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

ATLANTIC RICHFIELD COMPANY,

Plaintiff,

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

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

Defendants.

REPLY MEMORANDUM IN SUPPORT OF THE PUEBLO OF LAGUNA'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6) (DOC. 35)

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From the opening sentence of its Response (Doc. 47), Atlantic Richfield Company (ARCO) distorts the Pueblo of Laguna's (Pueblo) arguments and the facts,[1] and moves on to twist the law and the Agreement to Terminate Leases (ATL), around which many of ARCO's claims revolve. Ultimately, ARCO fails in its attempts to establish that tribes are subject to CERCLA[2] liability because tribes are not "persons" under the statute and because CERCLA does not abrogate tribal sovereign immunity. That disposes of Claims 1-5. ARCO attempts to backdoor its CERCLA claims through the December 1986 ATL by taking one paragraph of that agreement – ¶ 3(a) – out of context. Read properly in conjunction with the rest of the ATL, it is apparent that ARCO's reimagining of the ATL fails. CERCLA claims brought under that agreement had to be brought under ¶ 3(b) and therefore within 10 years. Thus, ARCO does not state any legitimate contract claims under ¶ 3(a), but even if it had, the statute ran on those claims decades years ago.

The confines of CERCLA, the properly defined scope of ¶ 3(a) of the ATL, the limited waiver of sovereign immunity in ¶ 5(a) of that agreement, and its other consistent provisions all constrain the claims that ARCO may lawfully assert. None of the claims here avoid those constraints, and dismissal is appropriate.

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[1] The Pueblo does not accept ARCO's factual recitation, Response at 2-5, but has elected not to devote space to refutation of non-jurisdictional facts at the Rule 12 stage.

[2] Comprehensive Environmental Response, Compensation, and Liability Act, 42 §§ 9601-9675.

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

ARCO's Response demonstrates that it has no credible argument that tribes generally, or the Pueblo specifically, are liable Potentially Responsible Parties (PRPs) under CERCLA. Congress did not intend tribes to be liable, and the lack of express language in the statute making tribes such "persons" or abrogating tribal immunity confirms that fact. No wonder ARCO was left to apples-to-oranges comparisons, distortion of a Supreme Court opinion, and invocation of an irrelevant tool of statutory construction. Consequently, claims 1-5 against the Pueblo must be dismissed under both Fed. R. Civ. P. 12(b)(1) and (6).

1) 12(b)(1) Sovereign Immunity Claims 1-5: ARCOs Response Does Not Refute That CERCLA Does Not Abrogate Tribal Immunity.

ARCO's claims 1-5 are brought directly under CERCLA and premised on ARCO's assertion in its complaint that Congress had abrogated tribal sovereign immunity in CERCLA. The Pueblo refuted that assertion in its Motion to Dismiss and noted that it "must await any arguments ARCO may make in response to determine if there is any reasoned basis for the Complaint's bald assertion of an abrogation in [CERCLA] section 9620(a)(1) and will reply as appropriate." ARCO has provided no such arguments in response and has apparently conceded the obvious: Congress did not abrogate tribal sovereign immunity in CERCLA.

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

ARCO concedes its own statutory liability under CERCLA, Response at 13, but then mischaracterizes the Pueblo as also being a PRP upon which CERCLA imposes strict liability. As discussed in some detail in the Pueblo's Memo in Support of its Motion to Dismiss (Pueblo's

Memo or Memo), Indian tribes are not included in the definition of "person" in CERCLA and therefore are not PRPs.[3] Memo at 17-21.

(a) CERCLA Is Not Ambiguous With Respect to the Exclusion of Indian Tribes From the Definition of "Person"

ARCO claims that CERCLA is ambiguous as to the exclusion of tribes from the definition of "person." The assertion is absolutely controverted by the statute itself. That definition clearly states that:

> The term ''person'' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

It does not say that "person" "includes" the specifically listed entities. It states instead exactly what "person" "means." Such limiting language should be strictly construed. *See, e.g., Bedford v. Raytheon Co.*, 755 F. Supp. 469, 471 n.4 (D. Mass. 1991) (definitions using the "more limited term 'means'" must be strictly construed).

While not included in the definition of "person," "Indian tribe" is expressly defined at § 9601(36). In its Memo, the Pueblo cited other examples of the **inclusion** of Indian tribes elsewhere in CERCLA, but not as PRPs. Memo at 20 n. 6. Others are discussed below. ARCO's argument that Congress inadvertently omitted tribes from the definition of "person" is wholly without basis, and every authority ARCO cites in fact supports the **Pueblo's** position.

