UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ATLANTIC RICHFIELD COMPANY, Plaintiff-Appellant, v. LAGUNA CONSTRUCTION COMPANY, INC., Defendant-Appellee.	Case No. 17-2002

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of New Mexico
Judge James A. Parker
Case No. 1:15-CV-00056-JAP-KK

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ORAL ARGUMENT IS REQUESTED

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Atlantic Richfield Company ("Atlantic Richfield") states that it is a subsidiary of BP America Inc. BP America Inc. is a subsidiary of BP America Limited. BP America Limited is a subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a subsidiary of BP p.l.c. BP p.l.c. is a publicly held corporation.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

District Court jurisdiction. The District Court had original and exclusive subject matter jurisdiction over Atlantic Richfield's CERCLA claims against Laguna Construction Company, Inc. under 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b).

Court of Appeals jurisdiction and finality. On December 6, 2016, under Fed. R. Civ. P. 54(b), the District Court certified its Order of Partial Dismissal of Plaintiff's Claims Against Laguna Construction Company, Inc. (Doc. No. 76) and its Order of Dismissal of Plaintiff's Claims Against Laguna Construction Company, Inc. (Doc. No. 94) as final judgments. (Doc. No. 105.) This Court therefore has jurisdiction over Atlantic Richfield's appeal of those orders under 28 U.S.C. § 1291.

Timeliness. Under Fed. R. App. P. 3 and 4, Atlantic Richfield timely filed a Notice of Appeal (Doc. No. 106) on January 5, 2017, within 30 days of the District Court's certification of its orders dismissing Laguna Construction Company, Inc. as final judgments.

STATEMENT OF THE ISSUES

1. Did Laguna Construction Company, Inc. ("LCC") waive any sovereign immunity it might have enjoyed as to Atlantic Richfield's claims by

stating in its Plan of Merger that it intended to "preserve[] unimpaired" all potential claims by creditors of its predecessor corporation?

2. Did the Pueblo of Laguna ("Pueblo") waive any sovereign immunity enjoyed by LCC when the Pueblo waived its own immunity in a settlement agreement with Atlantic Richfield and further agreed that any tribal entity it established to carry out its obligations under the agreement would assume all of the Pueblo's liabilities in the agreement, all for the express purpose of "provid[ing] [Atlantic Richfield] an effective means of securing judicial or other relief"?

STATEMENT OF THE CASE

A. Statement of the case

Atlantic Richfield brought this case to recover funds it has spent and will spend to remediate environmental conditions at the former Jackpile-Paguate Uranium Mine in Cibola County, New Mexico (the "Mine"). In 1986, the Pueblo and Atlantic Richfield executed an Agreement to Terminate Leases (the "Settlement Agreement"). The Pueblo agreed—in exchange for a payment of $43.6 million from Atlantic Richfield—to remediate and assume all liability for the Mine's environmental condition. The United States approved and signed the Settlement Agreement. The Pueblo then created LCC, the appellee here, to carry out the Mine's remediation.

The Pueblo and LCC failed to complete the remediation to anyone's satisfaction, even their own. Consequently, and at the Pueblo's and LCC's urging, the United States has sought to force Atlantic Richfield to undertake the entire cost of remediating the Mine anew. The Pueblo's and LCC's disavowal of their contractual obligations and efforts to convince the United States to compel Atlantic Richfield to pay the entire cost a second time violates the terms of the Settlement Agreement and the equitable allocation principles of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

All defendants moved to dismiss Atlantic Richfield's complaint in the District Court, asserting a variety of arguments. The District Court initially denied LCC's motion in part, rejecting LCC's argument that it possessed sovereign immunity from the majority of Atlantic Richfield's claims. The District Court ordered that Atlantic Richfield's claims could proceed against LCC because those claims are founded on rights against LCC's predecessor, a corporation organized under state law, that were "preserved unimpaired" when the predecessor merged into LCC. But the District Court then reversed itself after LCC moved for reconsideration, and granted LCC's motion to dismiss. Atlantic Richfield appeals the District Court's dismissal of LCC.

B. Statement of facts

The Mine and the Settlement Agreement. The Mine lies on the Pueblo's reservation. (Compl., Aplt. App. at 13, ¶ 2.) From 1951 through 1982, Atlantic Richfield prospected and then mined uranium there under a series of prospecting and lease agreements between Atlantic Richfield and the Pueblo. (*Id.* at 26-28, ¶¶ 58-64, 71.) As the close of mining operations approached, Atlantic Richfield developed a series of comprehensive cleanup plans that it was prepared to implement at the Mine. (*Id*. at 28, ¶ 72.)

The Pueblo decided, however, that it would prefer to assume the responsibility for reclaiming the Mine itself if Atlantic Richfield would fund that reclamation. (*Id*. at 28, ¶ 73.) Over several years, Atlantic Richfield negotiated with the Pueblo and the United States to determine what measures should be taken and the cost of performing that work. (*Id*. at 29, ¶ 75.) The negotiations resulted in the Settlement Agreement's execution in 1986, under which Atlantic Richfield paid the Pueblo $43.6 million to fund the Mine's remediation—approximately $9 million more than the Government's estimate of what the remediation would cost. (*Id*. at 30, ¶¶ 85-86.) The same year, the United States completed a Record of Decision ("ROD") that established the requirements for the cleanup of the Mine. (*Id*. at 31, ¶ 92.)

In consideration of Atlantic Richfield's payment, the Pueblo made specific commitments in the Settlement Agreement. *First*, the Pueblo agreed to "[a]ssume full and complete responsibility and liability under all applicable laws . . . for: (i) the cleanup, reclamation or other environmental remedial action at the Mine." (Settlement Agreement, Aplt. App. at 65, ¶ 3(a).)

Second, the Pueblo agreed to waive its sovereign immunity:

> In order to provide Anaconda[1] 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 . . . .

(*Id*. at 67, ¶ 5(a).)

Third, the Pueblo agreed that "any entity established to carry out reclamation at the Mine which is controlled by or related to The Pueblo will assume all of the responsibilities and liabilities of The Pueblo under this Agreement." (*Id*. at 67, ¶ 6(b).)

LCC's formation. The Pueblo formed LCC to carry out its obligations under the Settlement Agreement and the ROD. (LCC's Mem. of Law in Supp. of Mot. to Dismiss, Aplt. App. at 86; Compl., Aplt. App. at 19, 28, 32-33, 35, ¶¶ 31, 74, 99-104, 111.) Initially, the Pueblo incorporated LCC as a New Mexico corporation ("LCC New Mexico"). (LCC's Mem. of Law in Supp. of Mot. to

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[1] Atlantic Richfield is the successor to The Anaconda Company ("Anaconda").

Dismiss, Aplt. App. at 86.) The United States and the Pueblo intended LCC's management of the Mine's cleanup to be "a stepping stone to a continuing source of income and employment" for tribal members. (Compl., Aplt. App. at 33, ¶ 104.)

In 1994, the Pueblo incorporated a new version of LCC ("LCC") under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477. (*Id*.) The Pueblo then merged LCC New Mexico into LCC. (LCC's Mem. of Law in Supp. of Mot. to Dismiss, Aplt. App. at 86-87; Articles of Merger and Plan of Merger, Aplt. App. at 146-158; Pueblo of Laguna Resolution No. 41-94, Aplt. App. at 142-43 (effecting, as "the sole owner of the business enterprise known as the Laguna Construction Company," LCC's reorganization as a federally chartered corporation and the merger of LCC New Mexico into LCC).) By the time the merger took effect in 1995, all, or substantially all, of the cleanup work that LCC and the Pueblo would perform had been done. (Compl., Aplt. App. at 35, ¶ 117; Plan of Merger, Aplt. App. at 154, Art. VI ("Approval and Effective Time of the Merger").)

The Plan of Merger provides that:

> [A]ll 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.

(*Id*. at 151, Art. II(a)(3).)

The failed cleanup. Decisions, actions, inaction, and failures by the Pueblo, LCC, and the United States (together, the "Defendants"), made environmental conditions at the Mine worse than they were when Atlantic Richfield left the property. (Compl., Aplt. App. at 35, ¶ 118.) The worsened conditions resulted from a combination of inadequate assessment of the risks and cleanup options, poor engineering design, deviations from the ROD, inadequate monitoring and maintenance after the attempted cleanup, and failure to respond to indications that the cleanup was defective. (*Id*. at 36, ¶ 119.) These failures cannot be blamed on inadequate funding of the cleanup project by Atlantic Richfield. (*Id*. at 40, ¶ 142.) Indeed, when the project was deemed "completed," several million dollars of the funds Atlantic Richfield paid had not been spent for the originally planned cleanup work, monitoring, and corrective actions. (*Id*.)

The Defendants all recognize the failure of their cleanup. The Pueblo retained OA Systems Corporation ("OA Systems"), an independent consulting firm, to determine whether Defendants' cleanup complied with the ROD. (*Id*. at 38, ¶ 129.) OA Systems completed its initial compliance assessment in 2007, followed by an additional assessment in 2011. (*Id*. at 38, ¶¶ 130-31.) It concluded that Defendants' cleanup had been unsuccessful and that risks of releases of hazardous substances remained. (*Id*. at 38-41, ¶¶ 133-34, 139-41, 147-54.) Upon reviewing OA Systems' assessments, the United States Bureau of Land

Management concluded that the Mine cleanup project was "not ready to be closed out" and that "[the] Pueblo and the EPA should coordinate the efforts to comply with" the ROD. (*Id*. at 42, ¶ 156.)

But, instead of working together to complete an adequate cleanup, EPA and the Pueblo are attempting to shift responsibility to Atlantic Richfield. (*Id*. at 42, ¶ 157.) Despite Defendants' total control of, and responsibility for, the Mine's cleanup, the Pueblo actively encouraged the United States to list the Mine on the National Priorities List ("NPL") of sites for cleanup pursuant to CERCLA. (*Id*. at 42, ¶ 159.) EPA proposed adding the Mine to the NPL on March 15, 2012, and, since May 2014, has sought to place sole responsibility for funding and performing a Remedial Investigation / Feasibility Study for the Mine on Atlantic Richfield.

C. Proceedings below

Atlantic Richfield filed its complaint on January 21, 2015. (*See id*. at 12.) Atlantic Richfield brought cost-recovery, contribution, and declaratory judgment claims under CERCLA against LCC. (*Id*. at 45-49.) Atlantic Richfield asserted the same claims and an additional CERCLA claim against the United States and the Pueblo, as well as contract claims against the Pueblo. (*Id*. at 44-58.)

The Defendants each moved to dismiss on May 26, 2015. (Dist. Ct. Docket Sheet, Aplt. App. at 6.) In its Motion to Dismiss, LCC asserted sovereign immunity from Atlantic Richfield's claims. (Aplt. App. at 76-103.) Atlantic

Richfield responded by arguing: (a) LCC's Plan of Merger waived its sovereign immunity as to claims Atlantic Richfield had against LCC's predecessor, LCC New Mexico; and (b) LCC has no sovereign immunity as to Atlantic Richfield's claims because the Pueblo waived its own immunity, and LCC's immunity by extension, as to those claims. (Atlantic Richfield's Resp. in Opp'n to LCC's Mot. to Dismiss, Aplt. App. at 269-275.)

The District Court initially denied LCC's Motion to Dismiss as to claims for which LCC had waived immunity in its Plan of Merger. (Mem. Op. & Order, Aplt. App. at 362.) In so ruling, the District Court noted that LCC had not challenged Atlantic Richfield's argument that Atlantic Richfield was one of LCC New Mexico's "creditors" as that term was used in LCC's Plan of Merger. (*Id*. at 351.) However, when LCC filed a Motion for Reconsideration contesting that point, the District Court reversed itself and granted LCC's Motion to Dismiss in its entirety. (LCC's Mot. for Recons. and Mem. of Law in Supp., Aplt. App. at 399; Mem. Op. & Order, Aplt. App. at 418.)

