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

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR RECONSIDERATION (DOC. #79)

Defendant Laguna Construction Company, Inc. ("LCC" or "Laguna Construction") submits this Reply Memorandum of Law in response to Atlantic Richfield Company's ("ARCO") Response in Opposition to Laguna Construction's Motion for Reconsideration (Doc. # 83).

ARCO urges denial of LCC's Motion for Reconsideration on the grounds that reconsideration is improper in this case and the Court correctly ruled that LCC waived its sovereign immunity in the Plan of Merger. LCC disagrees and respectfully submits that this is a particularly appropriate case for the grant of reconsideration.

It cannot be emphasized enough that this is not a run-of-the-mill commercial case. Rather, the issue here is the waiver of a sovereign government's immunity from suit. The standard for finding such a waiver is high, and waivers must be interpreted strictly in favor of the sovereign. Indeed, this Court acknowledged that its conclusion that LCC had waived its

immunity is a "very close question."[1] Given the critical importance of the issue involved and the Court's own recognition that the answer is not clear cut, reconsideration is proper and should be granted.

Argument

A. Reconsideration is Proper.

ARCO contends that reconsideration is inappropriate here because LCC has raised a new argument that should have been addressed in LCC's Reply Brief on the original Motion to Dismiss.[2] ARCO emphasizes that LCC did not address ARCO's argument that ARCO was a "creditor" of LCC New Mexico, and therefore should not be permitted to address that point in its Motion for Reconsideration.

LCC acknowledges that it did not address the point in its Reply Brief on the Motion to Dismiss. Nonetheless, that failure should not stand as a bar to reconsideration. LCC reiterates and reemphasizes the point made in its Memorandum in Support of this Motion:[3] ARCO presented its "creditor" argument in half a paragraph and one footnote in its seventeen page brief in opposition to LCC's Motion to Dismiss.[4] Nor, as noted in LCC's initial brief on this Motion (Mem. at 6), did ARCO allege in its Complaint that LCC had waived its sovereign immunity because ARCO was a "creditor" under the Plan of Merger. Indeed, nowhere in the Complaint

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[1] Memorandum Opinion and Order at 8 (Doc. # 75) ("Mem. Op.").

[2] Atlantic Richfield Company's Response in Opposition to LCC's Motion for Reconsideration at 2-3 ("ARCO Resp.").

[3] 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 at 6 (Doc. # 80) ("LCC Mem.").

[4] Atlantic Richfield's Response in Opposition to Laguna Construction Company's Motion to Dismiss at 8 (Doc. #48).

did ARCO even mention the Plan of Merger, much less cite it as a basis for a waiver of LCC's sovereign immunity.[5]

This Court recently noted the great discretion a court has in reconsidering an interim decision, as opposed to the more restrictive standards applicable to reconsideration under Rules 59 and 60. In *United States v. Loera*, ___ F.Supp.3d ___, 2016 WL 1730357 (D.N.M. Apr. 19, 2016) ("*Loera*"), the Court stated that Rule 54(b) "puts no limit or governing standard on the district court's ability to [freely reconsider its prior rulings], other than that it must do so 'before the entry of judgment.'" *Id.* at *23. The Court continued:

> In short, a district court can use whatever standard it wants to review a motion to reconsider an interlocutory order. It can review the earlier ruling de novo and essentially reanalyze the earlier motion from scratch, it can review the ruling de novo but limit its review, it can require parties to establish one of the law-of-the case grounds, or it can refuse to entertain motions to reconsider altogether.

Id. Given the critical importance of tribal sovereign immunity, the Court's appreciation of its being a "very close question," and ARCO's cursory treatment of the issue, whether LCC waived its immunity as to LCC New Mexico's "creditors" and whether ARCO was such a "creditor" bears de novo reconsideration.

