.*, 629 F.3d at 1184. Applying those factors to the CERCLA inquiry would require limited discovery into matters such as the Pueblo of Laguna's degree of control over LCC and the economic relationship between the two. *See id.* at 1187 (listing factors); 1191-95 (discussing facts relevant to the six factors with respect to two tribal entities at issue).

CONCLUSION

For the reasons stated in Parts I-III, the Court should dismiss Plaintiff's claims against the United States under Federal Rule of Civil Procedure 12(b)(1) or (6). If the Court reaches the issue of LCC's status under CERCLA, the Court should grant limited discovery for the reasons stated in Part IV.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was served this 28th day of October, 2015, via the Court's ECF system upon:

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