

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Feb 14, 2017**

UNITED STATES DISTRICT COURT SEAN F. MCAVOY, CLERK  
EASTERN DISTRICT OF WASHINGTON

CITY OF SPOKANE, a municipal  
corporation located in the County of  
Spokane, State of Washington,

Plaintiff,

v.

MONSANTO COMPANY, SOLUTIA  
INC., and PHARMACIA  
CORPORATION, and DOES 1 through  
100,

Defendants.

No. 2:15-CV-00201-SMJ

**ORDER GRANTING PLAINTIFF’S  
MOTION TO DISMISS  
COUNTERCLAIMS**

**I. INTRODUCTION**

In July 2015, the City of Spokane filed this action against the Monsanto Company, Solutia Inc., and Pharmacia Corporation (collectively “Monsanto”) alleging that Monsanto was responsible for polychlorinated biphenyl (PCB) contamination in the Spokane River. ECF No. 1. Spokane alleged public nuisance, products liability, negligence, and equitable indemnity claims. ECF No. 1 at 27–34. On October 26, 2016, the Court dismissed Spokane’s common-law products-liability claim for lack of standing, but the Court denied Monsanto’s request to

1 dismiss each of Spokane's other claims. ECF No. 74. On November 8, 2016,  
2 Monsanto answered Spokane's complaint and counterclaimed against Spokane for  
3 cost recovery and declaratory judgment under the Comprehensive Environmental  
4 Response, Compensation, and Liability Act of 1980 (CERCLA) and Declaratory  
5 Judgment Act, alleging that Spokane is responsible for PCB contamination in the  
6 River.<sup>1</sup> Spokane now moves do dismiss Monsanto's CERCLA counterclaims. ECF  
7 No. 83.

8         Spokane argues that Monsanto's counterclaims must be dismissed for three  
9 alternative reasons: first, because Monsanto lacks standing; second, because  
10 Monsanto's interests are not within the zone of interests CERCLA was intended to  
11 protect; and third, because Monsanto cannot establish the elements necessary to  
12 prevail on a CERCLA cost-recovery claim. ECF No. 83 at 3–15. Because Monsanto  
13 alleges an injury in fact—response costs relating to PCB contamination in the  
14 Spokane River—that is fairly traceable to Spokane's alleged discharges into the  
15 River and would be redressed by a favorable decision, Monsanto has established  
16 Article III standing. And Monsanto's interest in recovering response costs from a  
17 party it alleges is responsible for contamination falls within CERCLA's zone of  
18 interests. However, Monsanto fails to allege facts plausibly showing that it has

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19  
20 <sup>1</sup> Monsanto represents that it intends to move to amend its answer to add additional  
counterclaims pursuant to state and federal law following completion of the  
required notice processes for those claims. ECF No. 79 at 36–38.

1 incurred or will incur response costs that are necessary and consistent with the  
2 national contingency plan, as required to state a CERCLA cost-recovery claim.  
3 Accordingly, and as discussed in greater detail below, Monsanto's counterclaims  
4 under CERCLA and the Declaratory Judgment Act are dismissed.

## 5 **II. BACKGROUND**

6 The Spokane River is contaminated with PCBs and listed on the Washington  
7 State Water Quality Assessment list of impaired water bodies under section 303(d)  
8 of the Clean Water Act (CWA). ECF No. 1 at 4. Monsanto produced PCBs in the  
9 United States from 1935 until the late 1970s. ECF No. 1 at 2; ECF No. 79 at 39.  
10 Spokane alleges that Monsanto was aware for decades that PCBs were toxic and  
11 contaminating natural resources and living organisms. ECF No. 1 at 2, 16–25.  
12 Spokane filed this action alleging that Monsanto is responsible for, and liable for  
13 resulting damages from, PCB contamination in the River.<sup>2</sup> ECF No. 1.