LCC then moved the District Court to certify its orders dismissing LCC as final under Fed. R. Civ. P. 54(b). (LCC's Mot. for Entry of Final J. and Mem. of Law in Supp., Aplt. App. at 421.) LCC argued there was no just reason for delay because it has been in the process of dissolving for the last five years, a dissolution that LCC explained was prompted by the FBI's discovery of crimes committed by

a group of high-level LCC employees involved in LCC's performance of environmental remediation contracts for the United States in Iraq. (LCC's Mem. of Law in Supp. of Mot. for Entry of Final J., Aplt. App. at 429-430; Decl. of Maxine R. Velasquez in Supp. of LCC's Mot. for Entry of Final J., Aplt. App. at 434, ¶¶ 4-6.) The District Court granted LCC's motion and certified its dismissal orders as final on December 6, 2016. (Order Granting LCC's Mot. for Entry of Final J., Aplt. App. at 438; Certification of Orders of Dismissal as Final Under Rule 54(b), Aplt. App. at 442.) This appeal followed.

SUMMARY OF ARGUMENT

LCC cannot claim sovereign immunity for two reasons. *First*, the Plan of Merger that LCC and the Pueblo used to effect LCC New Mexico's merger into LCC waived immunity as to Atlantic Richfield's claims. The Plan of Merger states that the rights of LCC New Mexico's creditors shall be "preserved unimpaired." As a holder of rights against LCC New Mexico under both CERCLA and the Settlement Agreement, Atlantic Richfield was a creditor of LCC New Mexico. Atlantic Richfield's rights, therefore, must be preserved unimpaired, i.e., without LCC raising an immunity defense that was unavailable to LCC New Mexico.

Second, LCC has no immunity from Atlantic Richfield's claims because the Pueblo waived its own immunity and any immunity LCC might have in the

Settlement Agreement. LCC's immunity is derivative of the Pueblo's. LCC cannot, then, enjoy immunity as to claims for which the Pueblo lacks immunity. Because the Pueblo waived its own immunity in the Settlement Agreement, LCC also lacks immunity as to those claims. Moreover, the Pueblo expressly committed in the Settlement Agreement to extend its waiver of immunity to any entity like LCC that the Pueblo created to carry out its obligations.

ARGUMENT

Standard of review. "A district court's evaluation of sovereign immunity and its decision to dismiss for lack of jurisdiction are reviewed *de novo*." *Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010).

I. LCC WAIVED ANY SOVEREIGN IMMUNITY TO ATLANTIC RICHFIELD'S CLAIMS IN THE PLAN OF MERGER.

The original LCC entity—LCC New Mexico—is the one that engaged in the conduct that is the subject of Atlantic Richfield's claims. LCC New Mexico had no sovereign immunity. When LCC New Mexico was merged into LCC, the Pueblo and LCC used the following language in the Plan of Merger to waive LCC's sovereign immunity as to any claims by LCC New Mexico's creditors: "[A]ll rights of creditors and all liens upon any property of either Constituent Corporation shall be preserved unimpaired." (Aplt. App. at 151.) Atlantic Richfield is a creditor of LCC New Mexico. By preserving Atlantic Richfield's

rights "unimpaired," LCC necessarily waived sovereign immunity as to the claims in this case.

A. LCC New Mexico had no sovereign immunity.

Because it incorporated under New Mexico state law, LCC New Mexico had no sovereign immunity. In *Somerlott v. Cherokee Nation Distributors, Inc.*, this Court held that a tribal corporation "organized under the laws of another sovereign . . . cannot share in the [tribe's] immunity from suit." 86 F.3d 1144, 1150 (10th Cir. 2012). The Court concluded that "the subordinate economic entity test"—which is used to determine whether a tribally-owned entity is an arm of the tribe entitled to immunity—"is inapplicable to entities which are legally distinct from their members and which voluntarily subject themselves to the authority of a sovereign which allows them to be sued." *Id.* at 1149-50.

LCC New Mexico voluntarily subjected itself to another sovereign when it incorporated under New Mexico law. (State of New Mexico Certificate of Incorporation for LCC New Mexico, Aplt. App. at 107.) It thereby lost any sovereign immunity it might otherwise have enjoyed. *See* N.M.S.A. § 53-4-4(C) ("An association shall have the capacity . . . to sue and be sued in its corporate name."); *Somerlott*, 686 F.3d at 1150 (citing Oklahoma's sue-and-be-sued provision for state corporations as grounds for concluding the tribal entity lacked immunity).

The District Court correctly reached this conclusion. (Mem. Op. & Order, Aplt. App. 351.) LCC refused to concede the point, but never contested it, despite the District Court's invitation for LCC to do so. (*Id.* ("Although it refuses to explicitly concede this point, LCC never contests this fact.").) That LCC New Mexico lacked sovereign immunity thus is undisputed.

B. By preserving the rights of LCC New Mexico's creditors, LCC waived sovereign immunity.

The Pueblo's agreement to "preserve[] unimpaired" the rights of LCC New Mexico's creditors means that LCC agreed to waive sovereign immunity for those creditors. Allowing LCC to assert sovereign immunity would not just impair Atlantic Richfield's claims, it would extinguish them. The Plan of Merger prohibits that result and thereby waives sovereign immunity.

The Plan of Merger's language distinguishes this case from the opinion on which LCC relied most heavily, *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011). In *Amerind*, the Eighth Circuit determined that "[a] sovereign entity does not automatically waive its sovereign immunity through the mere act of succeeding a corporation that is . . . not entitled to such immunity." *Id.* at 686 n.7 (cited in LCC's Mem. in Supp. of Mot. to Dismiss, Aplt. App. at 81). The court also ruled that a tribal corporation had not waived its immunity by including in its corporate charter a clause saying it agreed to "assume the

obligations and liabilities" of a predecessor that had waived sovereign immunity. *Id.* at 686.

But, as the District Court rightly concluded, Atlantic Richfield does not make the arguments *Amerind* rejected. (Mem. Op. & Order, Aplt. App. at 356) ("[T]he 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.").) Atlantic Richfield does not contend that LCC automatically waived sovereign immunity by merging with LCC New Mexico, or that a waiver occurred through LCC's "assumption" of LCC New Mexico's liabilities. Rather, Atlantic Richfield's argument is that LCC's Plan of Merger is more specific than the language in *Amerind* and expressly waives immunity as to LCC New Mexico's "creditors' rights."

The Seventh Circuit's decision in *Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904 (7th Cir. 1991), is the only opinion LCC cited that considered language similar to the Plan of Merger in the immunity context. *Kroll* supports Atlantic Richfield's arguments. In *Kroll*, the question was whether the State of Illinois had waived Eleventh Amendment immunity for a state agency when it merged a formerly non-immune agency into one with immunity and, in the statute accomplishing the merger, said that "[n]either the rights of creditors nor any liens upon the property of either of such corporations shall be impaired by such

merger." *Id.* at 909. The Seventh Circuit held that there was "a waiver in that statutory language," but nonetheless upheld the state's sovereign immunity because of an ambiguity in the specific "eleventh amendment context" at issue there. *Id.*

No such ambiguity is present here. The ambiguity in *Kroll* arose because "the legislature might have intended the merger statute to allow actions only in other Illinois state courts, and a state does not waive its eleventh amendment immunity by consenting to suit only in its own courts." *Id.* at 910. Here, as the District Court pointed out, federal courts have exclusive jurisdiction over Atlantic Richfield's CERCLA claims; those CERCLA claims would not be "preserved unimpaired" if LCC's Plan of Merger could be read as waiving immunity only in tribal courts. (Mem. Op. & Order, Aplt. App. at 354.)[2] The most analogous cases thus indicate that the Court should interpret the Plan of Merger's preservation of creditors' rights as waiving sovereign immunity.

C. When LCC New Mexico merged with LCC, Atlantic Richfield was one of LCC New Mexico's creditors.

When LCC and the Pueblo wrote the Plan of Merger, the term "creditor" included "[o]ne who has a right to require the fulfillment of an obligation or

[2] Moreover, as described below, the Pueblo and LCC expressly consented to suit in any federal court of competent jurisdiction.

contract." *Black's Law Dictionary* 368 (6th ed. 1990). Atlantic Richfield was a creditor of LCC New Mexico under that definition.

When the Plan of Merger was executed in December 1994, LCC was obligated to perform the Pueblo's commitments in the Settlement Agreement, and Atlantic Richfield had "a right to require the fulfillment of [that] contract." By then, LCC had completed nearly all of the work it would perform at the Mine. (Compl., Aplt. App. at 35, ¶ 117 ("In 1995, Defendants 'completed' the Jackpile Site cleanup two years ahead of schedule.").) LCC had performed that work under a provision in the Settlement Agreement whereby the Pueblo agreed that LCC would "assume all of the responsibilities and liabilities of The Pueblo under this Agreement." (Settlement Agreement, Aplt. App. at 67-68, § 6(b).) Through that assumption, LCC joined in the Pueblo's obligation to Atlantic Richfield to take "full and complete responsibility and liability under all applicable laws . . . for [*inter alia*] the cleanup, reclamation or other environmental remedial action at the Mine." (*Id.* at 65, § 3(a)(i).)

In its initial ruling on LCC's Motion to Dismiss, the District Court correctly applied the foregoing analysis and decided LCC was not immune from Atlantic Richfield's claims. (*Id.* at Aplt. App. 352.) But, when LCC's Motion for Reconsideration urged the District Court to adopt the narrowest possible meaning

of the word "creditor," the District Court obliged and dismissed LCC from the case entirely. (*Id.* at Aplt. App. 418.)

For at least three reasons, the meaning of "creditor" urged by LCC and ultimately adopted by the District Court is incorrect.

First, Black's Law Dictionary—the source on which LCC relies for its restrictive definition—explains how to define "creditor" in this case, and it is not the definition urged by LCC. "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 . . . ." *Black's Law Dictionary* 368 (6th ed. 1990) (emphasis added).

The Plan of Merger used the word "creditor" in exactly that context. The Plan of Merger's language echoes the New Mexico statute requiring that "[n]either the rights of creditors nor any liens upon the property of any such corporation shall be impaired by the merger or consolidation." N.M.S.A. § 53-14-6. That statute exists to prevent a New Mexico corporation from merging with a new entity to fraudulently avoid liabilities. (Mem. Op. & Order, Aplt. App. at 416 (describing the purpose of the statute as "ensur[ing] that creditors and other individuals with claims or potential claims against the non-surviving merged company retain the ability to enforce these claims").) When considering the meaning of "creditor" in this same context—interpreting a merger statute to determine who was a creditor to

the predecessor corporation—the New York Court of Appeals held that "[t]he term 'creditor' is broad enough, in view of the evident purpose of this act and of the other provisions we have mentioned, to include those persons to whom the corporation was under any enforceable obligation . . . ." *Marstaller v. Mills*, 38 N.E. 370, 371 (N.Y. 1894).

Second, LCC argued that "creditor" must mean "one who holds a demand which is certain and liquidated." (LCC's Mem. of Law in Supp. of its Mot. for Recons., Aplt. App. at 375.) The District Court understood LCC's argument as attempting to limit the definition of creditor to only those who held a debt of LCC New Mexico's at the time of the merger. (Mem. Op. & Order, Aplt. App. at 416 ("LCC insists that [Atlantic Richfield] was not a creditor within the meaning of either definition because LCC New Mexico did not owe [Atlantic Richfield] a debt at the time of the merger.").)

"Creditor," however, cannot mean only those holding LCC's debts. As the District Court recognized, the Plan of Merger treats "debts" differently from rights of "creditors." The District Court concluded that the Plan of Merger preserves LCC New Mexico's "debts, liabilities and duties" only "to the same extent as if said debts, liabilities and duties had been incurred or contracted by [LCC]," potentially subjecting those debts to LCC's sovereign immunity. (Plan of Merger, Aplt. App. At 151.) By contrast, the Plan of Merger says that "rights of creditors .

