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

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

MEMORANDUM OF LAW IN SUPPORT OF OPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR RECONSIDERATION OF THE COURT'S MEMORANDUM OPINION AND ORDER AND ORDER OF PARTIAL DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC. (DOCS. #75 & #76)

Defendant Laguna Construction Company, Inc. ("LCC" or "Laguna Construction") submits this Memorandum of Law in support of its Motion for Reconsideration of the Court's March 1, 2016 Memorandum Opinion and Order and Order of Partial Dismissal of Plaintiff's Claims Against it (Docs. #75 and #76).

In its Memorandum Opinion and Order (Doc. #75) ("Mem."), the Court held that LCC had waived its sovereign immunity for pre-merger conduct in its Plan of Merger. Although noting that it was a "very close question," the Court held that Article II(a)(3) of the Plan of Merger waived LCC's immunity as to creditors, and that ARCO's predecessor was a creditor of

LCC.[1] For the reasons discussed below, LCC respectfully requests that the Court reconsider that holding and conclude instead that (i) ARCO was not a creditor, and (ii) LCC did not waive its sovereign immunity in the Plan of Merger or elsewhere.

I. Standard for Motion for Reconsideration

Neither the Federal Rules of Civil Procedure nor this Court's local rules explicitly recognize Motions for Reconsideration of interlocutory orders.

> Motions to reconsider that are not specifically authorized under the Federal Rules of Civil Procedure fall into three categories: (i) a motion to reconsider filed within [twenty-eight] days of the entry of judgment is treated as a motion to alter or amend the judgment under rule 59(e); a motion to reconsider filed more than [twenty-eight] days after judgment is considered a motion for relief from judgment under rule 60(b); and (iii) a motion to reconsider any order that is not final is a general motion directed at the Court's inherent power to reopen any interlocutory matter in its discretion. *See Price v. Philpot*, 420 F.3d 1158, 1167 & n.9 (10th Cir. 2005).

Attorney General, State of New Mexico v. Valley Meat Company, LLC, 2015 WL 9703255, at *17 (D.N.M. 2015) ("*Valley Meat Company")* (brackets in the original). The instant motion falls within the third category.

The instant motion is also consistent with Rule 54(b). "The Tenth Circuit has not cabined district courts' discretion beyond what rule 54(b) provides: '[D]istrict courts generally remain free to reconsider their earlier interlocutory orders.'" *Valley Meat Company,* 2015 WL 9703255, at *14. As this Court has observed, Rule 54(b) provides:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and *may be revised at any time before the entry of a*

[1] For ease of reference, "ARCO" as used herein refers to both Atlantic Richfield and its predecessor, the Anaconda Minerals Company.

> *judgment* adjudicating all the claims and all the parties' rights and liabilities.

Anderson Living Trust v. WPX Energy Production, LLC, 308 F.R.D. 410, 433 (D.N.M. 2015) ("*Anderson Living Trust*") (emphasis added by court) (holding that "In the Tenth Circuit, 'law of the case has no bearing on the revisiting of interlocutory orders ….'" (*quoting Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1252 (10th Cir. 2011); *see also Valley Meat Company*, 2015 WL 9703255, at *14 (same).

The *Anderson Living Trust* Court described "[t]he best approach" as being "to analyze motions to reconsider differently depending on three factors." The first factor[2] is determinative here:

> First, the Court should restrict its review of a motion to reconsider a prior ruling in proportion to how thoroughly the earlier ruling addressed the specific findings or conclusions that the motion to reconsider challenges. *How "thoroughly" a point was addressed depends both on the amount of time and energy the Court spent on it, and on the amount of time and energy the parties spent on it-in briefing* and orally arguing the issue, but especially if they developed evidence on the issue.

Anderson Living Trust, 308 F.R.D. at 433 (emphasis added). *See also Valley Meat,* 2015 WL 9703255, at *14. As more fully discussed below, although the Court devoted substantial time and energy to the issue sought to be reconsidered here, it did so with virtually no substantive attention from the parties and without oral argument.