14 In its answer, Monsanto alleges that PCBs have numerous origins other than  
15 Monsanto's manufacturing, that Spokane authorized and continues to authorize the  
16 use of products containing PCBs, and that Spokane is responsible for discharging  
17 PCB's into the River. ECF No. 79 at 39–42. Accordingly, Monsanto counterclaims  
18 that Spokane is liable under CERCLA for costs associated with cleaning up PCBs

19 \_\_\_\_\_  
20 <sup>2</sup> A more detailed discussion of Spokane's factual allegations and legal claims is  
contained in the Court's order addressing Monsanto's motion to dismiss. ECF No.  
74.

1 and other contaminants in the Spokane River. ECF No. 79 at 44–58. Monsanto  
2 alleges the following facts in support of its counterclaims:

3         Spokane discharged untreated sewage into the Spokane River prior to the  
4 construction of Spokane’s wastewater treatment system in 1958. ECF No. 79 at 44.  
5 Since 1958, Spokane has discharged sewage, wastewater, and storm water  
6 containing contaminants, including PCBs, through its wastewater and storm water  
7 systems. ECF No. 79 at 45. Spokane’s reclamation facility and combined sewer  
8 overflows are regulated by an NPDES waste discharge permit. ECF No. 79 at 45.  
9 During heavy rain or snowmelt events, the combined system may become  
10 overwhelmed, resulting in direct discharge of untreated sewage and wastewater,  
11 which include PCBs, into the River. ECF No. 79 at 45–46.

12         In 1984, the Washington Supreme Court held that Spokane discharged  
13 sewage into the River in a manner constituting a public nuisance, *Miotke v.*  
14 *Spokane*, 678 P.2d 803, 817 (Wash. 1984), *abrogated on other grounds by Blue Sky*  
15 *Advocates v. State*, 727 P.2d 644 (Wash. 1986). ECF No. 79 at 46. Additionally,  
16 Spokane has received notice letters on several occasions concerning discharges  
17 allegedly in violation of the City’s NPDES permit. ECF No. 79 at 47. The combined  
18 system has experienced over 500 overflow events in the last three years. ECF No.  
19 79 at 47–49.

1 Spokane also has extensive, separate storm-water systems, which discharge  
2 untreated storm water into the Spokane River and Latah Creek at over 100 locations.  
3 ECF No. 79 at 49. These systems are regulated by a municipal storm water permit  
4 issued by the Washington State Department of Ecology, which, among other things,  
5 requires Spokane to use “all known, available, and reasonable methods of  
6 prevention, control and treatment to prevent and control pollution to the waters of  
7 the State of Washington.” ECF No. 79 at 49–50. Monitoring of three separate storm  
8 water systems between 2012 and 2014 revealed PCB contamination in excess of  
9 State water-quality standards. ECF NO. 79 at 50.

10 Spokane continues to use, purchase, and dispose of PCB-containing products.  
11 ECF No. 79 at 51. These include Freez-Gard road de-icers and Hydroseed erosion  
12 control products. ECF No. 79 at 51.

13 Monsanto alleges that it has incurred response costs, “including the costs of  
14 investigation of PCB sources into the Spokane River” and potential “regulatory,  
15 litigation, and other response costs” as a result of Spokane’s discharges. ECF NO.  
16 79 at 43, 53–55.

### 17 **III. MOTION TO DISMISS STANDARD**

18 A claim may be dismissed pursuant to Rule 12(b)(6) either for lack of a  
19 cognizable legal theory or failure to allege sufficient facts to support a cognizable  
20 legal theory. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). “To survive a motion

1 to dismiss, a complaint must contain sufficient factual matter, accepted as true, to  
2 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,  
3 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim  
4 is plausible on its face when “the plaintiff pleads factual content that allows the  
5 court to draw the reasonable inference that the defendant is liable for the misconduct  
6 alleged.” *Id.* A court must “accept all factual allegations in the complaint as true  
7 and construe the pleadings in the light most favorable to the nonmoving party.”  
8 *Taylor*, 780 F.3d at 935 (quoting *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028,  
9 1029–30 (9th Cir. 2009)). However, “[t]hreadbare recitals of the elements of a cause  
10 of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S.  
11 at 678. “Where the well-pleaded facts do not permit the court to infer more than the  
12 mere possibility of misconduct, the complaint has alleged—but has not ‘show[n]’—  
13 ‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