. . shall be preserved unimpaired," with no language that can be read to allow a sovereign immunity defense. (*Id.*; *see* Mem. Op. & Order, Aplt. App. at 355 (distinguishing between the Plan of Merger's treatment of "debts" and "rights of creditors" and explaining "there is no limitation on the command that creditors' rights survive the merger intact and unaffected")); *see also Marstaller*, 38 N.E. at 371 (defining creditor "to include those persons to whom the corporation was under any enforceable obligation, *as well as those to whom it was indebted*" (emphasis added)). The word "creditor" must, then, include more than those who hold LCC's "debts." *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) ("The Court will give effect to a State's waiver of . . . immunity . . . where . . . the text . . . will leave no room for any other reasonable construction." (cited in Mem. Op. & Order, Aplt. App. at 352)).

Third, LCC's alternative definition of creditor is so narrow and inconsistent with the weight of authority as to be unreasonable. Absent authority interpreting "creditor" as used in the New Mexico statute the Plan of Merger models (there is none), the most obvious legal definition of the word is the United States Bankruptcy Code. There, the term "creditor" is defined as any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10). "Claim," in turn, is defined to include any "right to payment, whether or not such right is reduced to judgment,

liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 101(5).[3]

LCC's proposed narrow definition of "creditor" conflicts with the weight of authority and therefore is unreasonable. Defining "creditor" to include only those holding a "debt" is inconsistent with the Bankruptcy Code, and even with the Black's Law Dictionary definition on which LCC relies, as that definition explains that "creditor" has a broad meaning in this context. The only meaning of "creditor" that is consistent with the Plan of Merger's other provisions, the purpose of the New Mexico statute on which the Plan of Merger is modeled, and the weight of the prevailing authorities is the meaning Atlantic Richfield advanced. The District Court therefore erred in holding that Atlantic Richfield was not a "creditor" of LCC New Mexico as that term was used in the Plan of Merger.

II. THE PUEBLO WAIVED LCC'S IMMUNITY TO ATLANTIC RICHFIELD'S CLAIMS IN THE SETTLEMENT AGREEMENT.

Even if the Pueblo and LCC had not waived sovereign immunity for claims based on the conduct of LCC New Mexico in its Plan of Merger, the Pueblo independently waived LCC's immunity to Atlantic Richfield's claims in the Settlement Agreement.

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[3] *See also* N.M.S.A. § 56-10-5(D) (defining creditor, for purposes of New Mexico's adoption of the Uniform Voidable Transactions Act, as "a person that has a claim"); *id.* § 56-10-5(C) (defining claim as "a right to payment, whether or not the right is reduced to judgment, liquidated, . . . contingent, . . . disputed, . . . or unsecured").

A. The Pueblo waived its immunity for any claims brought by Atlantic Richfield under the Settlement Agreement.

A tribe may "relinquish its immunity" in a contract so long as its waiver of immunity is "clear." *C&L Enters., Inc. v. Citizen Band & Potawatomi Indian Tribe of Okla.* ("*Potawatomi*"), 532 U.S. 411, 418 (2001). Here, the Pueblo's waiver of sovereign immunity could not be clearer: "The Pueblo hereby expressly waives its sovereign immunity as to any claims or actions brought by Anaconda under this Agreement." (Settlement Agreement, Aplt. App. at 67, ¶ 5(a).) And the Pueblo did so for the express purpose of "provid[ing] Anaconda an effective means of securing judicial or other relief." (*Id.*) The Agreement further provides that claims against the Pueblo may be brought in any federal court of competent jurisdiction. (*Id.*) This provision satisfies the requirements of *Potawatomi*, and the District Court agreed. (Mem. Op. & Order, Aplt. App. at 335-36(concluding that this provision waives sovereign immunity for claims against the Pueblo brought under the Settlement Agreement).) The District Court erred, however, in holding that this waiver does not apply to claims against LCC or encompass CERCLA claims.

B. The Settlement Agreement's immunity waiver applies to LCC.

The waiver of sovereign immunity in the Settlement Agreement applies to LCC because (1) LCC's immunity is derivative of the Pueblo's immunity, so the Pueblo's waiver of immunity necessarily waives the immunity of LCC, and

(2) the Agreement expressly extends the Pueblo's waiver to any tribal entity, like LCC, formed to fulfill the Pueblo's obligations under the Agreement.

1. A waiver by the Pueblo necessarily includes LCC.

LCC argued below—and the District Court agreed—that LCC was entitled to assert sovereign immunity only as a "subdivision of the tribe (sometimes called an 'arm of the tribe')." (Mem. Op. & Order, Aplt. App. at 345.) *See also Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1185 & n.9 (10th Cir. 2010) (explaining this terminology). This Court has elaborated that, to claim immunity, "subordinate economic entities" like LCC must lack "a distinct non-governmental character," and be separate from the tribe only as a matter of "administrative convenience." *Id.* at 1184. Therefore, if LCC was entitled to sovereign immunity in the first place, its immunity was derivative of the Pueblo's immunity—LCC cannot possess any greater immunity than does the tribe itself. In other words, if a tribe waives its sovereign immunity, that waiver includes its "subdivisions," its "arms," and its "subordinate economic entities." Because the Pueblo waived its sovereign immunity to Atlantic Richfield's claims on the face of the Settlement Agreement, LCC has no immunity to assert.

2. The waiver expressly applies to LCC.

Although not necessary to find a waiver of LCC's immunity, there is specific language in the Settlement Agreement applying the waiver to LCC.

An Indian Tribe can waive the sovereign immunity of its tribal corporation. *See, e.g.*, *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008) (recognizing that tribe can waive immunity for actions of tribal corporation); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1307 (D.N.M. 2009) (similar). Here, at the time the contract was negotiated, the parties contemplated that the Pueblo might form a tribal entity to perform under the Agreement. The Settlement Agreement extended the Pueblo's waiver to any future-formed tribal company by stating that "any entity established to carry out the reclamation at the Mine which is controlled by or related to The Pueblo will assume all of the responsibilities and liabilities of The Pueblo under this Agreement." (Settlement Agreement, Aplt. App. at 67-68, ¶ 6(b).) Again, the purpose of the Pueblo's waiver of sovereign immunity was "to provide Anaconda an effective means of securing judicial or other relief in the event of a breach" of the Agreement. (*Id.* at 67, ¶ 5(a).) No waiver would accomplish that purpose if the Pueblo could simply form a new entity, clothe it with tribal immunity, and direct it to carry out the Pueblo's obligations under the Agreement. Accordingly, the parties intended the waiver to apply to a tribal corporation like LCC, as well as to the Pueblo itself.

The District Court agreed that "this is not an unreasonable reading of the provisions of the Agreement." (Mem. Op. & Order, Aplt. App. at 349.) But,

applying the rule that waivers must be express rather than implied, the court nonetheless held that "the Agreement does not contain an unequivocal waiver of LLC's [sic] sovereign immunity." (*Id.* at 350 (emphasis in original).) This was error. And it was precisely the same error made by the lower court in *Potawatomi*, which held that provisions in an agreement "seem to indicate a willingness on [the] Tribe's part to expose itself to suit on the contract," but "the leap from that willingness to a waiver of immunity is one based on implication, not an equivocal expression." 532 U.S. at 417.

Potawatomi is the definitive opinion on whether contractual language is sufficiently clear to waive tribal immunity. There, the Supreme Court held that a tribe had waived its immunity through a contract requiring that any disputes arising from the agreement be settled in arbitration pursuant to American Arbitration Association rules and by indicating that Oklahoma law would govern the contract's interpretation. *Id*. at 415. The applicable American Arbitration Association rules provided for the enforcement of arbitral awards "in any federal or state court having jurisdiction thereof," and Oklahoma law conferred jurisdiction to enforce such awards in any court in the state. *Id.* at 415-16. Thus, the Court held that the tribe had waived its immunity because it had agreed to "adhere to certain dispute resolution procedures," including a "regime" where disputes would be resolved

through arbitration and ultimately enforced by a judgment from an Oklahoma court. *Id.* at 420.

The Settlement Agreement's waiver of immunity for LCC is far more "clear" than was the waiver in *Potawatomi*. The Agreement says that LCC will "assume all of the responsibilities and liabilities" of the Settlement Agreement for the express purpose of providing Atlantic Richfield "an effective means of securing judicial relief." (Settlement Agreement, Aplt. App. at 67-68.) The Settlement Agreement goes on to say that the Pueblo "consents to be sued in a Federal Court of competent jurisdiction." (*Id.* at 67.) In holding that the *Potawatomi* tribe had waived its immunity through a combination of arbitration and choice-of-law provisions, the Supreme Court engaged in a much finer parsing of the language and intent of that contract than is required here. If the waiver in *Potawatami* was sufficient, the waiver for LCC must be, too.

Just as in *Potawatomi*, "the Tribe[] commit[ted] to adhere to the contract's dispute resolution regime." *Id.* at 422. And, just as in *Potawatomi*, "[t]hat regime has a real world objective; it is not designed for regulation of a game lacking practical consequences." *Id.* Thus, just as in *Potawatomi*, the Pueblo should be held to its dispute resolution agreement—it waived LCC's sovereign immunity for claims brought by Atlantic Richfield under the Settlement Agreement.

C. The Settlement Agreement's immunity waiver applies to Atlantic Richfield's CERCLA claims.

The District Court held that the immunity waiver in the Settlement Agreement applies only to breach of contract claims. (Mem. Op. & Order, Aplt. App. at 334-35.) But the waiver is not so limited. The Settlement Agreement waives immunity "as to any claims or actions brought by [Atlantic Richfield] under this Agreement." LCC assumed liability in the Agreement for environmental cleanup of the Mine "under all applicable laws." Therefore, any claim under those laws—including a CERCLA claim—is brought under the Agreement.

Atlantic Richfield's CERCLA claims arise primarily under the following section of the Settlement Agreement:

> The Pueblo . . . will . . . [a]ssume full and complete responsibility and liability under all applicable laws . . . for:
>
> > (i) the cleanup, reclamation or other environmental remedial action at the Mine; and
> >
> > (ii) conducting all other related and necessary activities in a manner acceptable to, or required by governmental agencies with jurisdiction over reclamation and other related environmental programs . . . .

(Settlement Agreement, Aplt. App. at 65-66, ¶ 3(a).)

Under this section, the Pueblo contractually agreed to assume CERCLA liability for the Mine.[4] Because LCC "assume[d] all of the responsibilities and liabilities of The Pueblo under th[e] Agreement," (*id.* at 67-68, ¶ 6(b)), LCC likewise assumed that CERCLA liability.

LCC has failed to live up to its obligation to assume CERCLA liability for the Mine. The Settlement Agreement's immunity waiver does not limit Atlantic Richfield to a breach of contract claim—if that had been the parties' intent, the waiver could easily have been drafted to say that. Instead, the waiver broadly applies to "*any claims or actions* brought by [Atlantic Richfield] under this Agreement," to enforce any "breach by the Pueblo of its obligations under this Agreement." (*Id.* at 67, ¶5(a) (emphasis added).) CERCLA claims are "brought under" the Settlement Agreement for a "breach by [LCC] of its obligations" to assume that CERCLA liability. In other words, Atlantic Richfield's CERCLA claims are a means of enforcing LCC's assumption of environmental liability under the Settlement Agreement, which the waiver provision expressly authorizes. Moreover, Atlantic Richfield's CERCLA claims against LCC are based on the

[4] Parties may assume CERCLA liability by contract. *See Caldwell Trucking PRP v. Rexon Tech. Corp.*, 421 F.3d 234, 243-44 (3d Cir. 2005); *United States v. NCR Corp.*, 840 F. Supp. 2d 1093, 1097 (E.D. Wis. 2011) ("CERCLA case law is clear that parties may assume liability through agreement."); *Karras v. Teledyne Indus., Inc.*, 191 F. Supp. 2d 1162, 1169-70 (S.D. Cal. 2002) ("[CERCLA] does not foreclose entities from attaining PRP status by contract," requiring them to "stand in the shoes of PRPs because they have undertaken the liability for clean-up.").

environmental cleanup work LCC performed—and failed to perform—at the Mine. That cleanup work was required as part of the Pueblo's (and LCC's) obligations under the Agreement. (*Id.* at 65, ¶ 3(a).)

