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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

El Paso Natural Gas Company, L.L.C.,

Plaintiff and Counterclaim-Defendant,

v.

United States of America; et al.

Defendants and Counter-Claimants.

NO. 3:14-cv-08165-DGC

EL PASO NATURAL GAS COMPANY'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff El Paso Natural Gas Company, L.L.C. ("El Paso"), by and through its undersigned counsel, respectfully submits its Reply in Support of its Motion for Partial Summary Judgment (Dkt. No. 114).

INTRODUCTION

In its opposition, the government avoids responding to El Paso's main argument (reiterated in Argument I, below), urges this court to adopt legal reasoning not followed in this circuit, and floods the record with historical documents that actually support El Paso's motion. Additionally, the government's argument that CERCLA's waiver of sovereign immunity is inapplicable in this case has been squarely rejected by the Ninth Circuit and other federal courts. Finally, the government raises an issue under CERCLA §107(n)(1)[1] that is not relevant at this stage of the proceedings. Accordingly, El Paso's motion on the United States' liability as a CERCLA owner should be granted.[2]

[1] 42 U.S.C. §9607(n).

[2] In its brief, the United States urges the court to defer ruling on El Paso's motion until trial. This recommendation should not be followed because El Paso's motion is based on undisputed facts; is dispositive of a discrete legal issue in this case (viz. the government's CERCLA owner liability); if dealt with now will eliminate the need for El Paso to present to the court, and prevent the court from having to consider, evidence relating to fee ownership of the Navajo Reservation; and, regardless of which way the court rules on the motion, will significantly affect the parties' calculus of their respective litigation risk which, in turn, will encourage settlement of the dispute. *See Hillis v. Heineman*, 2009 WL 1357392, at *1 (D. Ariz. May 14, 2009).

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ARGUMENT

I. The Government Admits That it Holds Fee Title to the Mine Sites, Which is Sufficient to Establish its Liability as a CERCLA Owner.

The government admits that it holds fee title to the Mine Sites, and El Paso's motion can and should be granted on this basis alone because the District of Arizona previously has held that a trustee's status as holder of fee title is sufficient to make a trustee liable as an "owner" under CERCLA, *City of Phoenix v. Garbage Svcs. Co.*, 816 F. Supp. 564, 567-68 (D. Ariz. 1993), and there is no reason for the Court to stray from this precedent.

The *City of Phoenix* court directly addressed "the question of whether a trustee, as holder of legal title to property, may be held liable under CERCLA for cleanup costs as an 'owner' even though he played no role in the contamination of the property." *Id.* at 567. For its part, the government urges that *City of Phoenix* is "inapposite" because it did not involve the "unique" situation of the United States as trustee for tribal land, but it fails to explain why this particular type of trusteeship should be treated any differently under CERCLA. The government merely says it would be "inappropriate" to impose owner liability on the United States "when the United States is acting in the interests of, and on behalf of, the Nation by holding title to tribal trust lands." Opp. at 5. But this simply describes the role of any trustee holding land on behalf of a trust beneficiary—whether it is the government in this case, or the bank in *City of Phoenix*.

Contrary to the government's assertion that the holding in *City of Phoenix* is too narrow to apply here, that court's analysis was actually quite broad, noting that, "[t]he

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legislative history to CERCLA seems to take for granted that any titleholder is an 'owner' under the statute," *City of Phoenix*, 816 F. Supp. at 567; that Congress considered and mindfully provided only a single exclusion from trustee liability (for lenders holding title solely for the purpose of protecting a security interest); and that was "further evidence that Congress intended the term 'owner' to have the broadest possible meaning." *Id.* at 568.