#### 14 IV. DISCUSSION

##### 15 A. **Monsanto has standing under Article III of the Constitution to bring its 16 counterclaims.**

17 The Supreme Court has identified three requirements that constitute the  
18 “irreducible constitutional minimum of standing”:

19 First, the plaintiff must have suffered an injury in fact—an invasion  
20 of a legally protected interest which is (a) concrete and particularized,  
and (b) actual or imminent, not conjectural or hypothetical. Second,  
there must be a causal connection between the injury and the conduct  
complained of—the injury has to be fairly traceable to the challenged

1 action of the defendant, and not the result of independent action of  
2 some third party not before the court. Third, it must be likely, as  
3 opposed to merely speculative, that the injury will be redressed by a  
4 favorable decision.

5 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations and  
6 quotation marks omitted). “The party invoking federal jurisdiction bears the  
7 burden of establishing these elements.” *Id.* at 561.

8 Monsanto adequately alleges an injury in fact for standing purposes.  
9 Spokane argues that Monsanto does not and cannot allege an interest in the  
10 Spokane River that has been affected by the City’s discharges. ECF No. 83 at 5.  
11 But Monsanto’s alleged injury does not arise from an interest in the Spokane  
12 River. Rather, Monsanto alleges that it has suffered a direct economic injury  
13 because it has “paid and will continue to pay necessary response costs consistent  
14 with the National Contingency Plan, within the meaning of CERCLA § 101(31),  
15 42 U.S.C. § 9601(31), including costs to assess and investigate contamination  
16 caused by the City’s releases and/or disposal of hazardous substances to the  
17 Spokane River.” ECF No. 79 at 54.

18 Spokane also suggests that Monsanto’s alleged “response costs” are not a  
19 cognizable injury in fact because the costs arise from the City’s litigation against  
20 Monsanto. ECF No. 83 at 5. While a plaintiff “cannot manufacture [an] injury by  
incurring litigation costs or simply choosing to spend money fixing a problem that  
otherwise would not affect the organization at all,” *La Asociacion de*

1 *Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir.  
2 2010), no authority appears to extend this rule to bar a defendant from alleging  
3 litigation-related costs as the basis for standing in a counterclaim, and there is no  
4 basis to extend the rule here. There is no indication that the response costs alleged  
5 by Monsanto, whether or not they are litigation related, were undertaken for the  
6 purpose of creating standing for Monsanto's counterclaims.

7 Monsanto also adequately alleges that its injuries are traceable to Spokane's  
8 discharge of PCBs into the river. Spokane is correct that, as alleged, the direct  
9 cause of Monsanto's injuries is this litigation. *See* ECF No. 83 at 6. Monsanto has  
10 pleaded no facts indicating that in the absence of this lawsuit, it would be  
11 expending *any* resources on investigating, assessing, or cleaning up contamination  
12 in the Spokane River. However, Monsanto makes substantial factual allegations  
13 supporting its claim that discharges from Spokane's sewer and storm water  
14 systems are responsible for some significant portion of the PCB contamination in  
15 the Spokane River, and Spokane's discharges are therefore a cause of this  
16 litigation and Monsanto's resultant response costs. Accordingly, on the facts  
17 alleged by Monsanto, there is a causal connection between PCB contamination  
18 from Spokane's sewer and storm water systems and Monsanto's alleged response  
19 costs.



1 Finally, there is little question that Monsanto’s alleged injury would be  
2 redressed if the Court granted the relief Monsanto requests—damages and  
3 restitution “for past and future response costs.”

4 **B. Monsanto’s claims fall within CERCLA’s zone of interests.**

5 In addition to Article III standing, in order to bring a cause of action  
6 pursuant to a federal statute, a plaintiff’s asserted interests must fall within the  
7 “zone of interests” protected by the statute invoked. *Lexmark Int’l, Inc. v. Static*  
8 *Control Components, Inc.*, 134 S. Ct. 1377, 1388–89 (2014). “[W]hether a  
9 plaintiff’s claims are within a statute’s zone of interests is not a jurisdictional  
10 question.” *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1156 (9th Cir.  
11 2015) (citing *Lexmark*, 134 S. Ct. at 1387–88). Rather, the inquiry is one of  
12 statutory interpretation, which asks whether a particular class of plaintiff’s has a  
13 cause of action under a particular substantive statute. *Lexmark*, 134 S. Ct. at 1387;  
14 *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1120–21 (9th Cir. 2015).