Atlantic Richfield has not located any case that analyzes similar contract language (i.e., "any claims or actions brought . . . under this Agreement") in the immunity waiver context. A close analog, however, are cases analyzing the applicability of forum-selection clauses to claims other than breach of contract. These cases establish that when the parties use broad language to describe claims covered by a contract provision—such as "all disputes arising from this Agreement"—the provision applies to any claims linked to the obligations under or performance of the agreement, not merely breach of contract claims. *See, e.g.*, *McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290, 1308 (M.D. Ga. 2003) (contract provision applicable to "all disputes arising under this Agreement" was "not narrow, but expansive," and therefore was broad enough to encompass "claims for negligence, negligent misrepresentation and fraudulent concealment"); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1070 (11th Cir. 1987), *aff'd and remanded*, 487 U.S. 22 (1988) (holding that a clause governing any "case or controversy arising under or in connection with this Agreement" included "all causes of action arising directly or indirectly from the business relationship evidenced by the contract"); *ADT Sec. Servs., Inc. v. Apex Alarm, LLC*, 430 F.

Supp. 2d 1199, 1204 (D. Colo. 2006) (provision providing that "[a]ny action or proceeding . . . arising out of or relating to [the agreement]" included "[n]on-contract claims that involve the same operative facts as a parallel breach of contract claim").[5]

Here, the language "any claims or actions brought . . . under this Agreement" similarly includes any claims related to the parties' obligations or performance under the Agreement, and is not limited to breach-of-contract claims. Accordingly, because Atlantic Richfield's CERCLA claim is based on LCC's failure to perform its obligations under the Agreement, the immunity waiver applies to that claim.

CONCLUSION

LCC lacks sovereign immunity from Atlantic Richfield's claims, both because it waived any immunity in the Plan of Merger and because the Pueblo waived its own and LCC's immunity in the Settlement Agreement. Atlantic Richfield therefore requests that this Court reverse the District Court's ruling on LCC's Motion to Dismiss and remand for Atlantic Richfield's claims against LCC to proceed.

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[5] *See also Mediterranean Enters, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (holding that an arbitration clause applicable to "[a]ny disputes arising hereunder" included any claims "relating to the interpretation and performance of the contract itself," and therefore included a claim for breach of fiduciary duty in addition to a breach-of-contract claim).

Statement Regarding Oral Argument

To assist the Court in understanding the multiple documents in which LCC and the Pueblo waived any immunity LCC might have possessed, and to assist in interpreting the cases that have presented similar issues, Atlantic Richfield respectfully requests oral argument.

Dated: March 20, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B)(i) because, according to the word count feature of Microsoft Word 2010, the brief contains a total of 7,968 words.

This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman type style.

s/ Jonathan W. Rauchway

CERTIFICATE OF SERVICE

The undersigned certifies that on March 20, 2017, the foregoing was served via this Court's ECF system on the following attorneys for Laguna Construction Company, Inc.:

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s/ Jonathan W. Rauchway

ATTACHMENTS

Attachment A

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

ATLANTIC RICHFIELD COMPANY,
Plaintiff,

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

THE PUEBLO OF LAGUNA, an Indian tribe, and **LAGUNA CONSTRUCTION COMPANY, INC.,**
Defendants.

MEMORANDUM OPINION AND ORDER

On May 26, 2015, in lieu of filing an answer, Defendant Laguna Construction Company, Inc. (LCC) filed a motion to dismiss the claims asserted against it. *See* OPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. TO DISMISS THE COMPLAINT (DOC. #1). (Doc. No. 33). In this motion and the accompanying MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT LAGUNA CONSTRUCTION COMPANY'S MOTION TO DISMISS THE COMPLAINT (DOC. #1) AGAINST IT (Doc. No. 34) (Memo), LCC asserts sovereign immunity and requests dismissal under both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff Atlantic Richfield Company (ARCO) opposes the motion. *See* ATLANTIC RICHFIELD COMPANY'S RESPONSE IN OPPOSITION TO LAGUNA CONSTRUCTION COMPANY'S MOTION TO DISMISS (Doc. No. 48). For the reasons discussed below, the Court will grant the motion in part and deny it in part.

Background[1]

LCC is a federally-chartered tribal corporation whose sole shareholder is the Pueblo of

[1]The following facts are based, in part, on the representations in LLC's Motion and Memo. Because ARCO does not dispute these facts, the Court will accept them as true for the purpose of ruling on LLC's request for dismissal under Federal Rule of Civil Procedure 12(b)(1).

Laguna (the Pueblo), a federally recognized Indian Tribe. Memo at 7.[2] "The Pueblo initially incorporated LCC in 1988 as a New Mexico corporation." *Id.* at 8. Sometime thereafter, the Pueblo decided that it would like to change the character of the corporation by creating a federal LCC in order to take advantage of the provisions of 25 U.S.C. § 477. To this end, in 1994, the Pueblo created a second tribal corporation under § 477 with the same name as the New Mexico state corporation. *Id.* In so doing, the Pueblo stated its intention that the state LCC be merged with the federal LCC. *Id.* This intention was realized in 1995 when the two corporations – the state and federal LCCs – submitted Articles of Merger and a Plan of Merger to the New Mexico State Corporation Commission as required by statute. *See* N.M. Stat. Ann. § 53-11-1, *et seq*. The Commission approved the merger. *Id.* at 8-9. At this point, LCC New Mexico ceased to exist. Response at 4 (citing Plan of Merger, Exhibit 5 to Memo).

In the complaint, Plaintiff asserts Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claims against LCC based on LCC's performance of reclamation work at the Jackpile Paguate uranium mine. *See generally* COMPLAINT (Doc. No. 1) (Complaint). ARCO alleges that LCC New Mexico completed most, if not all, of this reclamation work before the 1995 merger. *Id.* ¶ 31; *see also* Response at 3-4 (citing Complaint ¶117). In light of this fact, Plaintiff avers that "[a]s named in th[e] Complaint, [LCC] includes both the New Mexico corporation that was dissolved and/or merged out of existence and the surviving federally-chartered tribal corporation." Complaint ¶ 31.

Standard of Review

I. Tribal Sovereign Immunity

[2] LCC's memo and REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT LAGUNA CONSTRUCTION COMPANY'S MOTION (DOCS. # 33, 34) TO DISMISS THE COMPLAINT (DOC. # 1) AGAINST IT (Doc. No. 63) (Reply) both have page numbers that differ from the numbers assigned by CM/ECF. When the Court refers to a specific page in either document, it is referring to the page number assigned by CM/ECF.

The doctrine of tribal sovereign immunity protects federally recognized Indian tribes from suit absent congressional or tribal authorization. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *see also Bonnet v. Harvest (US) Holdings, Inc.*, 741 F.3d 1155, 1159 (10th Cir. 2014). Generally speaking, tribal sovereign immunity "extend[s] to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity." *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010). In such circumstances, the subdivision of the tribe (sometimes called "an arm of the tribe") is, like the tribe, entitled to sovereign immunity in the absence of a valid waiver. *Cohen v. Winkelman*, 302 F. App'x 820, 823 (10th Cir. 2008).

Putative waivers of sovereign immunity, whether congressional or tribal in nature, are strictly construed. For example, Congress may not strip Indian tribes of their sovereign immunity by implication; any abrogation must be "unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "Similarly, to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001).

Because tribal sovereign immunity divests a court of subject matter jurisdiction over the tribe, a tribe or tribal subdivision may raise an immunity defense by way of a motion under Federal Rule of Civil Procedure 12(b)(1). *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302-1303 (10th Cir. 2001). Such motions come in two forms. *Id.* (citing *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995)). First, a defendant can facially attack the

complaint's allegations of subject matter jurisdiction. In such a case, the court accepts the allegations in the complaint as true. *Id.* at 1303. Second, a defendant may go beyond the information in the complaint and challenge the underlying facts upon which subject matter jurisdiction depends. *Id.* "In addressing a factual attack, the court . . . has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* (internal citation omitted). In accordance with this standard, the Court will construe LCC's motion as a factual attack on the Court's jurisdiction and consider the evidence attached to the motion as it relates to LCC's assertion of sovereign immunity.

II. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The Supreme Court has articulated a two-step approach for district courts to use when considering a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). First, a court must identify the adequately pleaded factual allegations contained in the complaint, disregarding any unsupported legal conclusions. *Id.* at 678. While a complaint need not include detailed factual allegations, it must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* Next, having identified the adequately pleaded facts, the court "should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. Stated concisely, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678.

Discussion

I. Sovereign Immunity

In its motion to dismiss, LCC asserts sovereign immunity as a tribal corporation organized under § 477 (these corporations are commonly referred to as "Section 17 corporations" in reference to Section 17 of the Indian Reorganization Act). In general, a defendant asserting sovereign immunity "must first establish a prima facie case that it is a sovereign state." *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 991 (10th Cir. 2007) (discussing immunity under the Foreign Sovereign Immunities Act); *see also Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237 (2d Cir. 2006) (joining the unanimous opinion of other circuits in holding that "the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity."); *Gonzalez v. 7th St. Casino*, No. 09-2674, 2010 U.S. Dist. LEXIS 44127, at *4-5 (D. Kan. May 5, 2010) (casino carried the initial burden of showing that it was a tribal agency entitled to tribal immunity). In other words, LCC shoulders the initial burden of producing evidence or identifying allegations in the complaint showing that it is affiliated with a federally recognized Indian Tribe and shares in this Tribe's sovereign immunity. Here, LCC purports to satisfy this burden by pointing to its status as a § 477 federally-chartered tribal

organization owned by the Pueblo. While this argument is not airtight,[3] ARCO does not dispute that LCC possesses tribal sovereign immunity as a subdivision of the Pueblo. As a result, for the purposes of ruling on this motion, the Court will accept that LCC enjoys immunity from suit due to its relationship with the Pueblo. Thus, the burden is on ARCO to establish that LCC (or Congress) has waived LCC's immunity. *See Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1244 (10th Cir. 2012) ("The party asserting jurisdiction bears the burden of proving that sovereign immunity has been waived.").

In its Response, ARCO provides three different reasons why it believes LCC's tribal sovereign immunity does not shield LCC from liability for the specific claims asserted in this lawsuit. First, ARCO contends that the Pueblo waived LCC's immunity for ARCO's CERCLA claims in ARCO's and the Pueblo's 1986 Agreement to Terminate Leases. Second, ARCO argues that during the merger process, the Pueblo and LCC waived LCC's sovereign immunity for liabilities the federally-chartered LCC inherited from LCC New Mexico, an allegedly non-

[3] The Tenth Circuit has directed courts to consider the following six factors before determining whether subordinate economic entities are entitled to share in a tribe's sovereign immunity: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *Breakthrough Mgmt. Group*, 629 F.3d at 1187. Neither party has produced any evidence regarding these factors. Instead, LCC asks the Court to find that it automatically enjoys immunity as a § 477 corporation. The weight of the case law supports this request, *see, e.g.*, *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011), but the Tenth Circuit has not definitively adopted this hardline approach, *see Breakthrough Mgmt. Group*, 629 F.3d at 1185 n. 8. Moreover, the Tenth Circuit has suggested in dicta that a § 477 corporation waives its sovereign immunity when its articles of incorporation contain a "sue and be sued" clause. *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998) (citing cases). LCC's articles of incorporation contain such a clause. Consequently, ARCO could have challenged LCC's immunity on this basis. But it did not, and the Court need not address (1) whether § 477 corporations always enjoy immunity and (2) if so, whether sue or be sued clauses waive this immunity. By including this explanation, the Court is not expressing any opinion about these issues or suggesting that LCC does not enjoy immunity. The Court notes that most courts that have decided whether a § 477 corporation is entitled to sovereign immunity despite a "sue and be sued" clause have held that such a corporation does enjoy sovereign immunity. *See, e.g.*, *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009); *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002). The Court is flagging these potential areas of dispute only to clarify the limited scope of its ruling.

immune entity. Finally, ARCO argues that it may pursue claims directly against LCC New Mexico under a New Mexico survivorship statute. The Court agrees with LCC that the first and third contentions lack merit. Nevertheless, with a small caveat that is discussed in more detail below, the Court is persuaded that the merger documents contain an unequivocal waiver of immunity for the claims of LCC New Mexico's creditors. Accordingly, for the time being, the Court will reject LCC's attempt to assert immunity as to these, and only these, claims.