ARCO notes that the Court must "consider the time and expense that the party opposing reconsideration spent in winning the earlier ruling and should try to prevent that party from having to bear the same impositions again." (ARCO Resp. at 2, *quoting Anderson Living Trust v. WPX Energy Production, LLC.*, 312 F.R.D. 620, 648-49 (D.N.M. 2015). LCC agrees. ARCO spent precisely one-half paragraph and one footnote winning the ruling on the point underlying

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[5]ARCO's only relevant allegation in the Complaint is that LCC waived its sovereign immunity "[b]y virtue of the Laguna's ownership of Laguna Construction and the conduct of Laguna Construction at the Jackpile Site." (Complaint, ¶ 21) (Doc. # 1).

the Court's conclusion that ARCO was a "creditor" of LCC New Mexico. Allowing the parties to address the issue properly would hardly constitute "the same imposition[] again."

The Court should also "consider 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, and use those factors to assess the degree of reasonable reliance the opposing party has placed in the Court's prior ruling." *Loera*, ___ F.Supp.3d at ___, 2016 WL at *24. Here, LCC's motion was timely and immediate. ARCO engaged in no intervening activity – no discovery, no trial preparation – in reliance on the prior ruling. Everything has been held in abeyance pending the Court's decision on LCC's Motion for Reconsideration.[6] There has been no reliance by ARCO on the Court's earlier ruling.

The lack of reliance and prejudice to ARCO from reconsideration stands in stark contrast to the injustice to LCC and the gravity of the issue sought to be reconsidered. A waiver of sovereign immunity must be strictly construed in favor of the sovereign." *Orff v. United States*, 545 U.S. 596, 601-02 (2005); *see also Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (same); *Cheyenne-Arapaho Gaming Com'n v. National Indian Gaming Commission*, 214 F.Supp.2d 1155, 1164 (N.D.Ok. 2002) (waivers by the government of sovereign immunity are to be read narrowly).

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[6] This Court granted an unopposed motion by Defendant Pueblo of Laguna to extend the time to answer or otherwise respond until after determination of LCC's Motion for Reconsideration. (Doc. ## 81 and 82). Despite this Order, ARCO suggests that LCC has waived its right to answer the Complaint if its Motion for Reconsideration is denied. (ARCO Resp. at 4 n.2, citing Fed.R.Civ.Pro. 12(a)(4)). ARCO cites no case law for this contention, and LCC disputes it. Just as nothing in the Federal Rules explicitly addresses Motions for Reconsideration, nothing in the Rules explicitly addresses how such a Motion affects a moving defendant's time to answer. As a practical matter, it is a waste of party and judicial resources to require a defendant to answer a Complaint if the defendant has sought reconsideration of a denial of a motion to dismiss the action altogether. Moreover, the Court's order extending the Pueblo's time to answer pending decision on LCC's Motion should, if it does not explicitly, apply as well to LCC's time to respond.

LCC respectfully submits that the Court erred in construing LCC's silence as a stipulation that ARCO was a "creditor." Yet,

> [e]ven in circumstances where the Court concludes that it is insulated from reversal on appeal, there are principled reasons for applying a de novo standard. After all, if the Court was wrong in its earlier decision, then, generally speaking, it is unjust to maintain that result – although the Court should weigh this injustice against any injustice that would result from upending the parties' reliance on the earlier ruling, which is the balancing test that the three factors above represent.

Loera, ___ F.Supp.3d at ___, 2016 WL at *24.

LCC submits that reconsideration is appropriate here, that the Court should consider both parties' arguments de novo and, upon reconsideration, reverse its conclusion that ARCO was a "creditor" of LCC New Mexico. Once that conclusion is rejected, LCC's motion to dismiss must be granted, as the basis on which the Court found a waiver of sovereign immunity no longer exists.