II. <u>The Court's Decision</u>

In its March 1, 2016 Order of Partial Dismissal ("Doc. #76) ("Order"), the Court

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[2] The second factor is "the case's overall progress and posture, the motion for reconsideration's timeliness relative to the ruling it challenges, and any direct evidence the parties may produce …." The third factor is that the court should consider the Servants of the Paraclete grounds." 308 F.R.D. at 435.

dismissed without prejudice claims asserted against the merged out New Mexico corporation ("New Mexico LCC") and, based on sovereign immunity, dismissed the claims against the federal corporation ("Federal LCC") "to the extent these claims arose after the 1995 merger of Defendant Laguna Construction Company, Inc. with the state entity of the same name." (Order at 1). However, the Court declined to dismiss the CERCLA claims against LCC arising from pre-merger allegations, on the ground that Federal LCC had waived its sovereign immunity from such claims in its 1995 Plan of Merger (Doc. #34-5) ("Plan of Merger").[3]

The Court based its holding that LCC had waived its sovereign immunity in the Plan of Merger on its conclusion that ARCO was a "creditor" of New Mexico LCC, and that the Plan of Merger waived immunity against creditors. (Mem. at 8-16). The applicable provision in the Plan of Merger provides in its entirety:

> The Surviving Corporation shall thereupon and thereafter possess all the rights, privileges, powers and franchises as well of a public as of a private nature, and be subject to all the restrictions,

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[3] The Court also denied LCC's motion to dismiss under Rule 12(b)(6), holding the motion "premature because LCC relies on evidence outside the boundaries of the Complaint to support its claims that it is not a person within the meaning of CERCLA." (Mem. at 19). Since the parties' initial briefing in this matter, the Court has dismissed all CERCLA claims against the other two defendants – the United States for failure to plead ripe CERCLA claims and the Pueblo of Laguna because it is immune from CERCLA claims. (Docs. # 72 and 74). LCC wishes to advise the Court that it intends to file a separate motion for summary judgment in the near future seeking dismissal of the CERCLA claims against it on the same grounds as those on which the United States prevailed. LCC has filed the instant Motion for Reconsideration first and separately because courts must address motions challenging their subject matter jurisdiction before considering other bases for dismissal. *In re Franklin Sav. Corp.*, 385 F.3d 1279, 1286 (10th Cir. 2004), *cert. denied,* 54 U.S. 814 (2005) ("Jurisdictional issues must be addressed first and, if they are resolved against jurisdiction, the case is at an end. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94, 118 S.Ct. 1003); *Amerind*, 633 F.3d at 686 (sovereign immunity is a "threshold jurisdictional matter" and a "jurisdictional prerequisite.").

> disabilities and duties of each Constituent Corporation; and all and singular, the rights, privileges, powers and franchises of each Constituent Corporation, and all property, real, personal and mixed, and all debts due to either Constituent Corporation on whatever account, as well for stock subscriptions as all other things in action or belonging to each Constituent Corporation shall be vested in the Surviving Corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the Surviving Corporation as they were of the respective Constituent Corporations, and the title to any real estate vested by deed or otherwise in either Constituent Corporation shall not revert or be in any way impaired by reason of the merger; *but all rights of creditors and all liens upon any property of either Constituent Corporation shall be preserved unimpaired*, and all debts, liabilities and duties of the respective Constituent Corporations shall thenceforth attach to the Surviving Corporation **and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.** Any action or proceeding, whether civil, criminal or administrative, pending by or against either Constituent Corporation, Laguna Construction Company, Inc. (New Mexico Corporation) and Laguna Construction Company, Inc. (Federal Corporation) shall be prosecuted as if the merger had not taken place, or the Surviving Corporation may be substituted in such action or proceeding.

(Plan of Merger at 7-8) (emphasis and bold typeface added).

The Court held that ARCO was a creditor within the meaning of this provision and that its right to force LCC into Court remained unimpaired by the merger. (Mem. at 9-10). The Court reached this critical linchpin of its holding based solely on what it viewed as LCC's "stipulation" that ARCO was in fact a creditor under the Plan of Merger:

> Second, LLC does not deny that ARCO is a creditor whose rights it agreed to preserve unimpaired during and after the merger. The Court will treat this silence as a stipulation that ARCO is a creditor within the meaning of the Plan of Merger.

(Mem. at 9). All of the Court's ensuing analysis flows from that assumed stipulation. Because that assumption was incorrect, reconsideration is appropriate.