A. The 1986 Agreement to Terminate Leases

In 1986, before the creation and incorporation of LCC, the Pueblo and ARCO entered into an Agreement to Terminate Leases that governed the reclamation of the Jackpile Paguate uranium mine. *See* 1986 Agreement to Terminate Leases, Exhibit A to COMPLAINT (Doc. No. 1-2 at 3-4) (Agreement). In this Agreement, the Pueblo promised to "assume full and complete responsibility and liability under all applicable laws . . . for . . . the cleanup, reclamation or other environmental remedial action at the mine" and expressly waived its sovereign immunity for any claims brought under the Agreement. *Id.* at 3-5. The Agreement contemplated that the Pueblo would create a company to perform reclamation work. In the event this occurred, the Pueblo agreed that the company would "assume all of the responsibilities and liabilities of The Pueblo under th[e] Agreement." *Id.* at 5-6. ARCO maintains that these clauses, read together, amount to a prospective waiver of sovereign immunity of any entity, like LCC, created and controlled by the Pueblo to conduct reclamation work at the Mine.

The Court acknowledges that this is not an unreasonable reading of the provisions of the Agreement. But it is not the only reading. The case law is clear that a sovereign entity does not waive immunity it would otherwise enjoy by assuming liabilities. *See Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1153 (10th Cir. 2011) (agreeing to assume substantive obligations does not

constitute a clear waiver of sovereign immunity). To the extent the above provisions suggest that the Pueblo would waive the immunity of any company it created under the Agreement, this waiver is implied, not express. ARCO's arguments about the meaning of these provisions are impermissible attempts to have the Court uphold an implied waiver based on equity. *See* Response at 6 ("The waiver would not have accomplished [its] purpose if the Pueblo were simply allowed to form a new entity, clothe it with tribal immunity, and direct that entity to carry out the Pueblo's obligations under the Agreement."). But "[a] waiver of tribal sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Here, the Agreement does not contain an unequivocal waiver of LLC's sovereign immunity.

In the alternative, even if the Court were inclined to accept ARCO's claim that the Pueblo's waiver of sovereign immunity extended to LCC, this waiver does not include CERCLA claims. As the Court has previously held, the waiver is limited by its own terms to claims brought under the 1986 Agreement to Terminate Leases. MEMORANDUM OPINION AND ORDER (Doc. No. 73 at 7-8). ARCO's claims against LCC, which are brought under CERCLA, do not fall within this limited waiver. As a result, the Court cannot exercise jurisdiction over these claims under the 1986 Agreement to Terminate Leases and declines ARCO's request to find that the Agreement waived LCC's immunity for ARCO's CERCLA claims.

B. Articles of Merger

ARCO's second waiver argument holds more promise, although it presents a very close question. ARCO maintains that the merger documents make clear that LCC waived its sovereign immunity "as to the liabilities it was assuming from LCC New Mexico," an allegedly non-

immune entity. Response at 8. ARCO particularly emphasizes the following section in the Plan of Merger:

> [B]ut 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.

Merger Documents, Exhibit 5 to Memo (Doc. No. 34-5 at 7-8) (Merger Documents). ARCO contends that it is a creditor within the meaning of this provision and that its right to force LCC into Court remained "unimpaired" by the merger.

Notably, LCC does not challenge the presuppositions that undergird ARCO's position. First, ARCO's argument hinges on the assumption that LCC New Mexico did not enjoy sovereign immunity. Although it refuses to explicitly concede this point, LCC never contests this fact. Memo at 11, 17. Thus, for the purposes of the present analysis, the Court will assume that LCC New Mexico did not possess any sovereign immunity.[4] *See Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1154 (10th Cir. 2012) (Gorsuch, J., concurring) ("[N]o matter how broadly conceived, sovereign immunity has never extended to a for-profit business owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued."). 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. The only question then remaining is whether LCC's promise not

[4] If LCC would like to contest this fact, the Court trusts it will file a motion clearly asserting the sovereign immunity of LCC New Mexico.

to impair ARCO's rights includes an unequivocal promise not to assert sovereign immunity as a bar to ARCO's pre-merger CERCLA claims.

The Court agrees with ARCO that the answer to this question is "yes." While the Plan of Merger does not reference sovereign immunity, LLC promised to preserve the rights of LLC New Mexico's creditors "unimpaired." Merger Documents at 7. LCC never explains what it believes this promise entails and the Court can think of only one reasonable construction of the promise: LCC New Mexico's creditors retain the same ability to enforce obligations against LCC as they possessed before the merger. Stated differently, LCC agreed to waive any defenses, including the defense of sovereign immunity, which are available to the federally-chartered LCC but would not have been available to LCC New Mexico. The Court finds that this promise is a clear and unequivocal waiver of sovereign immunity for any claims that could have been asserted against LCC New Mexico. *See Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1873 (1990) ("The Court will give effect to a State's waiver of Eleventh Amendment immunity . . . where . . . the text . . . will leave no room for any other reasonable construction.") (internal citation omitted).

The Court does not reach this conclusion lightly. It takes seriously the dictate that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *E.F.W.*, 264 F.3d at 1304 (quoting *Santa Clara Pueblo*, 436 U.S. at 58). However, the Supreme Court does not require the use of the words "sovereign immunity" for a waiver to be deemed clear and explicit. *C & L Enters.*, 532 U.S. at 420. Here, 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. The Court cannot recognize LCC's claims of sovereign immunity without disregarding this promise.

The Court notes that it could only find one other case addressing the effect of similar language in a merger document: *Kroll v. Board of Trustees of University of Illinois*, 934 F.2d 904, 909 (7th Cir. 1991). In *Kroll*, the plaintiff argued that the Board of Trustees of the University of Illinois – an entity possessing Eleventh Amendment sovereign immunity – had waived this immunity by subsuming a non-immune association. The special legislation effectuating the merger stated:

> The Board of Trustees of the University of Illinois shall be responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place, or the surviving corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of either of such corporations shall be impaired by such merger.

Id. at 909. The Seventh Circuit Court of Appeals determined that this language constituted an immunity waiver. However, it found that this waiver did not allow the plaintiff to sue the Board in federal court because "the legislature might have intended the merger statute to allow actions only in other Illinois state courts, and a state does not waive its eleventh amendment immunity by consenting to suit only in its own courts." *Id.* at 910. In other words, the Seventh Circuit Court of Appeals held that language similar to the language in LCC's merger document constituted a forum-specific waiver of sovereign immunity.

Oddly enough, although LCC cites *Kroll*, neither LCC nor ARCO discuss what implications *Kroll's* forum analysis might have on this case. Significantly, LCC does not advance the nuanced argument that the Seventh Circuit Court of Appeals found persuasive; LCC does not acknowledge that the Plan of Merger contains a forum-specific waiver of immunity which allows ARCO to sue LCC in tribal or state court but prevents ARCO from suing LCC in federal court. To the extent the Seventh Circuit properly employed such an argument to dismiss the plaintiff's claims in *Kroll*, the Court is not convinced that the same reasoning governs the

outcome in this case. Here, the merger documents suggest that LLC New Mexico's creditors should be able to bring claims against LCC in any court in the State of New Mexico that otherwise has jurisdiction over the claims. *See* Merger Documents at 3 ("If the surviving Corporation is to be governed by the laws of any other state, such surviving corporation hereby (1) agrees that it may be served with process in the State of New Mexico in any proceeding for the enforcement of any obligation of the undersigned domestic Corporation . . . [and] (2) irrevocably appoints the Secretary of the State of New Mexico as its agent to accept service of process in any such proceeding . . .").

Moreover, and more importantly, the reasoning in *Kroll* simply does not fit the facts of this case. In *Kroll*, the Seventh Circuit Court of Appeals reasoned that the waiver of immunity for pre-existing claims could be read as a forum-specific waiver allowing suits against the immune state-entity in state court. This is not a reasonable construction of LCC's immunity waiver as applied to ARCO's CERCLA claims. Congress has vested federal courts with exclusive jurisdiction over CERCLA claims. *See* 42 U.S.C. § 9613(b); *Anderson v. United States DOL*, 422 F.3d 1155, 1157 n. 3 (10th Cir. 2005). Consequently, unlike in *Kroll*, interpreting LCC's waiver as a forum-specific waiver would effectively extinguish the waiver as applied to CERCLA claims. The language of the Plan of Merger does not support such a result; LCC promised to preserve unimpaired "all rights of creditors" without qualification. For this reason, the Court will not adopt the reasoning in *Kroll* wholesale. Instead, the Court will treat LCC's promise to preserve the right of creditors unimpaired as a waiver of its ability to assert sovereign immunity in any case where LCC New Mexico would not have had immunity.

LCC only makes one direct attempt to explain why this is not the best reading of the Plan of Merger. *See* Reply at 12-13. LCC points out that the Plan of Merger states that the liabilities

assumed by the surviving corporation may be enforced against it "to the same extent as if said debts, liabilities and duties had been incurred or contract by it." LCC maintains that this language "qualified everything that comes before" with the result that LCC retains sovereign immunity. Reply at 13. LCC's reading of the Plan, however, is grammatically troublesome. Despite being separated by a comma, the statement regarding creditors' rights and the statement regarding debt and liabilities are separate and individually complete sentences, each with its own subject and predicate. In other words, the Plan contains two distinct commands: (1) "all rights of creditors . . . shall be preserved unimpaired" and (2) "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." Merger Documents at 7. The words "to the same extent," upon which LCC places so much significance, apply only to "debts, liabilities and duties." By comparison, there is no limitation on the command that creditors' rights survive the merger intact and unaffected.

LCC makes several other arguments about why the merger did not affect its ability to assert sovereign immunity. None of these arguments changes the Court's conclusion. First, LCC emphasizes that "[t]he mere act of succeeding" LCC New Mexico, a state incorporated entity, does not preclude LCC from asserting immunity as to liabilities it inherited from LCC New Mexico. Memo at 15-17. This is correct. More than one Circuit Court of Appeals has held that a sovereign government may merge with a non-immune entity into an immune entity and then assert sovereign immunity to bar claims that could previously have been brought against the non-immune entity. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 686 n. 7 (8th Cir. 2011); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 51 (1st Cir. 2003); *Kroll*, 934 F.2d at 909. ARCO

does not deny this fact or argue that the merger automatically lifted LCC's immunity for liabilities it acquired from LCC New Mexico. Rather, ARCO contends that the Plan of Merger contains an express waiver of immunity for these claims. The cases cited by LCC recognize that this is a possibility. *Amerind*, 633 F.3d at 686-687; *Kroll*, 934 F.2d at 909.

Second, LCC insists that *Amerind* controls the outcome in this case. Memo at 15-16; Reply at 18-19. Yet, 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. *See Amerind*, 633 F.3d at 686 (the plaintiff argued that the tribal corporation waived its immunity through provision assuming the obligations and liabilities of non-immune entity). As a result, *Amerind* is of extremely limited persuasive value on the ultimate issue in this case: did LCC's promise to preserve the rights of creditors unimpaired constitute a clear waiver of sovereign immunity?

Third, LCC maintains the following language in the Plan of Merger explicitly reserved LCC's sovereign immunity.

> This Plan and the legal relations between the parties hereto shall be governed by and construed in accordance with the laws of the State of New Mexico, as described in 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 the Charter of the Federal Corporation.

