

1 Dean R. Cox, Bar No. 014149  
2 DEAN R. COX, L.L.C.  
3 107 North Cortez, Suite 201  
4 Prescott, Arizona 86301  
5 (928)776-4454 ~ Fax (928)776-4494  
6 [dean@deanrcox.com](mailto:dean@deanrcox.com)

7 Attorney for Defendants Eldridge and Milam  
8 Building Associates, Inc.

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF ARIZONA

DANIEL FELIX and DOROTHY FELIX,  
Plaintiffs,

vs.

PIC-N-RUN, INC., an Arizona corporation,  
MILAM BUILDING ASSOCIATES, INC., a  
Texas corporation, STELLA JEANETTE  
ELDRIDGE, VERNON W. ELDRIDGE, the  
ENVIRONMENTAL PROTECTION  
AGENCY, an agency of United States Federal  
Government, THE NAVAJO NATION, THE  
NAVAJO NATION ENVIRONMENTAL  
PROTECTION AGENCY, an agency of the  
Navajo Nation, SERVICE STATION  
EQUIPMENT & SALES CO., INC., an Arizona  
corporation, UNDERGROUND ANALYTICAL  
SERVICES, INC., an Arizona corporation,  
PETROLEUM SYSTEMS INCORPORATED,  
an Arizona corporation, SPENCER RIEDEL,  
the ESTATE OF SYBIL BALDWIN,

Defendants.

MILAM BUILDING ASSOCIATES,  
INC., a Texas corporation; and  
STELLA JEANETTE ELDRIDGE and  
VERNON W. ELDRIDGE,

Counter-Claimants,

vs.

DANIEL FELIX and DOROTHY FELIX,

Counter-Defendants.

**NO. 3:09-CV-8015-JAT**

**REPLY IN SUPPORT OF  
MOTION TO DISMISS  
PURSUANT TO FED. R. CIV. P.,  
RULE 12(b)(1) AND (6) AND  
MEMORANDUM IN SUPPORT  
OF MOTION**

**(Oral Argument Requested)**

MILAM BUILDING ASSOCIATES, INC., a  
Texas corporation, STELLA JEANETTE  
ELDRIDGE, VERNON W. ELDRIDGE,

Cross-Claimants,

vs.

PIC-N-RUN, INC., an Arizona corporation,  
THE NAVAJO NATION, SERVICE  
STATION EQUIPMENT & SALES  
CO., INC., an Arizona corporation,  
UNDERGROUND ANALYTICAL  
SERVICES, INC., an Arizona corporation,  
PETROLEUM SYSTEMS INCORPORATED,  
an Arizona corporation, SPENCER RIEDEL,  
the ESTATE OF SYBIL BALDWIN,

Cross-Defendants.

ESTATE OF SYBIL BALDWIN,

Counter-Claimant,

vs.

DANIEL FELIX and DOROTHY FELIX,

Counter-Defendants.

ESTATE OF BALDWIN,

Cross-Claimant,

vs.

PIC-N-RUN, INC., an Arizona corporation;  
MILAM BUILDING ASSOCIATES, INC.,  
a Texas corporation; STELLA JEANETTE  
ELDRIDGE; VERNON W. ELDRIDGE;  
SERVICE STATION EQUIPMENT &  
SALES CO., INC., an Arizona  
corporation; PETROLEUM  
SYSTEMS INCORPORATED, an  
Arizona corporation; and SPENCER  
RIEDEL,

Cross-Defendants.

1 PIC-N-RUN, INC., an Arizona  
corporation,

2 Counter-Claimant,

3 vs.

4 DANIEL FELIX and DOROTHY FELIX,  
5 Counter-Defendants.

6  
7 PIC-N-RUN, INC., an Arizona  
corporation,

8 Cross-Claimant,

9 vs.

10 MILAM BUILDING ASSOCIATES, INC.,  
11 a Texas corporation; STELLA  
JEANETTE ELDRIDGE; VERNON W.  
12 ELDRIDGE; THE NAVAJO NATION;  
SERVICE STATION EQUIPMENT &  
13 SALES CO., INC., an Arizona corporation;  
UNDERGROUND ANALYTICAL  
14 SERVICES, INC., an Arizona corporation;  
SPENCER RIEDEL; and ESTATE  
15 OF SYBIL BALDWIN,

16 Cross-Defendants.

17  
18 SERVICE STATION EQUIPMENT &  
SALES CO., INC., an Arizona corporation,

19 Counter-Claimant,

20 vs.

21 DANIEL FELIX and DOROTHY FELIX,  
22 Counter-Defendants.

23  
24 SERVICE STATION EQUIPMENT &  
SALES CO., INC., an Arizona corporation,

25 Cross-Claimant,

26 vs.