B. <u>ARCO was not a "Creditor" of LCC New Mexico</u>.

In its initial Memorandum, LCC pointed out that the Black's Law Dictionary definition of "creditor" proffered by ARCO was misleading, incomplete, and inapplicable. (Mem. at 8-10). ARCO accuses LCC of "redefine[ing] 'creditor' in a way that would 'impair' the 'liabilities and obligations' it owes Atlantic Richfield." (ARCO Resp. at 7). To the contrary, it is ARCO that is attempting to distort the meaning of "creditor" to apply to an entity – LCC New Mexico -- that owed it no obligation at the relevant time

The four proposed definitions of "creditor" set out as bullet points in ARCO's response underscore this point. (ARCO Resp. at 5). In 1995, ARCO had no "right to require the fulfillment of an obligation or contract" and no "right to require the performance of any legal obligation." As established by the Court's ruling of February 9, 2016 (Doc. # 71), ARCO has no

current right under CERCLA to require any other party to do anything. It certainly had no such right with respect to LCC in 1995. There is no claim that LCC was "[o]ne to whom money is due" in 1995, nor is there any tenable claim that LCC had "any legal liability upon a contract, express or implied, or in tort" to ARCO in 1995. Among these four, "[o]ne to whom money is due" is the most natural reading of the Plan of Merger's use of the word "creditor," is the most consistent with the sovereign immunity standard, and clearly precludes any speculative, contingent, and inchoate CERCLA "claims" as of 1995.

ARCO now argues that its status as a "creditor" should be measured by "the most obvious alternative source for defining 'creditor'--the U.S. Bankruptcy Code." (ARCO Resp. at 5). Even more "latitudinous" in scope than the broader portions of the Black's dictionary definition it first offered, ARCO's new reliance on the Bankruptcy Code is entirely misplaced in the context of this case.

The Bankruptcy Code's definitions of "claim" and "debtor" were intended to be broad and broadly construed. "Congress unquestionably expected [the definition of "claim"] to have wide scope. 'By this broadest possible definition ... the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'" *Chateaugay Corp. v. LTV Corp.*, 944 F.2d 997, 1003 (2d Cir. 1991), *quoting* H.R.Rep. No. 595, 95th Cong., 2d Sess.309 (1978).[7] The "broadest possible definition" is not appropriate here. We return, again, to the foundational principle that waivers of sovereign immunity must be unequivocal and interpreted narrowly in favor of the sovereign. The

[7] ARCO cites *Chateaugay* for the noncontroversial proposition that creditors frequently file claims in bankruptcy for CERCLA liability. (ARCO Resp. at 5 n.3). That fact, however, does not support ARCO's transplanting of a definition Congress intended to have ultimate breadth to the entirely different context of a waiver of tribal sovereign immunity, in which all terms are to be construed narrowly.

wholesale importation of the bankruptcy definitions to the sovereign immunity waiver context is improper.

In its Motion, LCC pointed out that ARCO had made no attempt to demonstrate or explain how ARCO fit within even its overbroad definition of "creditor" from Black's Law Dictionary. (Mem. at 10). In response, ARCO now would squeeze LCC into the definition of debtor in several ways. First, it contends that it asserts a right under the Bankruptcy Code definition to payment arising from LCC's pre-merger conduct. (ARCO Resp. at 6). As noted above, the Bankruptcy Code definitions are intended to be interpreted broadly and are an inappropriate standard to establish a waiver of sovereign immunity outside the bankruptcy context.

Next, ARCO argues that under the Black's definition, it asserts "a right to require the fulfillment of an obligation … [arising] not just from CERCLA, but also from the Agreement to Terminate Leases." ARCO cites *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 299 F.3d 1029 (9th Cir. 2002) for the proposition that "a contract may be considered when apportioning CERCLA liability without actually enforcing the contract itself." (ARCO Resp. at 6). While that is a correct description of the Ninth Circuit's holding, it has no bearing here. The court there did not have jurisdiction to enforce the contract's indemnification clause against the Government, but it could and did consider the contract as a factor in its liability allocation under CERCLA. Of determinative significance, however, Dow was a party to the contract considered by the court. Here, LCC was not a party to the Agreement to Terminate Leases; it did not exist at the time. LCC owes ARCO no obligation under the Agreement, and ARCO cannot deem itself a "creditor" of LCC under that Agreement.