III. Discussion

ARCO's entire argument on the point that formed the basis of the Court's waiver finding consisted of one paragraph. Its proffered definition of "creditor" was relegated to a footnote. (ARCO Br. at 8 & n.2). Nor did ARCO allege in its Complaint that it was a "creditor" of LCC at the time of the merger (or any other time). LCC acknowledges that it did not directly counter ARCO's footnote defining the term "creditor" or the one paragraph "argument." That silence, however, was not intended to be and was not a stipulation that ARCO's predecessor was in fact a creditor of New Mexico LCC.

LCC did not directly address this argument because it was so abbreviated in ARCO's brief that it barely rose to the level of an argument.[4] Nothing in ARCO's one paragraph treatment of the issue signaled a major argument point, much less an argument of such substance that the Court would place the entire weight of LCC's waiver of sovereign immunity on that one paragraph. "A motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2002). In deeming LCC's silence a stipulation that ARCO was in fact a "creditor," the Court misapprehended LCC's position.

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[4] LCC also failed to address ARCO's cursory argument because LCC's focus was on different language in the same Article. Specifically, LCC focused on the language that the "rights of creditors and all liens upon any property of either Constituent Corporation shall be preserved unimpaired, and all debts, liabilities and duties of the respective Constituent Corporations shall thenceforth attach to the Surviving Corporation *and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it*." (LCC Reply Br. at 12 -13). The Court rejected this argument based on grammatical construction. (Mem. at 12-13). If upon reconsideration the Court concludes that ARCO does not qualify as a "creditor," the clause emphasized by LCC supports LCC's argument. That is, all debts, liabilities and duties of New Mexico LCC may be enforced against the surviving Federal LCC only as if they had been incurred or contracted by Federal LCC; that is, subject to unwaived sovereign immunity.

A. <u>ARCO was Not a Creditor</u>

Reconsideration is also appropriate where a point was not "thoroughly" addressed or given appropriate "time and energy" by the parties. *Anderson Living Trust*, 308 F.R.D. at 434; *Valley Meat Co.*, 2015 WL 9703255 at *14 (same). Neither party devoted sufficient time or energy to the point on which the Court's decision hinged – whether ARCO was a creditor of New Mexico LCC prior to the merger.

1. The Threshold for Finding a Waiver of Sovereign Immunity is High

Sovereign immunity waivers are to be construed narrowly. "When faced with a dispute over the scope of a waiver of tribal sovereign immunity, the court must construe the challenged waiver strictly." *Ramey Constr. Co. v. Apache Tribe of Mescalero* Reservation, 673 F.2d 315, 320 (10th Cir. 1982). *Compare In re Franklin Sav. Corp.*, 385 F.3d 1279, 1289-90 (10th Cir. 2004) *cert. denied*, 54 U.S. 814 (2005) ("'Like a waiver of immunity itself, which must be unequivocally expressed[,] [the Supreme] Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'") (quoting *Lehman v. Nakshian,* 453 U.S. 156 at 160-61 (1981)); *Reynolds v. United States*, 643 F.2d 707, 713 (10th Cir. 1981) ("sovereign immunity waivers are strictly construed"). ARCO's argument, and this Court's holding, must be measured against this standard.

2. ARCO's "Creditor" Argument Was Insufficient, and the Court's Acceptance of that Argument was Erroneous, Even in the Absence of a Counter-Argument from LCC

ARCO's argument was paper thin and, as stated, did not warrant a response. ARCO's sole citation to support its contention that it was a "creditor" of LCC New Mexico was

to Black's Law Dictionary:

> The prevailing definition of "creditor" at the time the Plan of Merger was executed included Atlantic Richfield. *See Black's Law Dictionary* 368 (6th ed.1990) (defining "creditor" as including '[o]ne who has the right to require the fulfillment of an obligation or contract"); *see also id.* ("The word is susceptible of latitudinous construction. In its broad sense the word means one who has any legal liability upon a contract, express or implied….")."

(ARCO Br. at 8 n.2). As a threshold matter, a "latitudinous" construction of a single word cannot support a waiver of sovereign immunity under the standard set forth above. Under that standard, the Court was obliged to use a narrow construction, not a broad one.