Boldly, however, ARCO draws on a single, isolated instance in CERCLA to conclude

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[3] Even if the Court were to conclude that the Pueblo is a person, ARCO's CERCLA claims must be dismissed for the reasons stated in the Pueblo's Memo at 21-24 and in the United States' Memorandum in Support of it Motion to Dismiss (Doc. 32).

that, "[g]iven 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." Response at 15. ARCO is comparing apples and oranges. ARCO points to 42 U.S.C. § 9607(j):

> Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section.

(emphasis added). Significantly, this "example" relied on by ARCO supports exactly the opposite conclusion. Section 9607(j) refers to parties who have incurred response costs or suffered damages from hazardous substances, not parties potentially responsible for causing the damage.[4] This and other provisions in CERCLA group these three sovereigns as the persons PRPs may be liable **to**, not persons who are liable.

The history of CERCLA's evolution confirms that Congress knowingly added tribes as enforcers of CERCLA in many other places. The phrase "or Indian tribe" was added to § 9607(i) & (j) – immediately following the phrase "including the United States or any State" – by the

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[4] ARCO could have noted similar language in the immediately preceding paragraph §9607(i) Application of a registered pesticide product:

> No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act

These two paragraphs simply serve as narrow exemptions to liability for response costs under CERCLA: These two paragraphs mirror the language at § 9607(a)(4)(A), establishing the liability of PRPs for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe."

1986 SARA amendments. The SARA amendments added the phrase "or Indian tribe" in three additional places but never to the definition of "person." Congress could have easily done so if it meant to include Indian tribes as PRPs. There are now 38 references to "Indian tribe" in CERCLA. To assert that Congress **inadvertently** omitted tribes from the definition of "person" strains credibility and certainly does not create ambiguity where none exists.

The Supreme Court "has repeatedly held that the word 'person' in a statute does not include a sovereign government absent affirmative evidence of such an inclusory intent." *Fayed v. CIA*, 229 F.3d 272, 274 (D.C. Cir. 2000) (citing, *e.g.*, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000)). The definition of "person" at CERCLA § 9601(21) does specifically include other sovereigns, namely the United States and States, while excluding sovereign Indian Nations. Since Indians are discussed in detail throughout CERCLA (including 58 instances of the word "tribe" and 48 instances of the word "Indian"), ARCO's supposition that tribes were "inadvertently" omitted from the definition of "person" is extremely unlikely.

***(b) ARCO Misconstrues* Atlantic Research**

ARCO cites *United States v. Atl. Research Co.*, 551 U.S. 128 (2007) for what it calls the "obvious implication" that the Supreme Court understands Indian tribes to be "persons" under CERCLA broadly. Not so. The Court's discussion of "any other persons" in *Atlantic Research* was not about the broad definition of persons in CERCLA. Nor was it about PRPs. Instead the Court was focused narrowly on a single CERCLA subparagraph, § 9607(a)(4)(A), in which Indian tribes, states, and the United States were grouped together as governments, as enforcers, that may bring suit under CERCLA. The *Atlantic Research* Court noted that 42 U.S.C. § 9601(21) "defin[ed] 'person' to include the United States and the various States." *Atl. Research*

Co., 551 U.S. at 336. The definition does not include Indian tribes, nor did the Court suggest that it did. Again, the entire focus of *Atlantic Research* was who may **bring** suit under CERCLA, not who can **be sued**. ARCO's generalization from the Court's narrow discussion to a broad conclusion again strains credibility and tries to create ambiguity where there is none.

(c) ARCO's Invocation of In Pari Materia Is Immaterial

In another failed sleight of hand, ARCO attempts to turn a tool of statutory construction – *in pari materia* – on its head. At its core, *in pari materia* is intended to ensure that similar statutes are read in harmony or to avoid inconsistent results, but "where no ambiguity exists there is no room for construction . . . Construction may not be substituted for legislation." *Glover Constr. Co. v. Andrus*, 591 F.2d 554, 559 (10th Cir. 1979) (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) ("The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."), *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."), *United States v. Colo. & N.W.R. Co., 15*7 F. 321, 327, 330 (8th Cir. 1907) ("a statute falls under [*in pari materia*] only when its terms are ambiguous or its significance is doubtful"); *see also Berliner, Zisser, Walter & Gallegos, P.C. v. SEC*, 962 F. Supp. 1348, 1350 n.2 (D. Colo. 1997) (quoting *Black's Law Dictionary* 791 (6th ed. 1990) (citations omitted) ("*in pari materia . . . applies only when the particular statute is ambiguous*")). CERCLA is not ambiguous with respect to tribes, a fact recognized by the court in *Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029 (E.D. Wa. 2009). While not controlling, that opinion is well reasoned and persuasive.