ARCO insists that it must be deemed a "creditor" because "an inclusive definition of 'creditor' that preserves liability for LCC's pre-merger conduct is the definition that LCC's Plan of Merger requires." (ARCO Resp. at 6). This circular argument assumes the conclusion to be reached and does nothing to advance ARCO's position. It bears repeating that the issue before the Court is whether a sovereign government has intentionally waived its sovereign immunity. "Inclusive" definitions are inconsistent with the bedrock principle that waivers are to be construed narrowly and in favor of the sovereign.

Finally, ARCO appears to contend that its status as a "creditor" is required by the New Mexico merger statutes. As an initial matter, neither the State's merger nor dissolution statutes define the term "creditor." Into this silence ARCO points to the language of Section 53-14-6(E), N.M.S.A., which contains the language echoed in LCC's Plan of Merger. From this, ARCO concludes that "[t]he statute thus contemplates that a "creditor" is anyone holding a 'liability[y]" or "obligation" of 'the corporations so merged.'" (ARCO Resp. at 6). A more reasonable reading of this statute, given its references to existing claims, pending actions or proceedings, and liens against property, is that only creditors holding existing or ripened claims are protected from impairment, not parties who years hence may seek to assert a claim.[8] In any event, the statute, like the Plan of Merger language mirroring it, does not address the situation in which the surviving corporation possesses sovereign immunity from suit.

[8] LCC would also note that neither § 53-14-6(E) nor § 53-14-4(B), cited elsewhere in ARCO's response, applies to this merger. They apply only to the merger of domestic New Mexico corporations. When one of the merger parties is a foreign corporation, § 53-14-7 applies instead. Thus, ARCO's speculative assertion that the New Mexico Secretary of State would not have "approved" this merger without the § 53-14-6-(E) language is wholly wide of the mark. The Secretary of State has no authority under § 53-14-7 to approve or disapprove a merger with a foreign corporation. LCC Federal, as a corporation formed under federal law, is a foreign corporation. If the merging foreign corporation is the surviving corporation, it is governed by that foreign jurisdiction's laws if different from the law of New Mexico. N.M.S.A. § 53-14-7(B). LCC's sovereign immunity and its preservation are matters of federal law.

C. LCC's Charter Governs Interpretation of the Plan of Merger.

One basis for reconsideration is that the court misapprehended applicable law. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2002). In its Motion, LCC argued that the Court's apparent misreading of *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) led the Court to conclude erroneously that *Amerind* was not persuasive authority. (Mem. at 12-15). Specifically, the Court found 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. Op. at 14) (emphasis added). ARCO responds that LCC's reliance on *Amerind* "is a non sequitur." (ARCO Resp. at 3 n.1).

The language the Court apparently believed was in Amerind's Plan of Merger appeared in fact in its federal Charter. The *Amerind* court nowhere quoted or otherwise relied on the merger language. The language that the *Amerind* court found did not constitute a waiver is identical to the language in LCC's Charter. The Amerind Charter "authorizes Amerind to 'assume the obligations and liabilities of [ARMC]." 633 F.3d at 680. The LCC Charter authorizes LCC Federal "[t]o 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). Thus, rather than being different, both federal corporations' Charter language is identical. The *Amerind* court's conclusion that the language did not constitute a waiver of sovereign immunity is equally applicable here.

ARCO argues that "if LCC were correct that immunity could be waived only by following the procedures in its corporate charter, it would render meaningless the entirety of the disputed provision in LCC's Plan of Merger. That would include not only the 'creditor' clause, but also the portion the Court found—and LCC does not dispute—'contains a clear waiver of

immunity for pending lawsuits.'" (ARCO Resp. at 8). The written requirements for a tribal government's or corporation's waiver of sovereign immunity are mandatory, not optional. They are not mere "internal procedures" without the force of law. They must be complied with or a waiver is not valid *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921-22 (6th Cir. 2009) (holding "board approval was not obtained, and CNI's charter controls. In short, without board approval, CNI's sovereign immunity remains intact").