Even if it were appropriate to use a word in its "broad sense" when construing a waiver, however, ARCO's argument fails. At the time of the merger, LCC had no "legal liability upon a contract, express or implied" with respect to ARCO. Similarly, at the time of the merger ARCO had no legal "right to require the fulfillment of an obligation or contract." There was no contract between LCC and ARCO. Moreover, any "obligation" under CERCLA had not (and still has not) risen to the level of a present right. The dismissal of ARCO's CERCLA claims against the United States confirms that fact. In short, even using ARCO's proffered definition of "creditor," ARCO simply does not fit the definition. The high standard for finding a waiver of sovereign immunity cannot support such a tenuous reading, and it was error to hold otherwise.

3. The Full Definition Confirms That ARCO Did Not and Does Not Qualify as a "Creditor"

Not only did ACRO offer an improperly broad definition of "creditor"; it offered an incomplete one as well. Significant language followed the ellipses in ARCO's proffered definition. The 1990 definition of "creditor" read in its entirety:

> **Creditor.** A person to whom a debt is owing by another person

> who is the "debtor." Rooney v. Inheritance Tax Commission of Kansas, 143 Kansas 143, 53 P.2d 500, 501. One who has a right to require the fulfillment of an obligation or contract. Murphy v. Jos. Hollander, Inc., 131 N.J.L. 165, 34 A.2d 780, 783. One to whom money is due, and, in ordinary acceptation, has reference to financial or business transactions. The antonym of "debtor." Erickson v. Grande Ronde Lumber Co., 162 Or. 556, 92 P.2d 170, 177.
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> The word is susceptible of latitudinous construction. In its broadest sense the word means one who has any legal liability upon a contract, express or implied, or in tort; *in its narrow sense, the term is limited to one who holds a demand which is certain and liquidated.* In statutes the term has various special meanings, dependent upon context, purpose of statute, etc.
>
> The term "creditor" within the common-law and statutes that conveyances with intent to defraud creditors shall be void, includes every one having right to require the performance of any legal obligation, contract, or guaranty, or a legal right to damages growing out of contract or tort, and includes not merely the holder of a fixed and certain present debt, but every one having right to require the performance of any legal obligation, contract, or guaranty, or a legal right to damages growing of contract or tort, and includes one entitled to damages for breach of contract to convey real estate, notwithstanding the abandonment of his action for specific performance.

Black's Law Dictionary 368 (6th ed.1990) (emphasis added).[5]

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[5] Subsequent editions of the Dictionary are more concise. The seventh edition provides:

> **creditor. 1**. One to whom a debt is owed; one who gives credit for money or goods. –Also termed *debtee*. **2**. A person or entity with a definite claim against another, esp. a claim that is capable of adjustment and liquidation. **3.** *Bankruptcy.* A person or entity having a claim against the debtor predating the order for relief concerning the debtor. **4.** *Roman law*. One to whom any obligation is owed, whether contractual or otherwise. Cf. DEBTOR.

Black's Law Dictionary (7th ed. 1999). The definition in the 8th and 9th editions is identical. The

At no time did ARCO hold a demand against LCC that was certain and liquidated. There was no debt owed by LCC to ARCO. ARCO had no definite claim, capable of adjustment and liquidation, against LCC. LCC owed no contractual or other obligation to ARCO; ARCO bases its claims against LCC on a federal statute, not contract or tort. CERCLA does not define "creditor" for purposes of the statute. Whether under the "latitudinous" or current version, ARCO was not a "creditor" under any version of Black's definition.[6]

Not only did ARCO provide the Court with an incomplete and misleading definition of the then-current definition of "creditor"; it made no effort to explain how the relationship between ARCO and LCC fell within that truncated definition. It did not, for example, contend that its status as a creditor arose from the 1986 Agreement to Terminate Leases ("Agreement") between ARCO and the Pueblo of Laguna; LCC did not exist at the time and was not a party to the Agreement. Indeed, although ARCO pleads a breach of contract and other claims arising out of the Agreement against the Pueblo of Laguna (Complaint, ¶¶204-230) (Doc. #1), it does not (and could not) do so against LCC. ARCO's argument is barren of any explanation of what debt or obligation LCC owed to it that qualified ARCO as a creditor at the time of the merger.

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definition in the 10th edition but retained but rearranged the same definitional elements. *See* 8th ed. (2004), 9th ed. (2009), and 10th ed. (2014).