Moreover, *in pari materia* may only be applied where the purposes of two statutes are the same. For example, ARCO quoted *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*." While the phrase "in charge" might have been borrowed from the CWA, the term "person" was not. And while RCRA and CERCLA might fall under the broad rubric of environmental protection, ARCO has not, and cannot, demonstrate that those statutes' definitions of "person" share the same purpose.[6]

Finally, if one were to resort to a canon of construction, it should not be *in pari materia* or ARCO's call for liberal construction. Response at 19. Rather, as a general principle of statutory construction, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted in their benefit." *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *see also McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 172-74 (1973) (The Indian sovereignty doctrine is relevant, . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read").[7]

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[6] Congress did not use the RCRA definition of a person when it enacted CERCLA, much less the RCRA definition of "municipality" (which expressly included tribes). Congress apparently used the RCRA definition of "person" as a starting point for the CERCLA definition but then made significant deletions and additions. In this context, one cannot assume that Congress' purpose was the same in the two instances, so one cannot assume that Congress meant the same thing by "municipality" in CERCLA.

[7] "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian*

B. ARCO Misconstrues the Agreement to Terminate Leases: There Is No Contractual Route to CERCLA Liability

The ATL is not, as ARCO conveniently mischaracterizes it, a "settlement agreement."[8] It is instead precisely what its title states, an agreement to terminate leases between the Pueblo and Anaconda. Under the terms of those active Indian mining leases and governing Federal mining

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Nation of N.Y., 470 U.S. 226, 247 (1985). Moreover, statutes are to be construed in ways that promote tribal self-government. *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982), *accord Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509-10 (1991) (noting congressional "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.") (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).

The earthmoving project taken on by the Pueblo is an example of such tribal self-sufficiency and economic development. It would not be consistent with this "overriding goal" for any tribe to take on CERCLA liability that would reduce, or even eliminate, any economic benefit. Consistently, Congress did not include tribes as CERCLA PRPs. While the Pueblo welcomed the royalty revenue and opportunity to provide employment for its members, uranium mining was not the windfall for the Pueblo that ARCO suggests it was. It is not clear, for example, what point ARCO was trying to make by grossly and inaccurately overstating the Pueblo's uranium mining royalty revenue, i.e. "many millions of dollars-between $5 and $10 million every year from 1976 to 1980 alone." ARCO picked the Pueblo's three highest revenue years, disregarding many years when revenue was less than $1 M and as little as $43,270. The Pueblo's total revenue from uranium royalties from 1953 to 1983 was $73.4 M, less than $2.4 M per year.

[8] The ATL is, in particular, not a "settlement" as contemplated by CERCLA § 9613(f)(3)(B). The ATL does not meet the criteria for a § 9613(f)(3)(B) "administrative or judicially approved settlement," which must comply with the requirements for settlements generally as laid out in CERCLA § 9622. The ATL is not a settlement with the United States to resolve CERCLA liability for response actions. Indeed there was no CERCLA action by EPA to resolve and the United States was not even a party to the ATL. No such CERCLA settlement ever occurred. *See* U.S. Motion to Dismiss at 18. Instead, Anaconda and the Pueblo agreed on the terms under which Anaconda would fulfil its obligation under the leases to make "full provision . . . for the conservation and protection" of the mine so that the Pueblo and Secretary of Interior as trustee could approve the lease termination as required under the leases and Federal regulations (e.g., 25 C.F.R. Parts 171 and 177 [redesignated at 25 C.F.R Parts 211 and 216, respectively], and 30 C.F.R. 231 [redesignated at 43 C.F.R. Part 3570]).

regulations, Anaconda was responsible for reclamation of the Jackpile Mine as a prerequisite to lease termination, subject to the approval of both the United States and the Pueblo.[9] "Reclamation" is defined in the mining regulations as "measures undertaken to bring about the necessary reconditioning or restoration of land or water that has been affected by exploration, testing, mineral development, mining, onsite processing operations, or waste disposal, in ways which will prevent or control onsite and offsite damage to the environment." 30 C.F.R. § 231.2 (1978). At the time, there were no Federal or State regulations or standards for reclaiming uranium mines so DOI used the EIS process, as mandated by the National Environmental Policy

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[9] For example, under the terms of the 1952 lease, ¶ 6 Surrender and Termination:

> The Lessee shall have the right at any time during the term hereof to surrender and terminate this lease or any part thereof upon the payment of all rentals, royalties, and other obligations due and payable to the Lessor and the further sum of one dollar upon a showing satisfactory to the Secretary of Interior and the lessor that full provision has been made for the conservation and protection of the property.