15 The zone-of-interests test is most frequently applied as a limitation on the  
16 right of action conferred by the Administrative Procedure Act (APA), but the  
17 Supreme Court has held that it applies “to all statutorily created causes of action.”  
18 *Lexmark*, 134 S. Ct. at 1388 (citing *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).  
19 In the APA context, “the test is not ‘especially demanding’”; *Id.* (quoting *Match-*  
20 *E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199,

1 2210 (2012)), it requires only that the Plaintiff’s interests “must be ‘arguably  
2 within the zone of interests to be protected or regulated by the statute,’” *Match–E–  
3 Be–Nash–She–Wish*, 132 S. Ct. at 2210 (quoting *Ass’n of Data Processing Serv.  
4 Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). But “the breadth of the zone of  
5 interests varies according to the provisions of law at issue, so that what comes  
6 within the zone of interests of a statute for purposes of obtaining judicial review of  
7 administrative action under the ‘generous review provisions’ of the APA may not  
8 do so for other purposes.” *Lexmark*, 134 S. Ct. at 1389 (quoting *Bennett*, 520 U.S.  
9 at 163).

10         In determining whether a plaintiff’s claims fall within a statute’s zone of  
11 interests, courts should look first to the statute’s stated purposes. *See Lexmark*,  
12 134 S. Ct. at 1389 (“Identifying the interests protected by the Lanham Act . . .  
13 requires no guesswork, since the Act includes an unusual, and extraordinarily  
14 helpful, detailed statement of the statute’s purposes.” (internal quotation marks  
15 omitted)). If a plaintiff’s claims are not expressly included in a statute’s stated  
16 purposes, a court may consider whether Congress nevertheless contemplated and  
17 intended to protect the plaintiff’s interests. *See Ray Charles Found.*, 795 F.3d at  
18 1122 (concluding that although Foundation’s interest was not expressly identified,  
19 the interest was one “Congress contemplated, regulated, and protected in enacting  
20 the [the Copyright Act’s] termination provisions”).

1           Spokane argues that CERCLA was not intended to protect manufacturers of  
2 chemicals from the costs of defending tort suits for damages caused by those  
3 chemicals or to shift responsibility to a claimant whose property is contaminated.  
4 ECF No. 83 at 7–8. Monsanto argues that its interests are consistent with  
5 CERCLA’s purpose of ensuring the responsible party pays for cleanup of  
6 contamination. ECF No. 94 at 10.

7           CERCLA does not contain a detailed purpose statement that is dispositive  
8 of what interests it was intended to protect. However, CERCLA has been  
9 examined in detail in a number of precedential opinions, which have identified  
10 two primary purposes of the Act: “(1) to ensure the prompt and effective cleanup  
11 of waste disposal sites, and (2) to assure that parties responsible for hazardous  
12 substances bore the cost of remedying the conditions they created.” *Carson*  
13 *Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (quoting  
14 *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir.  
15 1997)). CERCLA’s second purpose is accomplished in part through authorizing  
16 “private parties to institute civil actions to recover the costs involved in the  
17 cleanup of hazardous wastes from those responsible for their creation.” 3550  
18 *Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1357 (9th Cir.  
19 1990) (citing 42 U.S.C. § 9607(a)(1–4)).

1 Monsanto alleges that Spokane is responsible for contaminating the  
2 Spokane River with PCBs and other hazardous waste. ECF No. 79 at 45–50. And  
3 Monsanto’s counterclaims seek to recover costs it has been required to expend or  
4 may expend in the future in investigating and responding to the contamination.  
5 ECF No. 79 at 58. In other words, Monsanto’s alleged interest here is in  
6 transferring response costs from itself to the party it alleges is actually responsible  
7 for PCB and other hazardous waste contamination in the Spokane River. That  
8 interest falls squarely within CERCLA’s second purpose. Accordingly,  
9 Monsanto’s alleged interests are within the zone of interests CERCLA was  
10 intended to protect.