Moreover, it is unclear what exactly ARCO believes "LCC does not dispute." If ARCO is suggesting that LCC "does not dispute" that it has waived sovereign immunity for pending litigation against LCC New Mexico, ARCO is incorrect. A surviving merger entity that possesses sovereign immunity retains that immunity in pending litigation against the non-immune merger partner unless it has clearly and unequivocally waived it. *Amerind*, 633 F.3d at 686 n.7 ("A sovereign entity does not automatically waive its sovereign immunity through the mere act of succeeding a corporation that is either not entitled to sovereign immunity or that has waived such immunity"). In other words, "a predecessor corporation's amenability to a pending suit is irrelevant unless the sovereign's successor's immunity has been expressly and unequivocally waived.'" *Amerind, quoting Asociacion Empleados del Area Canalera v. Panama Canal Commission*, 453 F.3d 1309 (11th Cir. 2006); *see also Kroll v. Bd. of Trs. Of the Univ. Of Ill.*, 934 F.2d 904, 909 (7th Cir. 1991). There must be a clear and valid waiver. Neither exists here.

The Charter is LCC's governing document, pursuant to which all subsequent action must conform. The Charter is absolutely explicit about LCC's sovereign immunity and the manner in which it may be waived. The Charter was first in time and governs all subsequent corporate action. The Charter explicitly asserts LCC's sovereign immunity and states how it may be

waived, whereas the language in the Plan of Merger deemed by the Court to constitute a waiver is implicit at best. In determining whether LCC waived its sovereign immunity in the Plan of Merger, the proper source of guidance is the organic document with its explicit provision, rather than a subsequent agreement subject to the organic document with, at most, an inferential allusion to amenability to claims.

ARCO argues that "fundamental canons of construction [and] … a natural reading of LCC's Plan of Merger preserves Atlantic Richfield's claims against LCC." (ARCO Resp. at 8). ARCO fails to take into consideration, however, "that the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). *See also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) ("normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue"); *Equal Employment Opportunity Commission v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (same).

Where there is ambiguity, "the doubt would benefit the tribe, for 'ambiguities in federal law have been construed generously in order to comport with … traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 13, 152 (1982), *quoting White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980). *See also Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486, 490 (10th Cir. 1983) (same). A tribal government's sovereign immunity is rooted in "traditional notions of sovereignty" and "the federal policy of encouraging tribal independence."

Here the Court found ambiguity; otherwise, it could not be a "very close question." The Plan of Merger nowhere specifically addresses sovereign immunity or its waiver. While it

speaks in terms of preserving the claims of "creditors," it nowhere defines that word. The very debate about the meaning and scope of "creditor" demonstrates the existence of ambiguity. When laid next to the explicit language dealing with sovereign immunity and its waiver in LCC's Charter, a document that preceded and governs the Plan of Merger, any remaining ambiguity requires application of the Indian canon of construction rather than "fundamental canons of construction" as urged by ARCO. Accordingly, the implied waiver found by the Court in LCC's Plan of Merger must be read consistently with the explicit assertion of sovereign immunity and limitations on its waiver in LCC's Federal Charter. Such a reading confirms that ARCO was not a "creditor" of LCC New Mexico, and the Plan of Merger did not waive the surviving corporation's sovereign immunity for pre-merger claims.

Conclusion

For all of the foregoing reasons, LCC respectfully submits that this Court should reconsider and reverse its holding that ARCO was a "creditor" and that LCC's Plan of Merger waived sovereign immunity for all claims held by creditors of the merged out New Mexico corporation.

Dated: May 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief on Defendant's Motion for Reconsideration was served this 9th day of May, 2016, via the Court's ECF system upon:

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