And the 1976 lease stated:

> (24) PROTECTION OF THE ENVIRONMENT AND RECLAMATION OF THE SURFACE. Lessee agrees to comply with all applicable State and Federal law and regulations relating to the protection of the environment governing its operations hereunder and shall take such corrective actions as may be necessary within the scope of normal soil conservation and anti-stream and anti-air pollution practices acceptable to the Secretary. Lessee shall comply with regulations as set forth in Paragraph (7) of Article III herein and 25 CFR 177.7 and Lessee shall submit plans as required under such regulations to the Superintendent and the Pueblo of Laguna for approval.

To that end, "[b]efore mining operations ceased in 1982, Atlantic Richfield developed a series of comprehensive remediation plans that it was prepared to implement at the Jackpile Site." Compl. ¶ 72; see also alternatives proposed by ARCO, Record of Decision (ROD) at 1 (attached as Exhibit 1 to the Pueblo's Memo).

Act (NEPA), to determine the proper level of reclamation.[10] Final EIS 2 at A-36.[11] Concerned by Anaconda's position that it had "extremely limited reclamation obligations under the leases, approved mining plans, and applicable statutes and regulations," Final EIS 2 at 2, the Pueblo agreed to undertake the reclamation project.

Almost 30 years later, ARCO apparently concedes that it had to reclaim the Mine, Compl. ¶ 72, but it still seeks to avoid responsibility for the environmental harms caused by Anaconda. ARCO's remarkably overbroad reading of ¶ 3(a) of the ATL also ignores the structure and substance of the remaining provisions of the ATL. Specifically, ARCO ignores the limited waiver of sovereign immunity in ¶ 5 and the ramifications of those limitations on the interpretation of paragraphs 3(a) and 3(b). ARCO also ignores the regulatory structure that was

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[10] NEPA requires federal agencies such as BLM and BIA to consider environmental impacts arising from projects under their respective agency jurisdiction and to follow an environmental review process by which members of the public are afforded an opportunity to participate in the agency's consideration of the proposed action. 42 U.S.C. §§4321-4370h; 40 C.F.R. §§ 1500-1508. NEPA requires agencies to prepare an Environmental Impact Statement ("EIS") if a proposed action may "significantly affect the quality of the human environment." 42 U.S.C. § 4332(2)(C). BLM and BIA deemed the reclamation of the Jackpile Mine to be an action requiring an EIS. The Record of Decision ("ROD") is the final step in the EIS process and is prepared by the agency with jurisdiction by law over the proposed action. BIA and BLM's ROD regarding the Jackpile reclamation was prepared pursuant to the NEPA and was the basis for the reclamation project the Pueblo took on. In contrast, the NCP is a series of regulations promulgated by the EPA that govern the CERCLA cleanup process. 40 C.F.R. pt. 300 (2013). EPA requires CERCLA remedial actions to adhere to the NCP. A CERCLA ROD will be prepared for a remedial action required by CERCLA. Remedial and removal actions under CERCLA need to comply with NCP requirements. It is clear from a reading of the ROD issued by the BLM and BIA that the reclamation did not.

[11] The internet address for public access to the October 1986 Final Environmental Impact Statement is http://catalog.hathitrust.org/Record/002568102 and cited herein as Final EIS. Memo at 2 n.1.

applied to the reclamation project (and as significantly, the regulations and processes that were not followed but that should have been if the reclamation had instead been a CERCLA cleanup).

In short, only the Pueblo's construction of the ATL can explain and harmonize all its terms and the undisputed history. Only the Pueblo's construction makes sense of the allocation of risk given ARCO's contractual obligations under the leases and the very different specter of environmental liability under CERCLA. In contrast, ARCO's interpretation renders the ATL nonsensical, most notably highlighted by the fact that paragraphs 3(b) and 3(c) expressly include CERCLA but ¶ 3(a) –where ARCO nevertheless attempts to hang its CERCLA hat—does not.