Merger Documents at 10. As the Court sees it, this choice-of-law provision does not conflict with the Court's reading of the Plan of Merger. The Court recognizes that LCC is, as a general matter, governed by federal law and enjoys sovereign immunity to the extent federal law allows. Of course, federal law permits LCC to waive its immunity. Thus, the Court sees no incompatibility between the above provision and recognizing the existence of a clear, but limited waiver of LCC's sovereign immunity. To the contrary, the Court's interpretation of the Plan of Merger gives effect to each provision in the Plan, whereas LCC's proposed interpretation renders

certain provisions of the Plan meaningless. For example, the Plan of Merger contains a clear waiver of immunity for pending lawsuits. *See* Merger Documents at 7-8 ("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 . . ."). LCC's chosen reading of the choice-of-law provision would effectively expunge from the Plan of Merger both this waiver provision and LCC's promise to preserve the rights of creditors.

Finally, LCC argues that the Plan of Merger should not be read as containing a waiver of LCC's sovereign immunity because "LCC's corporate Charter permits a waiver subject to clearly defined requirements, none of which was met here." Memo at 17. In particular, LCC emphasizes that its corporate charter provides that any corporate sovereign immunity waiver must be approved by a resolution of the Board of Directors and the resolution must include certain information, such as a list of the property which may be subject to a judgment. 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. The primary case LCC relies on to support this point is inapposite. LCC cites *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009) for the proposition that "there can be no waiver [of a § 477 corporation's sovereign immunity] if the [corporate] Charter's specific conditions for effecting that waiver are not followed." Memo at 13.

In *Memphis Biofuels*, the Sixth Circuit held that a "sue and be sued" clause in a tribal corporation's corporate charter did not function as a waiver of sovereign immunity because the charter also contained a provision listing the procedures that must be followed to waive

sovereign immunity. *Id.* at 921-22. The Court reasoned that reading the "sue and be sued" clause as an immunity waiver would transform the later provision into utter surplusage. In reaching this conclusion, the Court was simply employing normal canons of interpretation to give meaning to the words in the corporate charter and determine whether one portion of the charter constituted a clear waiver of immunity. *Id.* The Court 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. *Id.* 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.

The Court notes that in certain circumstances a tribal corporation's ability to waive its sovereign immunity may be limited by the tribe from whom the immunity is derived. For example, a tribe may specify that a corporation can only waive its immunity in certain circumstances or that only certain individuals at the corporation have power to waive the immunity. In *Memphis Biofuels,* an unauthorized person signed a provision purporting to waive sovereign immunity on behalf of a tribal corporation. The Sixth Circuit found that this purported waiver, while clear, was invalid because the person who signed the waiver did not have the authority to waive the tribe's immunity under the terms of the corporate charter. *Id.* at 922. The validity of LCC's Plan of Merger, however, is not at issue in this case. LCC has represented that the merger was valid. The Plan of Merger indicates that it was duly approved by the board of the federally chartered LCC and that the Plan would be submitted to the Pueblo, LCC's sole shareholder, for approval. *See* Merger Documents at 6, 9. This is not a case where a rogue corporate official attempted to waive the corporation's immunity but lacked the power to actually do so. The parties both treat the Plan of Merger as a valid document approved by the

Pueblo. As a result, the Court is not convinced that LCC's decision not to follow its internal charter procedures for waiving its immunity invalidates or draws into question the waiver in the Plan of Merger. The Court will treat this waiver as effective and will deny LCC's motion to dismiss ARCO's pre-merger CERCLA claims.

C. Claims Against LLC New Mexico

ARCO also argues that it may proceed on its claims against LCC New Mexico under New Mexico's corporate survivorship statute, N.M. Stat. Ann. § 53-16-24 (West 2013), even if LCC enjoys sovereign immunity. N.M. Stat. Ann. § 53-16-24 (West 2013) states:

> Survival of remedy after dissolution. The dissolution of a corporation does not take away or impair any remedy available to or against the corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred, prior to the dissolution and any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers may take such corporate or other action as appropriate to protect the remedy, right or claim.

ARCO contends that this statute applies to LCC New Mexico because the merger of one corporation into another is legally indistinguishable from the dissolution of the corporation. Response at 12 n. 4 (citing *United States v. U.S. Vanadium Corp.*, 230 F.2d 646, 648 (10th Cir. 1956) and N.M. Stat. Ann. § 53-19-62.2(E) (West 2013)). From this proposition, ARCO argues that it may proceed against LCC New Mexico, even if this Court dismisses LCC as a defendant from this action based on sovereign immunity.

ARCO misreads the scope of N.M. Stat. Ann. § 53-16-24. The statute does not cause LCC New Mexico's non-immune existence to continue "indefinitely" and separately from LCC's immune status. New Mexico law distinguishes mergers from dissolutions. With a merger, "upon delivery of the articles of merger [to the Secretary of State]…the separate existence of all

corporations parties to [a] plan of merger or consolidation, except the surviving or new corporation, shall cease[.]" N.M. Stat. Ann. § 53-14-6 (West 2013). That is to say, the corporation's business, including its assets and liabilities, continues unabated under the aegis of the post-merger entity.

In contrast, when a corporation files a statement of its intent to dissolve, "the corporation shall cease to carry on its business, except insofar as necessary for the winding up thereof[.]" N.M. Stat. Ann. § 53-16-5 (West 2013). Once articles of dissolution are filed with the Secretary of State and the Secretary is satisfied that the articles of dissolution comply with the law, "the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by shareholders[.]" N.M. Stat. Ann. § 53-16-12 (West 2013).

Survival statutes make sense against this backdrop, especially given common law precedent that the dissolution of a corporation was "equivalent to the death of a natural person[,]" abating pending lawsuits and vesting title to corporate property in the shareholders. 16A Fletcher Cyclopedia of the Law of Corporations § 8113 (2014). But survival statutes are wholly superfluous where, as here, the successor corporation assumes its predecessor's liability and is substituted in any pending litigation.

This explains why New Mexico's survival statute is in the chapter governing the dissolution of corporations, not the merger of corporations. *Smith v. Halliburton Co.*, 879 P.2d 1198, 118 N.M. 179 (Ct. App. 1994), which ARCO cites for the proposition that a dissolved corporation may be sued in its corporate name indefinitely, must be read in this context. *Smith* acknowledges that the New Mexico's survivorship statute abrogates the common law rule that "actions to which a corporation was a party were abated upon dissolution of that corporation." *Smith*, 879 P.2d at 1202, 118 N.M. at 183 (citing *Oklahoma Natural Gas Co. v. Oklahoma*, 273

U.S. 257, 259 (1927)). But *Smith* recognized a crucial distinction between corporations that are organized under New Mexico law and corporations organized under foreign law, and that New Mexico's survivorship statute applies only to the former, not the latter *See Smith*, 879 P.2d at 1203, 118 N.M. at 184 (citing N.M. Stat. Ann. § 53-11-2(A)).

True, LCC New Mexico, unlike the corporation at issue in *Smith*, was organized under New Mexico law. Thus if LCC New Mexico had been dissolved, New Mexico's survivorship statute would preserve ARCO's causes of action against it. But as the Court has explained above, New Mexico's survivorship statute does not extend to mergers of a New Mexico corporation with a foreign corporation like LCC, which is organized under federal law. New Mexico law explicitly contemplates this distinction: in general, the "effect" of a merger under New Mexico law is the transfer of the merged corporation's assets and liabilities into the successor corporation, *see* N.M. Stat. Ann. § 53-14-6(C) (West 2013). As a result, New Mexico's survivor statute simply does not apply after a merger.[5] Instead, federal law applies to LCC, the successor corporation to LCC New Mexico, and ARCO concedes that federal law generally provides LCC with sovereign immunity from suit. The Court will dismiss ARCO's claims as asserted directly against LCC New Mexico, a non-existent entity.

II. Dismissal Under Rule 12(b)(6)

As an alternative to its assertion of sovereign immunity, LCC asks the Court to dismiss ARCO's CERCLA claims under Federal Rule of Civil Procedure 12(b)(6). LCC maintains that it is not a "person" within the meaning of CERCLA and is not, therefore, subject to suit under the statute. The Court will deny this request as premature because LCC relies on evidence outside

[5] ARCO's argument raises practical hurdles as well. How would a lawsuit against LCC New Mexico, but not LCC, proceed? Would ARCO be required to serve LCC New Mexico with process? Who would it serve? What if no one enters an appearance for LCC New Mexico and answers the complaint? Assuming a default judgment is entered, against whom could ARCO institute enforcement proceedings?

the boundaries of the complaint to support its claims that it is not a person within the meaning of CERCLA. The Court may not consider this evidence without converting LCC's motion into a motion for summary judgment and without providing ARCO notice so that it has an opportunity to request discovery under Rule 56(d) and/or to submit competing evidence. *See* FED. R. CIV. P. 12(d). Thus, the Court finds that the appropriate course is to deny LCC's Rule 12(b)(6) motion as premature without foreclosing LCC's right to reassert its arguments in a properly titled motion.

The Court notes that in a footnote, LCC states that it is incorporating the arguments of the Pueblo, a co-defendant, into its request for dismissal. Memo at 18 n. 10. LCC does not, however, clearly state which arguments it wants the Court to consider and it does not explain how these arguments apply to LCC as opposed to the Pueblo. As a result, the Court will not address whether alternative grounds exist for dismissing ARCO's CERCLA claims as asserted against LCC. If LCC has a valid basis for requesting dismissal of these claims that it has not clearly stated, it may do so in accordance with the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED THAT:

1. LCC's OPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. TO DISMISS THE COMPLAINT (DOC. #1). (Doc. No. 33) is granted in part and denied in part.
2. By separate order, the Court will dismiss ARCO's attempt to assert claims directly against LCC New Mexico, a company which no longer exists and has been merged into LCC, and the Court will dismiss ARCO's CERCLA claims to the extent these claims arose after the 1995 merger of LCC New Mexico into LCC Federal.

SENIOR UNITED STATES DISTRICT JUDGE

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

ATLANTIC RICHFIELD COMPANY,
Plaintiff,

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

THE PUEBLO OF LAGUNA, an Indian tribe, and **LAGUNA CONSTRUCTION COMPANY, INC.,**
Defendants.

ORDER OF PARTIAL DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC.

In accordance with the MEMORANDUM OPINION AND ORDER entered herewith, (1) the Court dismisses without prejudice Plaintiff's attempt to assert claims directly against Defendant Laguna Construction Company, Inc., the New Mexico corporation that was dissolved and/or merged out of existence and (2) based on sovereign immunity, the Court dismisses without prejudice Plaintiff's claims against Defendant Laguna Construction Company, Inc. to the extent these claims arose after the 1995 merger of Defendant Laguna Construction Company, Inc. with the state entity of the same name

SENIOR UNITED STATES DISTRICT JUDGE

Attachment B

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

ATLANTIC RICHFIELD COMPANY,
Plaintiff,

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

THE PUEBLO OF LAGUNA, an Indian tribe, and LAGUNA CONSTRUCTION COMPANY, INC.,
Defendants.

MEMORANDUM OPINION AND ORDER

On March 29, 2016, Defendant Laguna Construction Company, Inc. (LCC) filed a motion to reconsider asking the Court to reverse its partial denial of LCC's motion asserting sovereign immunity. *See* OPPOSED MOTION FOR DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR RECONSIDERATION OF THE COURT'S MEMORANDUM OPINION AND ORDER (DOC # 75) AND ORDER OF PARTIAL DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC. (DOC # 76) (Doc. No. 79). Plaintiff Atlantic Richfield Company (Plaintiff or ARCO) opposes the motion as procedurally and substantively flawed. *See* ATLANTIC RICHFIELD COMPANY'S RESPONSE IN OPPOSITION TO LAGUNA CONSTRUCTION COMPANY'S MOTION FOR RECONSIDERATION (Doc. No. 83) (Response). Having examined the briefing[1] and carefully reviewed the relevant law, the Court finds that LCC has presented a new argument showing that it is entitled to sovereign immunity as to Plaintiff's

[1]The Court has read and considered LCC's 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) (Doc. No. 80) (Memo), ARCO's Response (Doc. No. 83), and LCC's REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR RECONSIDERATION (DOC. #79) (Doc. No. 91) (Reply).

claims. Consequently, the Court will grant LCC's motion to reconsider and will dismiss the remaining claims asserted against LCC.