The government also misrepresents the nature of the *City of Phoenix* court's reliance on *United States v. Burns*, 1988 WL 242553 (D. N.H. 1988). As the government says, the defendant in *Burns* was simultaneously the trustee and trust beneficiary, but the *City of Phoenix* court correctly recognized that the trustee's dual role played no part in the analysis: "The [*Burns*] court could have disregarded the trust because the defendant was both trustee and sole beneficiary, but it chose not to do so. Instead, the court based its decision on the ground that the defendant, as trustee, held legal title to the property and under trust law could be held liable for obligations as the owner of the property.'" *City of Phoenix*, 816 F. Supp. at 568 (quoting *Burns*, 1988 WL 242553 at *2). Thus, because the United States held and still holds title to the Mine Sites, it is liable as a CERCLA owner under both *City of Phoenix* and *Burns*.[3]

II. CERCLA Owner Liability Does Not Require Indicia of Ownership.

Having failed to provide any convincing reason why this Court should depart from the holding in *City of Phoenix*, the government briefs the merits under a district court case

[3] A trustee may incur liability when its duties as trustee become intertwined with the interests of the trust. *See Hillis*, 2009 WL 1357392. In this case, the interest of the United States in developing a domestic source of uranium for national defense was inextricably intertwined with the Navajo's economic interest.

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from another circuit, *United States v. Friedland*, 152 F. Supp. 2d 1234 (D. Colo. 2001), but skips the crucial step of explaining why *Friedland* should control here. *Friedland* addressed a unique set of facts not present in this case. As the *Friedland* court explained, its task was to address the narrow issue of "whether the United States, as bare legal title holder of *unpatented mining claims*, can be held liable as an 'owner' under CERCLA where the 'possessor' of the land contaminates it." *Id.* at 1242 (emphasis added). The government itself points out that unpatented mining claims are a "unique form of property" not relevant here. Opp. at 10.

More importantly, the Ninth Circuit has explicitly rejected the analysis applied in *Friedland*. In *Friedland*, as here, the United States "argue[d] for a more expansive [owner] definition that relies primarily on property interests and *the right to control property*." *Id.* (emphasis added). Accepting this approach, the court modeled its legal analysis on a Second Circuit case, *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000), in which the Circuit court analyzed factors informing a lessee's degree of site control "that might transform a lessee into an 'owner' for purposes of CERCLA liability." *Friedland*, 152 F. Supp. at 1244.

Explicitly rejecting *Barlo*, the Ninth Circuit explained in *San Pedro Boat Works* that factors relating to site control are part of *operator* liability analysis, and *owner* liability analysis "need not be unduly expanded to resolve situations the [operator] liability hook was intended to address." *San Pedro Boat Works*, 635 F.3d 440 at 451. The Ninth Circuit made clear that holding fee title alone is sufficient for CERCLA owner

liability: "[T]he CERCLA framework holds liable [ ] the passive title holder of real property who acquiesces in another's discharge of harmful pollutants on his real property or pollutes the land himself ('owner' liability) . . . . " *Id.* at 451–52.

Friedland's reliance on *Barlo* is flawed for the additional reason that it applied the Second Circuit's analysis for determining whether to *expand* the scope of CERCLA owner liability to a party *not* holding legal title (a lessee), in order to *narrow* CERCLA owner liability of a party that does in fact hold legal title. As demonstrated in the House Report quoted in El Paso's opening brief, CERCLA's legislative history demonstrates that Congress' discussion of "indicia of ownership" was in the context of *broadening* owner liability to those *without* legal title, not to narrow the liability of those who do. *See United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050, 1068 (E.D. Wash. 2007) (observing that the same House Report indicates that "Congress appears to have envisioned 'some equivalent indicia of ownership' as a separate basis for liability rather than as an additional requirement when a party holds legal title."). For the foregoing reasons, this Court can and should grant El Paso's motion without engaging in the government's suggested "indicia of ownership" analysis.

III. Even if the Court Does Look For "Indicia of Ownership," Admissions in the Government's Expert's Declaration and the Undisputed Facts Presented by El Paso Show that the Government Controlled the Lands Upon Which the Uranium Mining Occurred.

As mentioned above, the *Friedland* "indicia of ownership" test is largely a proxy for the ability to *control* the property, *see*, *e.g.*, *Friedland*, 152 F. Supp. 2d at 1242–43, and, even prior to the government's submittal of its brief responding to El Paso's motion

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(and the associated Declarations of Dr. Brigham and Mr. Woolner), there existed in the record undisputed facts sufficient for this court to conclude that the government ultimately was in control of how the Navajo lands were used. If anything, the government's brief, and particularly the Declarations, provide additional reinforcement for that conclusion.