1) Analysis of the Entire Agreement to Terminate Leases Exposes the Inherent Inconsistency in ARCO's Interpretation of ¶ 3(a).

ARCO devotes scant space in its Response to its analysis of the ATL and summarily concludes that ¶ 3(a) is the "assumption of liability clause." ARCO mischaracterizes that paragraph as "the Pueblo's unbounded agreement to assume environmental liability for the site." By the artful omission of important language, sometimes with ellipses, sometimes not, ARCO gives the false impression that ¶ 3(a) stands alone and is unqualified. Not so. As the Pueblo argued in its Memo, at 25-26, each part of the ATL must make sense in light of the entire agreement. ARCO may not cherry pick the parts it likes while disregarding the rest.

(a) Paragraph-by-Paragraph Summary of the ATL

Paragraph 1 details the uranium leases, which gave rise to ARCO's obligations to the Pueblo and provides that the agreement between the Pueblo and ARCO "constitutes an agreement to terminate the leases upon the effective date of the Agreement."

Paragraph 2 sets forth the overarching context of the ATL and consideration flowing from each side. ARCO agreed to pay $43,600,000 "in consideration for the release of Anaconda

from "obligations arising under the leases" not under CERCLA or RCRA. That payment was to be used "[t]o the extent required . . . for reclamation and related purposes as prescribed by the Record of Decision issued jointly by the Bureau of Indian Affairs and the Bureau of Land Management, and pursuant to the management plan and agreement between The Pueblo and the Secretary of the Interior governing the performance of reclamation by The Pueblo."

Paragraph 3 sets forth the allocation of contractual responsibilities under the leases (¶ 3(a)) and non-contractual risks like CERCLA (¶ 3(b)). It also contains the Pueblo's release of Anaconda from claims by the Pueblo (¶ 3(c)).

Paragraph 4 sets forth the requirements for Anaconda as indemnitor to notify the Pueblo of any third party claims, including CERCLA and RCRA claims, that could only have been filed between Dec. 12, 1986 and Dec. 12, 1996.

Paragraph 5 includes the Pueblo's carefully limited waiver of sovereign immunity with its cap on any liability at $10 million, a 10-year term on indemnification claims, and a 10-year set-aside of $10 million.

Paragraph 6 contains ARCO's express representation that there were no hazardous substances, wastes, or toxic materials at the Mine.

The remaining paragraphs are not germane at this juncture. However, it is worth noting that the United States, through the Assistant Secretary for Indian Affairs, executed a release of Anaconda in conjunction with its approval of the ATL. ATL at 6.

(b) The Meaning of Paragraph 3 in the Context of the Whole Agreement

Under paragraph 3, the Pueblo released Anaconda from all obligations under the leases and agreed to undertake three categories of liability arising from the Pueblo's assumption of

ARCO's duty to perform the reclamation (but only the reclamation, over which BLM and BIA had authority) of the Jackpile Mine.

The first of the categories of liability is covered under ¶ 3(a) in which the Pueblo "assumed full and complete responsibility and liability under all applicable laws including any obligations imposed by Anaconda's leases with The·Pueblo" for the reclamation project as prescribed by BIA and BLM.[12] Coupled with the United States' approval and separate release of Anaconda appended at the end of the ATL, this resolved ARCO's responsibility for the reclamation project itself. The Pueblo (or its to-be-created tribal corporation) would do the reclamation work pursuant to "the management plan and agreement between The Pueblo and the

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[12] The July 24, 1963 lease referenced some of those laws (emphasis added):

> (7) REGULATIONS. "**To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases including 25 CFR 171, and 30 CFR 231**."

Those regulations in turn provided, for example:

> 25 C.F.R. § 171.24 (1969): Surrender of leased premised in good condition. On expiration of the term of a lease, or when a lease is surrendered, the lessee shall deliver to the Government the leased ground with the mine workings in good order and condition, and bondsmen will be held for such delivery in good order and condition, unless relieved by the Secretary of the Interior for cause.
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> 30 C.F.R. § 231.10: Operating Plans "**Exploration and mining plans shall be consistent with and** responsive **to the requirements of the lease or permit for the protection of nonmineral resources and for the reclamation of the surface of the lands affected by the operations.** The mining supervisor shall consult with the other agencies involved, and shall promptly approve the plans or indicate what modifications of the plans are necessary to conform to the provisions of the applicable regulations and the terms and conditions of the permit or lease. No operations shall be conducted except under an approved plan."