11 **C. Monsanto fails to state a claim under CERCLA.**

12 To prevail on a claim for private cost recovery under Section 107 of  
13 CERCLA, a plaintiff must establish that:

14 (1) the site on which the hazardous substances are contained is a  
15 “facility” under CERCLA’s definition of that term, Section 101(9),  
16 42 U.S.C. § 9601(9); (2) a “release” or “threatened release” of any  
17 “hazardous substance” from the facility has occurred, 42 U.S.C. §  
18 9607(a)(4); (3) such “release” or “threatened release” has caused the  
19 plaintiff to incur response costs that were “necessary” and “consistent  
20 with the national contingency plan,” 42 U.S.C. §§ 9607(a)(4) and  
(a)(4)(B); and (4) the defendant is within one of four classes of  
persons subject to the liability provisions of Section 107(a).

19 *Carson*, 270 F.3d at 870–71 (quoting *3550 Stevens Creek Assocs.*, 915 F.2d at  
20 1358) (internal quotation marks omitted).

1 Spokane, for the purpose of this motion, does not dispute whether  
2 Monsanto has adequately alleged the first, second, and fourth elements of a  
3 Section 107 cost-recovery action. ECF No. 83 at 10. Instead, Spokane argues that  
4 even if Monsanto can establish those elements, Monsanto cannot establish the  
5 third element—that it incurred necessary response costs caused by Spokane’s  
6 alleged release of hazardous substances. ECF No. 83 at 10–14. Spokane further  
7 argues that costs incurred to defend litigation are not recoverable “response costs.”  
8 ECF No. 83 at 12–14. Monsanto argues that it has adequately alleged that it has  
9 incurred necessary response costs as a result of Spokane’s discharges and that a  
10 fact-specific inquiry into whether its costs were necessary is inappropriate at the  
11 motion to dismiss stage. ECF No. 94 at 11–13. Monsanto also argues that its costs  
12 to assess and investigate contamination in the Spokane River are recoverable, ECF  
13 No. 94 at 13–14, and that even some litigation-related costs may be recoverable.  
14 ECF No. 94 at 19–20.

15 “Necessary costs are costs that are ‘necessary to the containment and  
16 cleanup of hazardous releases.’ *United States v. Iron Mountain Mines, Inc.*, 987 F.  
17 Supp. 1263, 1271 (E.D. Cal. 1997) (quoting *United States v. Hardage*, 982 F.2d  
18 1436, 1448 (10th Cir. 1992)). “[C]osts cannot be ‘necessary’ to the containment  
19 and cleanup of hazardous releases ‘absent some nexus between the alleged  
20

1 response cost and an actual effort to respond to environmental contamination.’’

2 *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005).

3 Monsanto makes the following allegations concerning the costs it allegedly  
4 has and will continue to incur:

5 As a result of the City’s discharges, Defendants/Counter-Claimants  
6 have incurred and will continue to incur response costs to investigate  
7 alleged PCB contamination in the Spokane River. In addition to past  
8 costs, Defendants/Counter-Claimants will continue to incur response  
9 costs as the investigation proceeds. Defendants/Counter-Claimants  
10 have incurred legal and other costs defending the legal action(s)  
11 attributable to and caused by the City’s own discharges.

12 Defendants/Counter-Claimants have paid and will continue to pay  
13 necessary response costs consistent with the National Contingency  
14 Plan, within the meaning of CERCLA § 101(31), 42 U.S.C. §  
15 9601(31), including costs to assess and investigate contamination  
16 caused by the City’s releases and/or disposal of hazardous substances  
17 to the Spokane River.

18 Additionally, if Defendants/Counter-Claimants are found liable to the  
19 City for contamination of the Spokane River, Defendants/Counter-  
20 Claimants will incur costs to investigate and/or remediate the  
hazardous substances that the City has released and/or disposed of to  
the Spokane River.