27 PIC-N-RUN, INC., an Arizona corporation;  
MILAM BUILDING ASSOCIATES, INC.,  
28 a Texas corporation; STELLA JEANETTE

ELDRIDGE; VERNON W. ELDRIDGE;  
and ESTATE OF SYBIL BALDWIN,

Cross-Defendants.

SPENCER RIEDEL,

Counter-Claimant,

vs.

DANIEL FELIX and DOROTHY FELIX,

Counter-Defendants.

SPENCER RIEDEL,

Cross-Claimant,

vs.

PIC-N-RUN, INC., an Arizona corporation;  
MILAM BUILDING ASSOCIATES, INC.,  
a Texas corporation; STELLA JEANETTE  
ELDRIDGE; VERNON W. ELDRIDGE;  
SERVICE STATION EQUIPMENT &  
SALES CO., INC. an Arizona corporation;  
and ESTATE OF SYBIL BALDWIN,

Cross-Defendants.

Pursuant to Fed. R. Civ. P., Rules 12(b)(1) and (6), Defendants Milam Building Associates, Inc. and Eldridge (herein "Defendants Milam"), by and through their undersigned counsel, hereby file this reply in support of their motion to dismiss all claims and cross-claims against Defendants Milam in this case. This reply is supported by the following Memorandum of Points and Authorities.

DATED this 15th day of June, 2011.

/s/ Dean R. Cox

Dean R. Cox  
107 N. Cortez, Suite 201  
Prescott, Arizona 86301  
*Attorney for Defendants Eldridge  
and Milam Building Associates, Inc.*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

All remaining parties to this action, including Plaintiffs Daniel and Dorothy Felix, dba Shiprock Construction Company (herein “Plaintiff Shiprock”), Defendant Pic-N-Run, Inc. (herein “Defendant PNR”) and Defendant Estate of Sybil Baldwin (herein “Defendant Baldwin”) offered responses to Defendants Milam’s Motion to Dismiss. While Defendant Baldwin agreed that Defendants Milam should be dismissed, Plaintiff Shiprock and Defendant PNR offered several arguments against dismissal. However, as outlined below, none of the arguments offered overcome Defendants Milam’s Motion to Dismiss.

### II. ARGUMENT

#### **A. In the Court’s discretion, this case should be dismissed as only pendant claims remain after dismissal of all federal claims**

Plaintiff Shiprock makes an argument for this Court having clear federal jurisdiction over this case and seems to argue that the Court must accept jurisdiction. This argument does not make sense. On May 4, 2010 this Court dismissed all the federal claims arising from RCRA, 42 U.S.C. § 6921, and along with that, all the potential federal issues. Determining that any allocation of apportionment under the federal RCRA laws would challenge or infringe on the authority of the EPA Order, this Court determined that it must dismiss the RCRA claims in this federal action. It left the RCRA claims to be handled exclusively by the EPA. Without the RCRA claims, there is no federal subject matter jurisdiction.

Defendant PNR agrees with Defendants Milam that retaining jurisdiction in this case is within the Court’s discretion. There is little dispute that a district court has discretion in retaining a pendant claim (*see* Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985)), where thought is given to the time, expense and judicial economy in a particular case. While both Plaintiff Shiprock and Defendant PNR argue that jurisdiction should be retained on judicial efficiency grounds, this is Defendant PNR’s primary

1 argument for keeping the case in federal court.

2 Both Plaintiff Shiprock and Defendant PNR make arguments that discovery has, in  
3 fact, been done. Defendant PNR points out the disclosures have been made and experts  
4 have been retained. In Plaintiff Shiprock's Response, it states that

5 the parties have engaged in substantial disclosure of evidence,  
6 which coupled with the parties' preparation for several  
7 mediation attempts over the course of this litigation, has  
8 enabled each party to prepare for trial without the need of  
9 formal discovery.

10 However, there has been no discovery propounded or exchanged, and despite the  
11 magnitude of this lawsuit being potentially worth millions of dollars, not a single  
12 deposition has taken place. The interpretation here is that none of the parties are sure of  
13 where this case is headed and little time or effort has been spent working on the  
14 respective files. Judicial economy and efficiency is not a very strong argument for  
15 keeping this case in federal court.