[6]Nor does ARCO fall within the definition of "creditor" from other sources. *See Gallant v. Fashion Piece Dye Works*, 174 A. 248, 249 (N.J. Ch. 1934) (stating that "the party who claims to be a creditor, so as to be entitled to institute this action, must, I think, at the time he comes into court with his bill, be a creditor, *as distinguished from being merely entitled to become a creditor by the proof of a claim for damages ....")* (emphasis added); *and see, e.g.,* dictionary.com (defining "creditor" as (1) a person or firm to whom money is due and (2) a person or firm that gives credit; investopedia.com/terms/c/creditor (defining "creditor" as "an entity (person or institution) that extends credit by giving another entity permission to borrow money if it is paid back at a later date…."); debitoor.com/dictionary/creditor (defining "creditor" as "an entity, a company or a person of a legal nature that has provided goods, services or a monetary loan to a debtor….").

4. *Under the Applicable Standard to Find a Waiver of Sovereign Immunity, No Definition of Creditor can Support the Conclusion that ARCO was Entitled to That Status*

In conclusion, LCC respectfully submits that ARCO's "argument" presented in a single paragraph is too slim a reed to bear the heavy weight of a waiver of sovereign immunity. Although the Court devoted substantial "time and energy" to the consequences of ARCO's being an alleged "creditor" of New Mexico LCC, *Anderson Living Trust* 308 F.R.D. at 434, neither of the parties did. The Court had the benefit of virtually no substantive argument on the question. In light of the Court's recognition of the closeness of the question, the failure of either party to address the issue thoroughly, and the crucial importance of the issue, LCC respectfully submits that the Court's March 1, 2016 Memorandum Opinion and Order and Order should be reconsidered.

B. The Plan of Merger Must be Read Consistently With LCC's Federal Charter

LCC also asks the Court to reconsider its elevating the Plan of Merger language over the explicit language of LCC's federal corporate Charter. The Plan of Merger is silent on sovereign immunity, whereas LCC's Charter is explicit and clear on the subject. The Pueblo of Laguna, LCC's tribal governmental shareholder, expressly intended that LCC share the Pueblo's sovereign immunity and mandated the only way in which that immunity could be waived. (Federal Charter of Incorporation, Art. XVI) ("Charter") (Doc. #34-3, at B-12-13).

The Charter was adopted and approved in September of 1994. The Plan of Merger was executed on December 15, 1994 (Doc. #34-3 at D-5-11), the Articles of Merger were filed with the State on June 1, 1995 (Doc. #34-3 at D-1), and the State issued the Certificate of Merger on June 2, 1995 (Doc.#34-3 at D-12). Accordingly, Federal LCC's ability to waive its sovereign

immunity was set in stone in September of 1994, when its Charter was approved by the Pueblo of Laguna Tribal Council and the Secretary of the Interior. Any future waiver was required to comply and be consistent with that Charter. Against that backdrop, the Plan of Merger cannot be read in a vacuum, but must instead be read as subject to the Charter in general, and the Charter's waiver requirements in particular. (Charter, Art. XVI) (Doc. #34-4, at B-12).

LCC argued that *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011), *cert. denied,* 132 S.Ct. 1094 (2012) ("*Amerind")*, was fundamentally on all fours with this case. (LCC Br. at 10-11). The Court found *Amerind* unpersuasive, stating that "the merger language that was held not to constitute a waiver of sovereign immunity in *Amerind* is different than the language in LCC's Plan of Merger." (Mem. at 14). LCC is unable to find anywhere in the *Amerind* decision mention of, citation to, or quotation from the Plan of Merger. Rather, the language cited by the *Amerind* Court and noted as different by this Court came from Amerind's Federal Charter of Incorporation. (Mem. at 14, *quoting* 633 F.3d at 686). Because the language in Amerind's Charter is nearly identical to that in LCC's Charter, the Eighth Circuit's conclusion that it did not waive Amerind's sovereign immunity applies with equal logical force here. Reconsideration is appropriate where a court clearly misreads what would otherwise be persuasive authority.[7]

[7]"The plaintiffs begin their argument by pointing out that Amerind's *federal charter* authorizes Amerind to 'assume the obligations and liabilities of [ARMC].' … Because we hold that the general assumption of ARMC's obligations and liabilities in Amerind's *federal charter* does not constitute an express waiver of Amerind's sovereign immunity, we need not address the plaintiffs' arguments regarding ARMC's purported waiver of its sovereign immunity." *Amerind*, 633 F.3d at 686 (emphasis added). LCC's Charter contains the virtually identical language as Amerind's Charter, authorizing LCC to "acquire the rights and assume the obligations and liabilities of Laguna Construction Company, a New Mexico Corporation, through merger as provided in Article XVII of this Charter." (LCC Charter, Art. VIII.Q). *See also* Article XVII.E,