Fundamentally, underneath the government's brief's and Dr. Brigham's observations that the government had to "approve" numerous instances of Navajo actions to facilitate uranium mining on the Navajo Reservation, lies the indisputable reality that the government retained the ultimate power to veto every significant outcome of the Navajo Nation's involvement.[4] By definition, whoever can veto, controls.

Perhaps the clearest expression of who among the three parties to El Paso's mining leases (*i.e.*, El Paso, the Navajo Nation, and the government) ultimately was in control is in the "Cancellation and Forfeiture" section of the mining leases, the agreements (invariably on government-drafted forms) that most directly controlled the use of the Navajo lands for mining purposes. The Chairman of the Navajo Tribal Council clearly was involved because he could "recommend" to the government's Commissioner of Indian Affairs that the lease be cancelled, but the *Commissioner's* decision was final, unless an appeal was timely lodged with the ultimate decision-maker: the Secretary of the Interior. Because the government reserved for itself the final say as to whether the Mine

[4] *See* Woolner Decl., Exhibits 2-4; 7-9; Dr. Jay Brigham Declaration ¶¶ 12, 14-15, 17, 25; El Paso Exhibits A-E.

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Site leases should be terminated or cancelled, the government, not the Navajo Tribal Council, ultimately was in control.

Additionally, as it must, the government concedes the indisputable fact that, "under the Mining Permits, BIA was permitted to revoke a permit if a permittee failed to diligently develop a mine," yet, it asserts that this fact is "irrelevant and misleading" and tries to inject disputable questions of fact to cloud the analysis, namely: "El Paso voluntarily agreed to the terms" of the permit, "easily exceeded" the permit's requirements, and "BIA never interfered with El Paso's independent mining operations or revoked or threatened to revoke El Paso's mining permits." U.S. SOF ¶17. But this attempt to divert attention to operations, rather than ownership, fails to obscure the indisputable reality that, through its ability to veto, the government retained ultimate authority to control.[5]

Similarly, the government seeks to obscure the indisputable fact that "BIA was permitted to suspend operations if economic conditions were unsatisfactory," by injecting facts related to operations into the analysis ("this was never an issue;" "El Paso easily exceeded" the permit requirements;" and "BIA never interfered with El Paso's independent mining operations or revoked or threatened to revoke El Paso's mining

[5] In his Declaration Dr. Brigham explicitly acknowledges that his analysis involves diluting undisputed facts with disputed facts, when he suggests the "terms in El Paso's permits or leases [indicia of ownership arguably relevant under *Friedland*] do not change the fact that El Paso independently conducted its mining activities at the Mine Sites [which are disputed facts and relevant only to CERCLA operator liability]." Brigham ¶23.

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permits." U.S. SOF ¶18.) Here again, the existence of facts regarding operations must not be allowed to obscure the essential, undisputed fact that the BIA held the power to suspend El Paso's mining operations. The government, again, ultimately was in control.

The government states that the Navajo "established its own mining rules," but fails to mention that those rules were only effective if approved by the government. *See Hillis*, 2009 WL 1357392.

The consistent theme running through the government's newly-minted rendition of how it implemented its undisputed trustee power over the lands in the Navajo Nation during the time period in question is that, because it only held "bare legal title;" and because of its "government-to-government relationship," the Navajo Nation predominantly was in control of the use of the Reservation lands; the government "deferred to the Nation's authority;" and that "the United States' involvement here was minimal."

The government's modern characterization of how it exercised its powers as trustee of the Navajo Reservation during the 1950s and 1960s stands in stark contrast to the contemporaneous description of the government-Navajo relationship contained in Exhibit 3 to Mr. Wooley's Declaration: a 1955 letter from Norman L. Littell (the Navajo's General Counsel) to the Commissioner of Indian Affairs in Washington, D.C.:

> Permit me to say here in all good humor, as an old veteran of Washington and a long-time observer of affairs in the Indian Bureau, that the "trustee's power" has long appeared to me as a blackjack carried around in the pocket of some Indian Bureau employees for which they are inclined to reach

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> whenever they cannot get their way by reason on the merits. I have seen the blackjack used.