Secretary of the Interior governing the performance of reclamation by The Pueblo" and under the oversight of the United States' agencies with jurisdiction over mining reclamation – BIA and BLM, but not EPA.[13] The language in ¶ 3(a) is clear that the parties understood that the Pueblo was assuming ARCO's liability and obligations to reclaim the Jackpile Mine consistent with the applicable federal mining regulations and the leases under BIA and BLM jurisdiction. But the mining regulations and leases are not CERCLA.

Under the second category of liability, which is the subject of ¶ 3(b), the Pueblo agreed to "indemnify and hold Anaconda harmless from, and reimburse Anaconda . . . for any amounts paid or expenses incurred . . . because of any claim, liability or obligation" related to the reclamation project or environmental laws, "including but not limited to, any liability or obligation which exists or arises under [CERCLA] and [RCRA]." Here the Pueblo explicitly agreed to assume unknown or future risks of liability but only for a limited time.

The third category of liability, addressed in ¶ 3(c) releases ARCO from claims by the Pueblo and requires that the Pueblo "refrain from filing any claims or actions on behalf of The Pueblo, for damages to The Pueblo's natural resources, or for recovery for the costs of cleanup and reclamation under CERCLA or other applicable law[.]"

CERCLA (and RCRA) claims fall under ¶ 3(b), not ¶ 3(a).[15] Paragraph 3 addresses "all applicable laws" in ¶ 3(a), or "all applicable environmental laws and regulations" in ¶ 3(a)(ii),

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[13] As noted by the United States in its Motion to Dismiss at 19, the Secretary of Interior lacked CERCLA authority in 1986 when the ATL was signed. The laws "applicable" to ¶ 3(a) are logically only those over which the Secretary of Interior had authority at the time.

[15] ARCO asserts in its Response, at 12, that the term "remedial action" is a "CERCLA-specific" term and that the "inclusion of CERCLA-specific language in Paragraph 3(a) leaves no

but separately addresses in ¶ 3(b) risks related to laws not yet applicable to the ATL, namely CERCLA and RCRA. Again, those statutes are named in ¶ 3(b) but not in ¶ 3(a). Their exclusion from ¶ 3(a) makes perfect sense in context. CERCLA and RCRA, which are directed respectively to "hazardous substances" and "hazardous wastes," were not "applicable laws" with respect to the reclamation project for several reasons.[16] First, Anaconda explicitly represented in ¶ 6(a)(ii) that such materials were not present at the Mine. Second, liability under those statutes would not arise "under the leases" and therefore were not part of the reclamation project. Nevertheless, the Pueblo agreed, for a period strictly limited to 10 years, *see* ¶ 5(a), to "[i]ndemnify and hold Anaconda harmless from, and reimburse Anaconda . . . for any amounts paid or expenses incurred, including attorneys' fees and expenses, because of any claim, liability or obligation . . . which exists or arises under" CERCLA and RCRA.

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doubt that 3(a) was intended to include CERCLA liability." ARCO is mistaken. Congress has used the term "remedial action" in over 100 sections of the United States Code outside of CERCLA. Roughly half of the uses of the term occur outside of Title 42 and in statutes ranging from violations of the congressional franking privilege, 2 U.S.C. § 501(e) (2012), to correcting improper reprisals against whistleblowers, 50 U.S.C. § 2702(k) (2012). (The Pueblo searched the United States Code on uscode.house.gov using "remedial action" as the search term.) Similarly, the Supreme Court used the phrase "remedial action" in 58 reported opinions in a range of contexts before the date CERCLA was enacted and as early as 1881. (The Pueblo searched for "remedial action" in LexisAdvance and then limited the result to U.S. Supreme Court cases decided before October 7, 1980, the date of CERCLA's enactment.)

[16] ARCO contends that CERCLA was an "applicable law" under ¶ 3(a) and therefore that the failure to reference it by name in that paragraph was not a "conspicuous[] absen[ce]." Given that CERCLA was referenced by name in ¶ 3(b) and ¶ 3(c), however, its absence in ¶ 3(a) is certainly "conspicuous." The Pueblo offers an explanation why it was not an "applicable law" under ¶ 3(a), why its inclusion would have made no sense in the context of the reclamation project, and how the overall allocation of risk in ¶ 3 and the ATL as a whole makes sense. ARCO simply ignores the rest of the ATL and offers no explanation for CERCLA's conspicuous omission from ¶ 3(a).