In its Memorandum Opinion, the Court several times refers to the Article XVI mandatory requirements for a waiver of sovereign immunity as "internal procedures." (Mem. at 15, 16). Explaining its conclusion, the Court stated: "LCC has not, however, identified any authority that would support a finding that its failure to comply with internal procedures could invalidate an otherwise valid and clear waiver of sovereign immunity." (Mem. at 15). This statement begs the very issue of the waiver's validity: a waiver cannot be clear and *valid* if it does not satisfy the requirements of Article XVI. To the contrary, it is compliance or non-compliance with those requirements that makes a waiver valid or not valid.

The Court distinguished the authority that LCC did identify by stating that the court there "did not opine about whether a provision detailing how immunity could be waived would function as a limitation on a waiver of immunity in an *unrelated contract or agreement*. In the absence of any authority regarding this issue, the Court will not hold that a valid and clear waiver of sovereign immunity must be consistent with a tribal corporation's internal procedures in order to be effective." (Mem. at 16, discussing *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009) ("*Memphis Biofuels*") (emphasis added). LCC respectfully submits that the very purpose of a Charter provision governing sovereign immunity and its waiver is to limit the tribal corporation's ability to waive that immunity in all of its contracts and agreements, which by definition are "unrelated" to the Charter itself.

Courts that have examined Charter requirements for waiver have treated them with the

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stating that "Federal LCC shall acquire all the rights and be subject to all the liabilities and obligations of this Corporation and of the New Mexico Corporation …." Thus, Amerind's Plan of Merger was irrelevant to the *Amerind* court's holding that sovereign immunity was not waived. Rather, that court relied on the identical Charter language that appears in LCC's Charter.

substantive force they rightfully possess. *See, e.g., Amerind*, 633 F.3d 680, 687-88 (8th Cir. 2011), *cert. denied,* 132 S.Ct. 1094 (2012) (holding there was no waiver, despite sue and be sued clause, because the Charter required that waiver be authorized by a resolution of the Board of Directors and there was no evidence of any such resolution); *Memphis Biofuels,* 585 F.3d at 921-22 (6th Cir. 2009) (stating that "the ability to take legal action is limited to action approved by the board of directors" and holding there was no waiver without such a resolution); *Sanchez v. Santa Ana Golf Club*, 2005-NMCA-003 at {10}, 136 N.M. 682, 104 P.3d 548 (2004), *cert. denied*, No. 28,987 (2005) (holding "[i]n this case, the sue or be sued clause was only activated if it met the requirements of Article XVI. Section D of Article XVI mandates that all waivers must be in the form of a resolution, which shall be duly adopted by Defendant's board of directors. … [S]ince Article VIII's sue or be sued clause can only be made effective pursuant to the requirements set out in Section D of Article XVI, we conclude that no waiver was created.")

Mandatory limitations on how sovereign immunity may be waived are not internal procedures. Internal procedures govern corporate meetings and quorums and voting and other internal governance. They are procedural. Sovereign immunity and the manner of its waiver, when specified, is substantive. The Article XVI limitations on LCC's ability to waive its immunity are an inherent element of the Corporation's being. They bind its authority in contracting with vendors, employees, the United States Government, and all others. They similarly bound LCC when it entered into the Plan of Merger. These explicit limitations on LCC's authority to waive its sovereign immunity are essential to its existence; they are not "internal procedures" of inferior stature.