Id. at 646.

The uncontroverted facts in this case firmly establish that the Government was the fee title holder and had the authority to control the Navajo Reservation, particularly with respect to uranium mining during the relevant time periods in this case. Under controlling Ninth Circuit precedent (and even under *Friedland),* the government is liable as the CERCLA owner of the Mine Sites.

IV. CERCLA's Waiver of Sovereign Immunity Applies Here, and the Government's Argument to the Contrary Has Been Rejected by the Ninth Circuit.

The government argues that CERCLA's waiver of sovereign immunity does not apply because the United States is in "a special situation of land ownership" not explicitly addressed by CERCLA. Opp. at 3. This argument simply repackages the same argument the Ninth Circuit rejected in *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002).

In *Shell Oil*, the government argued that CERCLA's sovereign immunity waiver, which subjects the government to CERCLA "in the same manner and to the same extent . . . as any nongovernmental entity" was restricted to situations where the government engaged in "nongovernmental" activities. *Id.* at 1052. The Ninth Circuit observed that the United States has repeatedly been held liable under CERCLA for acts taken in its uniquely "governmental" capacity, and the only relevant issue is whether a private party finding itself in the same situation would be liable. *Id.* In line with this broad reading of the waiver, the Ninth Circuit held that "CERCLA's waiver of sovereign immunity is

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coextensive with the scope of liability imposed by 42 U.S.C. § 9607. If § 9607 provides for liability, then § 9620(a)(1) waives sovereign immunity to that liability." *Id.* at 1053; *accord. East Bay Mun. Util. Dist. v. U.S. Dep't of Commerce*, 142 F. 3d 479, 482–83 (D.C. Cir. 1998); *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 841–42 (3d Cir. 1994).

Thus, the government's role as trustee for the Navajo Nation does not entitle it to create an exception to CERCLA's waiver of sovereign immunity that is nowhere to be found in CERCLA, despite the government's assertion that it is entitled to such an exemption because "private parties do not engage on a government-to-government basis with tribal nations or have a trust responsibility under federal law." The *Shell* court summarily disposed of an equivalent argument, saying: "[A]lthough no private party could own a military base, the government is liable for clean up of hazardous wastes at military bases because a private party would be liable if it did own a military base." *Shell*, 294 F.3d at 1053 (citing *FMC*, 29 F.3d at 840).[6]

[6] Similarly, the court in *Pakootas v. Teck Cominico Metals, Ltd.,* 632 F. Supp. 2d 1029 (E.D. Wa. 2009) refused to, in effect, amend CERCLA by adding "Indian Tribes" into CERCLA's definition of liable "persons," and where Congress failed to do so, and CERCLA's silence on that issue did not render the statute ambiguous: "There may be some very compelling policy reasons why Indian tribes should not be exempt from CERCLA liability, but that is something Congress needs to address, not this Court." *Id.* at 1034.

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V. CERCLA Section 107(n) Does Not Relieve the United States from Liability.

CERCLA § 107(n) does not relieve the government of its liability as owner of the Mine Sites because that section is not a liability exemption; rather, it is a limitation on the assets available to satisfy a judgement against a trustee. Indeed, CERCLA § 107(n) only comes into play once there is a judgement to enforce, long after the liability and allocation phases of a case have been completed. Moreover, the government's argument presumes that in this case the "assets held in the fiduciary capacity" is limited to trust lands when, in fact, this could mean all Navajo land and revenues from the Navajo Reservation currently held in trust by the United States.

CONCLUSION

For the reasons described herein and in El Paso's opening brief, the United States is liable as the current and past owner of the Mine Sites under section 107(a) of CERCLA. Accordingly, El Paso respectfully requests that the Court grant its Motion for Partial Summary Judgment.

Respectfully submitted this 7th day of April 2017.

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