Procedural History

On January 21, 2015, Plaintiff filed a complaint seeking reimbursement under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et. seq.*, from LCC for the cleanup of the Jackpile Paguate uranium mine. *See generally* COMPLAINT (Doc. No. 1) (Complaint). As the complaint insinuates, LCC was originally incorporated in 1988 as a New Mexico corporation. *Id.* ¶ 31; (Doc. No. 34 at 8). During the following years, while functioning as a state corporation, LCC conducted most, if not all, of the reclamation work that forms the basis of Plaintiff's CERCLA claims. Complaint ¶ 31. In 1994, however, towards the end of the reclamation project, the Pueblo of Laguna (the Pueblo), the sole shareholder of LCC, created a tribal corporation under 25 U.S.C. § 477 with the same name as the New Mexico state corporation and then merged the state corporation into the tribal corporation with the tribal corporation as the surviving entity. (Doc. No. 34 at 8-9). As a result of this merger, which was completed in 1995, LCC became a federally-chartered tribal corporation governed by federal law.

On May 26, 2015, in lieu of filing an answer to Plaintiff's complaint, LCC filed a motion asserting tribal sovereign immunity and asking the Court to dismiss the claims asserted against it. *See* OPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. TO DISMISS THE COMPLAINT (DOC. #1). (Doc. No. 33). In response to this motion, ARCO conceded that LCC enjoys sovereign immunity as a tribal corporation owned by the Pueblo and organized under 25 U.S.C. § 477. *See generally* ATLANTIC RICHFIELD COMPANY'S RESPONSE IN OPPOSITION TO LAGUNA CONSTRUCTION COMPANY'S MOTION TO

DISMISS (Doc. No. 48). ARCO maintained, however, that during the merger LCC had waived its immunity for liabilities the federally-chartered LCC inherited from LCC New Mexico, a non-immune entity.[2] To support this position, ARCO emphasized the following language from the Plan of Merger:

> [A]ll 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.

Merger Documents (Doc. No. 34-5 at 7). ARCO read this language as a promise that the obligations of LCC New Mexico could be enforced against LCC despite its newfound sovereign immunity. (Doc. No. 48 at 8, 11). According to ARCO, this waiver encompassed its CERCLA claims because "all, or nearly all, of the conduct relevant to LCC's CERCLA liability occurred while [LCC] was still a New Mexico corporation." *Id.* at 2.

LCC filed a reply acknowledging that it had assumed the liabilities of LCC New Mexico as a result of the 1995 merger, but absolutely denying that it had waived its immunity as to these liabilities. REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT LAGUNA CONSTRUCTION COMPANY'S MOTION (DOCS. # 33, 34) TO DISMISS THE COMPLAINT (DOC. # 1) AGAINST IT (Doc. No. 63). In taking this position, LCC focused its attention on the language in the Plan of Merger involving the transfer of "all debts, liabilities and duties" from LCC New Mexico to the surviving, federally-chartered LCC. It never directly addressed ARCO's contention that LCC waived its immunity by promising to preserve the rights of creditors unimpaired. Nor did LCC challenge the two key assumptions undergirding ARCO's

[2] ARCO also argued that (1) the Pueblo waived LCC's immunity for ARCO's CERCLA claims in ARCO's and the Pueblo's 1986 Agreement to Terminate Leases and (2) ARCO could sue LCC New Mexico directly under the New Mexico survivorship statute. The Court rejected both of these arguments. Unsurprisingly, LCC does not challenge either determination in its motion to reconsider.

waiver argument: (1) that ARCO was a creditor whose rights LCC promised to protect and (2) that LCC New Mexico did not enjoy sovereign immunity.

In light of this silence, the Court made the following assumptions for the purpose of ruling on LCC's motion to dismiss: (1) insofar as ARCO was asserting CERCLA claims based on the conduct of LCC New Mexico, ARCO was a creditor of LCC New Mexico within the meaning of the Plan of Merger and (2) LCC New Mexico did not possess sovereign immunity. MEMORANDUM OPINION AND ORDER (Doc. No. 75 at 9) (March 1, 2016 MOO). Based on these assumptions, the Court concluded that the language in the merger documents constituted a waiver of immunity for ARCO's claims. *Id.* at 10-13. The Court reached this conclusion because it could conceive of only one reasonable construction of LCC's promise to preserve the rights of creditors "unimpaired:" LCC assured that LCC New Mexico's creditors would retain the same ability to enforce obligations against LCC as they possessed before the merger. I.e., LCC agreed to waive any defenses, including the defense of sovereign immunity, that would not have been available to LCC New Mexico. *Id.*

In its motion to reconsider, LCC attacks the Court's conclusion as contrary to *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) and *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009) – two cases that the Court addressed at length and ultimately distinguished in its March 1, 2016 MOO. Additionally, LCC asserts for the first time on reconsideration that ARCO was not a creditor of LCC New Mexico and is not, therefore, entitled to bring claims against LCC unimpaired by the merger.

Standard of Review

While the rules of civil procedure do not articulate a specific procedure by which a party may object to an interim order, Rule 54(b) provides that "any 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 judgment adjudicating all the claims and all the parties' rights and liabilities." FED. R. CIV. P. 54(b).

As a general matter, a district court possesses broad discretion to review interlocutory matters under this standard. *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011); *Anderson v. Deere & Co.*, 852 F.2d 1244, 1246 (10th Cir. 1988). This does not mean, however, that litigants should treat Rule 54(b) as an invitation to air their disagreement with a court's ruling or to present more refined versions of arguments that the court has already rejected. The Tenth Circuit has indicated that a district court faced with a Rule 54(b) motion to reconsider may use the standards for reviewing a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e) to guide its analysis. *Ankeney v. Zavaras*, 524 F. App'x 454, 458 (10th Cir. 2013) (unpublished). Under the Rule 59(e) standards, a court may grant a motion for reconsideration in three circumstances: when there is "an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *Brumark Corp. v. Samson Res.Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). A motion to reconsider is not an opportunity "to revisit issues already addressed or advance arguments that could have been raised earlier." *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014). In other words, a motion to reconsider should do more than simply restate the position that was unsuccessfully advanced by the party in the initial motion, and should not present new arguments that could have been raised in the initial motion.

Discussion

A. Propriety of Reconsideration

ARCO contends that LCC's motion to reconsider is a procedurally improper attempt to present new arguments that should have been raised previously and to rehash the same losing arguments LCC raised in its motion to dismiss. According to ARCO, this is reason enough to deny LCC's motion to reconsider. Response at 1-2. The Court agrees in part. In its motion to reconsider, LCC contends that it "did not waive its sovereign immunity in the Plan of Merger" because (1) it assumed the liabilities of LCC New Mexico, but did not waive immunity as to these liabilities and (2) the Plan did not comply with the waiver requirements of LCC's corporate charter. Memo at 2, 11-12. These are the same arguments that LCC advanced in its motion to dismiss and that the Court thoroughly analyzed in its March 1, 2016 MOO. For the reasons stated in that opinion, the Court stands by its conclusion that LCC waived its sovereign immunity as to the claims of the creditors of LCC New Mexico. LCC has not identified any new evidence, change in law, or clear error[3] that would warrant revisiting this issue.

Nevertheless, the Court finds that it must address LCC's new argument in favor of reconsideration. As both parties recognize, the limited waiver of LCC's sovereign immunity only permits ARCO to assert claims against LCC to the extent ARCO is asserting claims as a creditor of LCC New Mexico.[4] In its March 1, 2016 MOO, the Court assumed ARCO was a creditor because ARCO averred that it was and LCC did not challenge this claim. ARCO maintains that

[3] LCC argues that reconsideration is appropriate because the Court clearly misread *Amerind*, 633 F.3d 680, a case LCC cited as persuasive authority. The Court rejects LCC's interpretation of *Amerind* and of the Court's prior ruling. As the Court previously explained, unlike the defendant in *Amerind*, LCC not only assumed the liabilities of LCC New Mexico, it promised to preserve the rights of LCC's creditors unimpaired. Because *Amerind* does not address the import of this second promise, it has little to no persuasive value in determining whether such a promise constitutes a waiver of sovereign immunity.

[4] In recognition of this fact, the Court previously dismissed ARCO's post-merger CERCLA claims. March 1, 2016 MOO at 20.

the Court should not reopen this determination because LCC could have countered ARCO's claim to be a creditor in its briefing on the motion to dismiss, but chose not to do so. In the normal course of affairs, ARCO would have a solid argument. This Court does not bear responsibility for constructing the parties' arguments. If LCC believed ARCO did not qualify as a creditor of LCC New Mexico within the meaning of the Plan of Merger, LCC should have contested this issue in the reply in support of its motion to dismiss. S*ee Kipling v. State Farm Mut.*, 774 F.3d 1306, 1307 (10th Cir. 2014) (holding that the district court did not abuse its discretion in denying defendant's motion to reconsider, which asserted a "respectable" and potentially "correct" defense to liability, because defendant could have raised the argument earlier but failed to do so).

Normal principles of waiver do not apply, however, when the Court's jurisdiction is called into question. *See Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982) (holding that a failure to appeal an adverse sovereign immunity determination did not prevent tribal defendants from raising sovereign immunity as a defense in a motion to reconsider on remand; "[s]o long as a case is pending, the issue of federal court jurisdiction may be raised at any stage of the proceedings."). It is well-established that a sovereign generally does not waive its immunity by failing to assert arguments in favor of immunity in a timely fashion. *Villescas v. Abraham*, 311 F.3d 1253, 1257, n.3 (10th Cir. 2002). Consequently, the Court will not treat LCC's failure to timely object to ARCO's alleged creditor-status as a waiver of LCC's argument that ARCO's CERCLA claims do not fall within the scope of the limited waiver of sovereign immunity contained in the Plan of Merger. Because the Court has not yet addressed the merits of this particular argument, it will do so now.

B. ARCO's Status as a Creditor

The Tenth Circuit has repeatedly admonished courts to "construe waivers of sovereign immunity narrowly." *Iowa Tribe v. Salazar*, 607 F.3d 1225, 1236 (10th Cir. 2010); *see also Kane County v. United States*, 772 F.3d 1205, 1211 (10th Cir. 2014) ("[W]aivers of sovereign immunity are to be read narrowly and conditions on the waiver are to be strictly observed."); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (when faced with a dispute over the scope of a waiver of tribal sovereign immunity, the court must construe the challenged waiver strictly). This is because "sovereign immunity [is] an inherent part of the concept of sovereignty." *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010). Thus, the sovereign – not the court – is generally the master of its own immunity. A sovereign entity, such as a tribal corporation, may choose to waive its immunity as to certain claims, but not others, or it may set limits on an immunity waiver safe in the knowledge that a more extensive waiver cannot be implied but would have to be unequivocally expressed. *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304 (10th Cir. 2001) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). In other words, "[w]hen consent to be sued is given, the terms of the consent establish the bounds of a court's jurisdiction." *Ramey*, 673 F.2d at 320.

Here, the Court has determined that LCC waived its sovereign immunity in the Plan of Merger for claims brought by "creditors" of LCC New Mexico. Unfortunately, the Plan of Merger does not define the word "creditor." Nor does it reference any other document or source of law that contains a definition of the word "creditor." As a result, the meaning of the word is subject to debate. LCC argues that the Court should construe the word "creditor" in a narrow sense as "one who holds a demand which is certain and liquidated" or as "one to whom money is

due." Memo at 8-10. LCC insists that ARCO was not a creditor within the meaning of either definition because LCC New Mexico did not owe ARCO a debt at the time of the merger.[5]

ARCO, on the other hand, argues that "creditor" should be interpreted broadly in accordance with the United States Bankruptcy Code to include any entity having a right to payment based on LCC New Mexico's conduct, whether or not this right to payment arose prior to or after the merger. ARCO points out that the Plan of Merger is modeled on language from NMSA § 53-14-6(E), the New Mexico statute which governs intra-state mergers. NMSA § 53-14-6(E) states:

> When a merger or consolidation has become effective . . . the surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated, and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if the merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by the merger or consolidation.