In acknowledging the high standard for finding a waiver of sovereign immunity, the Court stated that "[h]ere, the plain language of the Plan of Merger construed in a common sense manner, promises creditors that the merger will not impede their right to enforce obligations against LCC." (Mem. at 10). Once ARCO is stripped of its status as a "creditor," this conclusion no longer provides ARCO with an argument to haul LCC into court. The analysis ends there. Nonetheless, the Court's observation applies as well to a common sense reading of the source of LCC's privileges, obligations and immunities – its Federal Charter. That Charter explicitly anticipates and authorizes the merger, and addresses the relationship between the two merging companies in plain and clear language:

> E. The effect of such merger shall be the same as in the case of the merger of two New Mexico corporations, as described in § 53-14-6 of the New Mexico Business Corporations Act, *except that the surviving corporation shall have all the rights, privileges, immunities and powers of a corporation organized under 25 U.S.C. § 477* as specified in this Charter, and shall be subject to all the duties and liabilities of a foreign corporation lawfully transacting business in the State of New Mexico. This Corporation shall acquire all the rights and be subject to all the liabilities and obligations of this Corporation and of the New Mexico Corporation, as described in § 53-14-6 of the New Mexico Business Corporations Act.

(Charter, Art. XVII.E) (emphasis added). The explicit reference to the "rights, privileges, *immunities* and powers of a corporation organized under § 477, together with Article XVI, is an infinitely clearer assertion of LCC's sovereign immunity than any implied waiver of that immunity to be found in the Plan of Merger. Such an attenuated implied waiver does not comport with the mandate of *Santa Clara Pueblo* that waivers of sovereign immunity must be clear and unequivocal. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

C. <u>The Sue and be Sued Clause in the Charter is Not a Waiver of LCC's Sovereign Immunity</u>

Because the Court based its waiver holding on the Plan of Merger, it alluded to but did not address the impact of the Charter's "sue and be sued" clause.[8] (Mem. at 6 n.3). If, upon reconsideration, the Court agrees that the "creditor" argument cannot support a waiver of LCC's sovereign immunity in the Plan of Merger, it will become necessary for the Court to determine whether this § 477 corporation possesses sovereign immunity and whether that immunity was waived by the "sue and be sued" clause in the Charter. LCC does not reargue its earlier arguments on those points here, as they are not directly at issue in the Motion for Reconsideration. Nonetheless, LCC briefly addresses the issue to avoid any suggestion that it did or does concede that the "sue and be sued" clause constitutes a waiver of its sovereign immunity.

The sue and be sued clause in LCC's Charter explicitly makes the right to sue and be sued subject to Article XVI of the Charter – the provision governing sovereign immunity and the manner in which it may be waived. Specifically, it confers on the corporation the authority "[t]o sue and be sued in its Corporate name *to the extent provided in Article XVI of this Charter*." (Emphasis added). To read the sue and be sued clause as a blanket, implied waiver of sovereign immunity would render Article XVI meaningless. Had the Pueblo intended such a blanket waiver, it would not have devoted an entire Charter Article to the preservation and manner of waiving LCC's sovereign immunity. As observed by Felix Cohen, "[m]ost courts have reasoned that tribal adoption of a charter with such a clause simply creates the power in the corporation to waive immunity, and that adoption of the charter alone does not independently waive tribal

[8] Charter, Art. VIII(K).

immunity.")) Felix S. Cohen, Handbook of Federal Indian Law § 7.05(1)(c)(2005 ed.) (quoted in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 n.2 (10th Cir. 2008). So, here, the Charter permits LCC to waive its sovereign immunity, but the waiver is valid only if it complies with the requirements of Article XVI. There was no Board resolution.[9] There was no waiver.

CONCLUSION

For all of the foregoing reasons, LCC respectfully requests that the Court:

1. Reconsider its finding that LCC was a "creditor" for purposes of the Plan of Merger, thereby waiving its sovereign immunity;

2. Reconsider its conclusion that LCC waived its sovereign immunity in the Plan of Merger;

3. Conclude that LCC did not waive its sovereign immunity because there was no compliance with the mandatory requirements for such waiver in its Federal Charter of Incorporation; and

4. Dismiss ARCO's CERCLA claims against it, with prejudice, on the grounds that LCC's sovereign immunity deprives this Court of subject matter jurisdiction to adjudicate these claims.

Dated: March 29, 2016

Respectfully submitted,

JANOV LAW OFFICES, P.C.

/s/ *Gwenellen P. Janov*

[9] Declaration of Robert Plunkett (Doc. # 34-1), at ¶ 4.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Opposed Motion of Defendant Laguna Construction Company, Inc. for Reconsideration of the Court's Memorandum and Order of Partial Dismissal of Plaintiff's Claims Against Laguna Construction Company, Inc. was served this 29th day of March, 2016, via the Court's ECF system upon:

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