16 **B. The current claims in front of this Court are not ripe for decision.**

17 Plaintiff Shiprock claims in its Response that "there is no need for further 'factual  
18 development,' since Shiprock has already incurred the remediation costs." While  
19 Plaintiff Shiprock has expended monies toward remediation, the implication that this  
20 number is fixed is inaccurate. In its Response, Plaintiff Shiprock claims that "Shiprock  
21 (through its insurer) has expended \$885,290.64 in remediation costs at the site." As  
22 Shiprock has only disclosed \$759,334.75 through May of 2010, we can only assume that  
23 these remediation costs are not finite but continuing. Plaintiff Shiprock also points out  
24 that the parties' experts range in their estimates from approximately \$474,000 to  
25 \$4,000,000 to remediate the site. In no way have all the remediation expenses been  
26 determined or paid.

27 Even if fault were determined by a federal court and Plaintiff Shiprock's  
28 expenditures to date reimbursed, the bigger issue of damage to the site would remain, and  
the EPA would still be looking for payment from the parties to complete remediation. In  
short, the federal action would not resolve the issues.

1 Plaintiff Shiprock further argues that the “EPA is not mandated to actually  
 2 apportion fault” and the EPA is not bound by this Court’s determination, thus, presenting  
 3 “no danger of interference with administrative proceedings.” However, this argument is  
 4 short sighted because we know that the EPA is involved in this dispute (it does not  
 5 support continuing with a federal action) and the EPA can continue to seek payment for  
 6 the remediation. The above arguments actually support the issue of this case not being  
 7 ripe.

8 Defendant PNR argues that its “Crossclaim against Milam alleges that Pic-N-Run  
 9 has suffered damages as a result of both Milam’s breach of contract and its negligence,”  
 10 so, therefore, Defendant PNR has damages. However, in Defendant PNR Initial  
 11 Disclosure Statement dated May 25, 2010, it indicates that as far as damages, Defendant  
 12 PNR:

13 has not completed a calculation of damages in this matter and  
 14 will be unable to do so until the of remediation at the Site is  
 15 complete and any portion of the expense associated therewith  
 16 is paid by Pic-N-Run. Generally, Pic-N-Run’s damages will  
 be the amount it pays in connection with the remediation of  
 the Site . . .

17 In short, Defendant PNR has no damages to date.

18 As previously cited, “the basic rationale of the ripeness doctrine ‘is to prevent the  
 19 courts, through avoidance of premature adjudication, from entangling themselves in  
 20 abstract disagreements over administrative policies, and also to protect the agencies from  
 21 judicial interference until an administrative decision has been formalized and its effects  
 22 felt in a concrete way by the parties.’” America West Airlines, Inc. V. National Mediation  
Board, 743 F.Supp. 693 (D. Ariz., 1990) *citing* Pac. Gas & Elec. V. St. Energy Resources  
Conserv., 461 U.S. 190, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752 (1983).

24 While, in theory, the damages could be determined through expert testimony, it  
 25 does not eliminate the fact that the EPA can order joint and several payment from the  
 26 parties over and above what the federal court determines regardless of apportionment of  
 27 fault. Bifurcating the EPA out of this dispute is not helpful and will further perpetuate  
 28

the issues of this case.

### CONCLUSION

For the foregoing reasons, Defendants Milam respectfully reiterate their request that the claims and cross-claims against them be dismissed without prejudice.

DATED this 15th day of June, 2011.

/s/ Dean R. Cox  
\_\_\_\_\_  
Dean R. Cox  
107 N. Cortez, Suite 201  
Prescott, Arizona 86301  
*Attorney for Defendants Eldridge  
and Milam Building Associates, Inc.*

ORIGINAL of the foregoing e-filed  
this 15th day of June, 2011; and

#### COPY TO:

The Honorable James A. Teilborg  
United States District Judge  
401 W. Washington, Suite 5523  
Phoenix, Arizona 85003

#### E-COPY TO:

Tom Shorall  
SHORALL McGOLDRICK BRINKMAN  
1232 East Missouri Avenue  
Phoenix, Arizona 85014  
*Attorney for Plaintiffs*

Sampson Martinez  
SAMPSON MARTINEZ, PC  
P.O. Box 2415  
Gallup, New Mexico 87305  
*Atty for Walter Baldwin as Legal Guardian of  
Defendant Estate of Sybil Baldwin*

David Armstrong  
BALLARD SPAHR, LLP  
1 East Washington Street, Suite 2300  
Phoenix, Arizona 85004  
*Attorney for Defendant Pic-N-Run, Inc.*

...

...

...



1 Sal J. Rivera  
RIVERA LAW GROUP, P.C.  
2 5330 N. 12th Street, Suite 200  
Phoenix, Arizona 85014  
3 *Attorney for Defendants Ridel and Service*  
*Station Equipment & Sales Co., Inc.*

4  
5 /s/ Vicky Carothers  
Vicky Carothers