This attempt by ARCO to shoehorn CERCLA into 3(a) fails badly, especially when juxtaposed to CERCLA being named specifically in 3(b) and 3(c).[17]

(c) Paragraph 5: A Limited Waiver of Sovereign Immunity

With a disturbing lack of candor, ARCO asserts that the waiver of sovereign immunity in ¶ 5(a) "could not be more clear" and then proceeds to quote only a portion of that paragraph. Response at 6. In fact, the waiver read as a whole is carefully crafted to track the parties' intent regarding the claims that could be brought under the various provisions of ¶ 3. ¶ 5(a) provides:

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

But for this carefully limited consent to suit, the Pueblo could not even be a party to this case.

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[17] In this context, it does not matter that the Pueblo interpreted ARCO's Complaint as alleging that any CERCLA liability ARCO might have was being transferred to the Pueblo. Response at 8-10. Given the language of the Complaint, that interpretation may have been warranted. For example, ¶ 7 of the Complaint reads:

> In reliance upon these promises and upon comprehensive releases by Defendants of any responsibility or liability for environmental remedial action (including any work required by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")), Atlantic Richfield paid $43.6 million to be used by the Laguna, under the supervision of the United States, to perform the environmental cleanup required at the Jackpile Site.

That ARCO now acknowledges that it could not divest itself of CERCLA liability is a welcome clarification. Regardless, it does not matter that the Pueblo could have agreed to share in that liability in ¶ 3(a) because it did not do so. It did agree to indemnify ARCO for CERCLA liability under 3(b), but any such claims had to have been brought by 1996. ATL at ¶ 5(a).

Not only is the Pueblo's liability limited to $10 million regardless of the source of liability, the careful delineation between the "indemnification agreement," i.e., ¶ 3(b), and all other liability supports the Pueblo's construction of ¶ 3. Indemnification claims are limited to 10 years from the date of the ATL. With its inclusion of unknown future liabilities, including express mention of CERCLA and RCRA, ¶ 3(b) claims were expressly limited as to time.

Consistently, ¶ 5(b), which ARCO fails to mention at all, provides:

> 5.(b) The Pueblo agrees to make available up to Ten Million Dollars ($10,000,000) for a period of ten (10) years out of funds held in trust for The Pueblo by the Secretary of the Interior, or held by The Pueblo directly, for the purpose of satisfying any award or judgment obtained by Anaconda pursuant to this Agreement.

The $10 million for which the Pueblo might have had to indemnify Anaconda was to be kept readily available for that 10-year period.

In contrast, since the reclamation work to be performed under ¶ 3(a) by the Pueblo could have taken eight years or twelve, claims properly relating to the reclamation work were not subject to a set time limitation in the ATL but instead, like any construction project, were to be measured by the work itself, which ARCO and the US acknowledged was completed in 1995. *See* Compl. ¶ 72; U.S. Motion to Dismiss at 7.

ARCO's contention that ¶ 3(a) was an all-encompassing "assumption of liability" by the Pueblo would make the delineation in ¶ 5(a) nonsensical. Why would the Pueblo carefully limit the period during which it could be held liable for indemnification under ¶ 3(b) but leave itself wide open as to time period and the scope of claims under ¶ 3(a)? It would not. It did not.

2) Summary

ARCO is trying to bring what are inherently CERCLA claims under ¶ 3(a). Those claims

belong under ¶ 3(b) and are timed out by ¶ 5(a)'s 10-year limit on indemnification. To the extent anything in ARCO's complaint might be construed as a contract claim actually arising under ¶ 3(a), such claims would have been timed out long ago under the statute of limitations, as discussed in the Pueblo's Memo at 34.[18]

CONCLUSION

For the foregoing reasons, ARCO's claims against the Pueblo should be dismissed.

Respectfully submitted, October 28, 2015

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[18] The separate release by the United States that is appended at the end of the ATL, and which cannot encompass CERCLA liability, mirrors the language of ¶3(a), which, likewise, does not encompass CERCLA liability. See United States Motion to Dismiss at 19 ("As a matter of law, the Secretary of the Interior did not have the authority to resolve CERCLA liability on behalf of the United States at the time the Agreement was signed on December 12, 1986.").

CERTIFICATE OF SERVICE

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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