ECF No. 79 at 53–55.

Monsanto is correct that a fact-specific inquiry into whether its response  
costs were necessary is not appropriate at the Rule 12(b)(6) stage, but Monsanto’s  
conclusory allegations here are simply insufficient to state a claim. *See Iqbal*, 556  
U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported

1 by mere conclusory statements, do not suffice.”). Monsanto alleges no facts from  
2 which the Court could plausibly conclude that Monsanto’s alleged response costs  
3 were necessary to the actual containment and cleanup of hazardous releases.  
4 Neither does Monsanto allege any facts from which the Court may conclude that  
5 its alleged response costs are consistent with the national contingency plan, which  
6 sets out extensive requirements governing hazardous substance response. *See* 40  
7 C.F.R. §§ 300.400–.440. Further, Monsanto has not alleged any facts that  
8 plausibly show that it has incurred “response costs” other than for the purpose of  
9 defending against the claims brought against it by Spokane. Such costs are not  
10 recoverable. *See Atl. Richfield Co. v. United States*, 181 F. Supp. 3d 898, 915 (D.  
11 N.M. 2016) (holding that litigation costs are not recoverable under CERCLA §  
12 107). Accordingly, Monsanto fails to plead sufficient facts plausibly showing that  
13 it has incurred or will incur costs that are necessary and consistent with the  
14 national contingency plan.

15 **D. Monsanto fails to state a claim for declaratory relief under CERCLA**  
16 **or the Declaratory Judgment Act.**

17 An action for declaratory relief under Section 113 of CERCLA fails in the  
18 “in the absence of a substantive cause of action.” *Chevron Env’tl. Mgmt. Co. v.*  
19 *BKK Corp.*, 880 F. Supp. 2d 1083, 1091 (E.D. Cal. 2012) (quoting *Union Station*  
20 *Assocs., LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1226, 1230 (W.D.  
Wash. 2002)). The same rule applies to Monsanto’s claim under the Declaratory

1 Judgment Act. *See City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d  
2 998, 1007 (9th Cir. 2007). Accordingly, because Monsanto fails to state a claim  
3 under Section 107, Monsanto has no substantive claim for relief upon which to  
4 base declaratory judgment.

5 **E. Monsanto’s CERCLA counterclaims will be dismissed without  
6 prejudice.**

7 Spokane argues that Monsanto’s counterclaims should be dismissed with  
8 prejudice because the defects in those counterclaims cannot be cured by an  
9 amended pleading. ECF No. 83 at 15–16. While it appears unlikely that Monsanto  
10 has incurred or will incur recoverable response costs that are necessary and  
11 consistent with the national contingency plan, it is not absolutely clear from the  
12 record that Monsanto has not incurred or will not incur such costs. Accordingly,  
13 the Court will not preemptively deny Monsanto the opportunity to amend its  
14 answer to include facts sufficient to state a CERCLA cost-recovery claim, if such  
15 facts exist. The dismissal of Monsanto’s counterclaims is without prejudice.

16 **V. CONCLUSION**

17 For the reasons discussed, Monsanto has failed to state a claim upon which  
18 relief may be granted under CERCLA or the Declaratory Judgment Act.

19 Accordingly, **IT IS HEREBY ORDERED:**


- 20 **1.** Plaintiff’s Motion to Dismiss Monsanto’s Counterclaims, **ECF No. 83,**  
is **GRANTED.**



1           **2.** Defendant's First Counterclaim for Relief (Cost Recovery Under  
2 CERCLA), ECF No. 79 at 53-55, and Second Counterclaim for Relief  
3 (Federal Declaratory Relief Under CERCLA and Declaratory  
4 Judgment Act), ECF No. 55-58, are **DISMISSED WITHOUT**  
5 **PREJUDICE.**

6           **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
7 provide copies to all counsel.

8           **DATED** this 14th day of February 2017.

9  
10             
11           SALVADOR MENDOZA, JR.  
12           United States District Judge