While there is no New Mexico case law defining or interpreting the word "creditor" as used in NMSA § 53-14-6(E), one apparent purpose of the statute is to ensure that creditors and other individuals with claims or potential claims against the non-surviving merged company retain the ability to enforce these claims against the surviving company once the merger is complete. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 837 F. Supp. 1123, 1126 (N.D. Ala. 1993) (finding that it is a fundamental principle of statutory mergers that the surviving corporation cannot escape personal jurisdiction in a state where one of the merging corporations had been

[5]ARCO does not deny that did not have a viable CERCLA claim against LCC New Mexico as of the merger. The Court will, therefore, accept this as true for the purpose of ruling on LCC's motion to reconsider. The Court notes that ARCO asserts both CERCLA cost recovery and CERCLA contribution claims against LCC. While the cost recovery claims request reimbursement for monies spent on cleanup efforts during or after 2010, the contribution claim requests reimbursement for funds released as part of a 1986 settlement. ARCO does not, however, argue that its contribution claim falls within LCC's narrow reading of the waiver language. Accordingly, the Court will treat this claim as abandoned.

subject to suit). According to ARCO, this suggests that the New Mexico State Corporation Commission may have taken steps to block the proposed merger of LCC New Mexico in the absence of assurances that LCC would assume its liabilities and waive immunity as to these obligations.

The Court is sympathetic to Plaintiff's position. If the Court was tasked with interpreting the Plan of Merger according to the normal principles of contract construction, without the patina of sovereign immunity, the Court might be inclined to adopt Plaintiff's proposed definition of the word "creditor." The doctrine of sovereign immunity, however, ties the Court's hands. Absent evidence that LCC intended to use the word "creditor" broadly, the Court must construe the word in favor of LCC. In other words, to the extent the word "creditor" encompasses a range of meanings and is, therefore, ambiguous, the Court must adopt the most narrow but reasonable meaning of the word unless and until ARCO, the party asserting jurisdiction, carries the burden of showing that LCC was clearly using the word "creditor" to comprehensively waive its sovereign immunity for any and all claims arising from LCC New Mexico's conduct. *See Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1244 (10th Cir. 2012) ("The party asserting jurisdiction bears the burden of proving that sovereign immunity has been waived.").

ARCO has not satisfied this burden. LCC has proposed a narrow, but reasonable interpretation of the Plan of Merger: LCC waived sovereign immunity and promised to preserve the rights of all entities who currently (as of the merger) possessed claims against LCC New Mexico. This limited waiver would not apply to entities like ARCO whose claims did not come to fruition until after the merger was complete. ARCO has not presented any evidence that this reading of the Plan of Merger is clearly incorrect. ARCO does not cite to any pre-1995 New Mexico case law defining the word "creditor." Nor does it provide any evidence that LCC

understood the term "creditor" in accordance with the United States Bankruptcy Code, a source of law that is never referenced in the Plan of Merger.

ARCO contends that LCC must have intended that the word "creditor" have an inclusive definition because otherwise the New Mexico State Corporation Commission would not have approved the merger. But this is purely speculative. NMSA § 53-14-7(B), the statute governing inter-state mergers, states "if the surviving or new corporation is to be governed by the laws of any state other than this state, the effect of such merger of consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise." The statute does not require the inclusion of specific language for a merger of a New Mexico corporation to be approved.[6] Because ARCO has not presented any evidence showing that LCC's waiver of sovereign immunity clearly extends to entities, like ARCO, whose claims against LCC did not accrue until after the merger was completed, the Court finds that LCC is entitled to sovereign immunity as to Plaintiff's CERCLA claims.

IT IS THEREFORE ORDERED THAT:

1. LCC's OPPOSED MOTION FOR DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR RECONSIDERATION OF THE COURT'S MEMORANDUM OPINION AND ORDER (DOC # 75) AND ORDER OF PARTIAL DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC. (DOC # 76) (Doc. No. 79) is GRANTED.

[6] LCC takes the position that the New Mexico Secretary of State "has no authority . . . to approve or disapprove a merger with a foreign corporation." Reply at 8 n.8. This strikes the Court as an overly technical reading of NMSA § 53-14-7, which requires any New Mexico corporation participating in a merger to comply with the provisions of the New Mexico Business Corporation Act. NMSA § 53-14-7 (A)(1). However, the Court takes no position on this issue. ARCO has not challenged the validity of the merger. Nor does the authority of the New Mexico Secretary of State to approve the merger change the Court's conclusion.

2. By separate order, the Court will dismiss the remaining claims against LCC.

SENIOR UNITED STATES DISTRICT JUDGE

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

ATLANTIC RICHFIELD COMPANY,
Plaintiff,

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

THE PUEBLO OF LAGUNA, an Indian tribe, and **LAGUNA CONSTRUCTION COMPANY, INC.,**
Defendants.

ORDER OF DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC.

In accordance with the MEMORANDUM OPINION AND ORDER entered herewith, based on sovereign immunity, the Court dismisses without prejudice Plaintiff Atlantic Richfield Company's remaining claims against Defendant Laguna Construction Company, Inc.

SENIOR UNITED STATES DISTRICT JUDGE

Attachment C

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

ATLANTIC RICHFIELD COMPANY,

Plaintiff,

v. **No. 1:15-cv-56-JAP/KK**

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

Defendants.

ORDER GRANTING UNOPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b), FEDERAL RULES OF CIVIL PROCEDURE

In the UNOPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b), FEDERAL RULES OF CIVIL PROCEDURE (Doc. No. 101) (Motion),[1] Defendant Laguna Construction Company, Inc. (LCC) asks the Court to certify as final two orders of dismissal: (1) ORDER OF PARTIAL DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC. (Doc. No. 76) and (2) ORDER OF DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC. (Doc. No. 94) (together, the Orders of Dismissal). Plaintiff Atlantic Richfield Company (ARCO) and

[1] On the same day, LCC filed a MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b), FEDERAL RULES OF CIVIL PROCEDURE (Doc. No. 102), which the Court has carefully considered in ruling on the Motion.

Defendant Pueblo of Laguna do not oppose the Motion. Defendant the United States of America takes no position on the Motion.

Plaintiff ARCO brought this case asserting CERCLA[2] claims against three Defendants: the United States, the Pueblo of Laguna, and LCC. In addition, ARCO asserted claims against the Pueblo of Laguna under a Termination of Lease Agreement (Agreement). On February 9, 2016, the Court dismissed all claims against the United States. *See* ORDER OF DISMISSAL OF PLAINTIFF'S CLAIMS AGAISNT THE UNITED STATES (Doc. No. 72). On February 22, 2016, the Court dismissed the CERCLA claims against the Pueblo of Laguna, but not the claims related to the Agreement. *See* ORDER OF PARTIAL DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST THE PUEBLO OF LAGUNA (Doc. No. 74). In the Orders of Dismissal, the Court dismissed all of the claims against LCC on these grounds: (1) ARCO may not assert a claim against LCC's predecessor state corporation, which was merged into the current federal tribal corporation; (2) LCC had not waived its sovereign immunity in its Articles of Merger;[3] and (3) LCC possesses sovereign immunity from ARCO's suit. As a result, the only remaining claims in this case are against the Pueblo of Laguna based on an alleged breach of the Agreement.

I. DISCUSSION

"When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). To

[2] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9628.

[3] The Court made this determination in the MEMORANDUM OPINION AND ORDER (Doc. No. 93) granting LCC's OPPOSED MOTION FOR DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR RECONSIDERATION OF THE COURT'S MEMORANDUM OPINION AND ORDER (DOC #75) AND ORDER OR PARTIAL DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC. (DOC #76) (Doc. No. 79).

properly certify a final judgment under Rule 54(b), a court must make two determinations: (1) that the order certified is final and (2) that there is no just reason to delay review of the order. *Inola Drug, Inc. v. Express Scripts, Inc.*, 390 Fed. App'x 774, 775 (10th Cir. 2010). Overall, a court must "weigh[ ] Rule 54(b)'s policy of preventing piecemeal appeals against the inequities that could result from delaying an appeal." *Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005). Under the first element, courts should consider "whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined are such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Id.* Specifically, a court should examine "whether the allegedly separate claims turn on the same factual questions, whether they involve common legal issues, and whether separate recovery is possible." *Id.* at 827.

In the Orders of Dismissal, the Court decided that ARCO could not sue LCC's predecessor state corporation that had been merged into the current federally-chartered corporation. That decision relates solely to the sovereign immunity of LCC and whether LCC waived its sovereign immunity. ARCO's remaining claims against the Pueblo of Laguna arise out of the Agreement and will require the Court to determine whether the Pueblo of Laguna waived its sovereign immunity in the Agreement. The Orders of Dismissal involve separate issues related to sovereign immunity because LCC's waiver of sovereign immunity and the Pueblo of Laguna's waiver of sovereign immunity arise from wholly separate circumstances. If the Court grants the Motion, an appeal of the Orders of Dismissal that LCC's sovereign immunity was not waived will not present the same issue as a subsequent appeal of the Court's ruling on whether the Pueblo of Laguna waived its sovereign immunity in the Agreement.

Consequently, the claims adjudicated in the Orders of Dismissal and the remaining claims against the Pueblo of Laguna are separate for purposes of Rule 54(b) certification.

The Court must also determine whether there is no just reason to delay Rule 54(b) certification. Approximately five years ago, LCC began the process of dissolution. Currently, LCC has no employees, no office, and no business activities. *See* Declaration of Maxine R. Velasquez, Chair of LCC Board of Directors, (Doc. No. 103) ¶¶ 4-11. Over the past five years, LCC has been disposing of its tangible assets, and litigating and resolving outstanding claims. (*Id.*) The only other case involving LCC is one in which LCC sued the United States for reimbursement of past costs incurred in construction work in Iraq. (*Id.*) LCC's appeal of a decision against it has been resolved, and an accounting for those costs is in its final stages. (Valasquez Decl. ¶ 8.) *See Laguna Construction Company v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016). If LCC waits for a final resolution of all claims in this case, LCC will have to further delay the dissolution process. But if the Court certifies the Orders of Dissolution as final, ARCO may appeal or it may allow the appeal period to expire. Either way, LCC would see an earlier resolution of the claims and LCC will be able to wind up its activities and save its dwindling resources. The Court finds that there is no just reason for delay of entry of a final judgment of dismissal and certification of the Orders of Dismissal as final is appropriate.

IT IS ORDERED that the UNOPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b), FEDERAL RULES OF CIVIL PROCEDURE (Doc. No. 101) is granted, and the Court will certify the Orders of Dismissal as final.

SENIOR UNITED STATES DISTRICT JUDGE

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

ATLANTIC RICHFIELD COMPANY,

Plaintiff,

v. **No. 1:15-cv-56-JAP/KK**

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

Defendants.

CERTIFICATION OF ORDERS OF DISMISSAL AS FINAL UNDER RULE 54(b)

In accordance with the ORDER GRANTING UNOPPOSED MOTION OF DEFENDANT LAGUNA CONSTRUCTION COMPANY, INC. FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b), FEDERAL RULES OF CIVIL PROCEDURE, entered herewith, the Court concludes that certification of two orders of dismissal as final is appropriate.

IT IS CERTIFIED under Rule 54(b) that the ORDER OF PARTIAL DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC. (Doc. No. 76) and the ORDER OF DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST LAGUNA CONSTRUCTION COMPANY, INC. (Doc. No. 94) are final judgments.

SENIOR UNITED STATES DISTRICT JUDGE