

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re

Chapter

Case No.

Adv. No.

Debtor(s)

Plaintiff(s)

v.

Defendant(s)

TRANSMITTAL TO DISTRICT COURT

TO: BRIAN D. KARTH
CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

Transmitted herewith is:

Motion for Withdrawal of reference from Bankruptcy Court pursuant to 28 U.S.C. Sec. 157(d) and Bankruptcy Rule 5011(a).

Recommended findings of fact and conclusions of law submitted to District Court pursuant to 28 U.S.C. Section 157(c)(1) and Bankruptcy Rule 9033. Any objections or responses to objections filed pursuant to Bankruptcy Rule 9033(b) are to be filed directly with the District Court under the District Court Civil Number.

Copies of the pleadings/file in the above-named matter, the reference having been withdrawn to the District Court.

Other:

Dated:

CLERK, U.S. BANKRUPTCY COURT

By: _____

Copies of the foregoing and a copy of any recommended findings
to be mailed to the attorneys and pro se interested parties by the BNC

SIGNED

Dated: January 6, 2012



George B. Nielsen

George B. Nielsen, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re:)	Chapter 11
KRYSTAL ENERGY CO. INC.,)	Case No. 2:01-00166-GBN
Debtor.)	
_____)	
KRYSTAL ENERGY CO. INC.,)	Adversary No. 01-ap-00171-GBN
Plaintiff,)	
vs.)	RECOMMENDATION TO UNITED
THE NAVAJO NATION,)	STATES DISTRICT COURT FOR
Defendant.)	ISSUANCE OF A FINAL JUDGMENT
_____)	AND ORDER

IT IS RECOMMENDED that the United States District Court, after conducting the review procedure it deems appropriate, enter a final judgment in favor of plaintiff and against defendant in an amount of not less than four million dollars, based on the attached proposed findings of fact and conclusions of law.

IT IS ORDERED that the Clerk of Bankruptcy Court transmit this recommendation with attached proposed findings and conclusions to the Phoenix Division of the United States District Court for the District of Arizona.

RECOMMENDED AND ORDERED ACCORDINGLY.

1 Copies emailed this 21st day
2 of December, 2011, to:


3 Adam B. Nach
4 LANE & NACH, P.C.
5 2025 N. Third Street
6 Suite 157
7 Phoenix, AZ 85004
8 Email: adam.nach@azbar.org
9 Attorney for Plaintiff

10 Lisa Perry Banen
11 LANE & NACH, P.C.
12 2025 N. Third Street
13 Suite 157
14 Phoenix, AZ 85004
15 Email: lisa.banen@LANE-NACH.com
16 Attorney for Plaintiff

17 Marcelino R. Gomez
18 Assistant Attorney General
19 Navajo Nation Department of Justice
20 P.O. Box 2010
21 Window Rock, AZ 86515
22 Email: mrgomez1952@yahoo.com
23 Attorney for Defendant

24 By: /s/Rachael M. Stapleton
25 Judicial Assistant
26
27
28

Dated: January 6, 2012


George B. Nielsen, Bankruptcy JudgeUNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:) Chapter 11
KRYSTAL ENERGY CO. INC.,) Case No. 2:01-00166-GBN
Debtor.)
_____)
KRYSTAL ENERGY CO. INC.,) Adversary No. 01-ap-00171-GBN
Plaintiff,)
vs.)
THE NAVAJO NATION,) PROPOSED FINDINGS OF FACT,
Defendant.) CONCLUSIONS OF LAW AND
_____) ORDER

This adversary proceeding seeks, *inter alia*, to adjudicate a demand for damages by the Chapter 11 bankruptcy estate of Krystal Energy Co., Inc. against the Navajo Nation, a sovereign Indian tribe.¹ Plaintiff filed a Chapter 11 bankruptcy case in the District of Arizona on January 5, 2001. On April 8, 2003, the case was dismissed by stipulated order between the Chapter 11 bankruptcy trustee and the United States Trustee, effective as of February 14, 2003 and reserving to this court

¹The Ninth Circuit Court of Appeals has expressly ruled that Congress has abrogated the tribe's sovereign immunity in regard to this litigation. *Krystal Energy Co. v. Navajo Nation (In re Krystal Energy Co.)* 375 F.3d 1055, 1056-61 (9th Cir. 2004).

1 jurisdiction over this adversary proceeding.

2 After the defendant tribe ("Nation") answered the
3 amended complaint, plaintiff sought approval for filing a second
4 amended complaint and request for injunctive relief. Adversary
5 docket items ("dkt.") 38 and 39. The court granted the motion to
6 further amend the complaint. Injunctive relief was granted in
7 part and denied in part. The court authorized plaintiff's agents
8 to visit two oil well sites located on the Nation's reservation
9 upon notice, but would not authorize resumption of oil producing
10 activities by plaintiff. Dkt. 50 at p. 2; Order at dkt. 54.
11 After briefing of a motion to dismiss, the court dismissed without
12 prejudice second amended complaint counts one (Breach of Con-
13 tract), two (unjust enrichment) and three (violation of due
14 process). See Dkts. 52, 65.

15 Following briefing and oral argument, the court on
16 January 8, 2008, granted summary judgment to plaintiff on
17 complaint count four (turnover of property) and reserved ruling on
18 count five (violation of the automatic stay). Dkts. 76-78, 81-86,
19 88. Transcript at dkt. 106. The court ruled in part that Krystal
20 had obtained assignments of oil leases near Aneth, Utah and
21 Farmington, New Mexico with the knowledge of the Nation and made
22 substantial investments to acquire operating equipment. The
23 Bureau of Indian Affairs never approved the oil lease assignments
24 to Krystal. Through the declarations of an eye witness and a
25 principal of Krystal, plaintiff established that defendant's
26 employees appeared at the Utah site in 1999, escorted Krystal's
27 employee off the premises, locked it, removed oil from storage
28 tanks and warned the employee not to return. Defendant's physical

ejection and exclusion of Krystal from both sites without the opportunity to remove its equipment was found to create liability for return of the property or its value. Dkts. 86, 88 at p. 2.

The court stated in part: "The problem I'm having is that there was an ejectment. The Nation had some role in that ejectment. There might be other parties liable, but the Nation has not sought to bring them into this proceeding.... I don't have a clear explanation why ... the Nation believes that the debtor didn't own this personal property.... I don't have a clear explanation from the Nation why it didn't have an obligation to see that some opportunity be given for the safe keeping of that equipment.... [A]s long as it's proper you can eject someone from your property, but that doesn't mean you get to keep the property that... person has brought onto the property. That's the explanation that seems to be lacking in the response." Dkt. 106 at p. 7.

The United States District Court for the District of Arizona has affirmed the liability ruling. *The Navajo Nation v. Krystal Energy Co., Inc.* Civ. 08-0178-Phx-MHM. Dkt. 123. An evidentiary hearing on damages concluded with post trial briefing and closing argument. The court has considered sworn witness testimony, admitted exhibits, briefs and the facts and conclusions of this case. An interim order was issued on December 20, 2011, advising the parties of court's decision. Dkt. 223. The following findings and conclusions are now proposed to the district court:

FINDINGS OF FACT

1. Johnny Bennett, Jr. is a college educated New Mexico

1 crude oil loader who worked for approximately eight years as an
2 oil and gas inspector for the Nation in Arizona, Utah and New
3 Mexico. He was required by the Nation to inspect at least
4 annually, all well sites located on the reservation, including
5 Krystal's sites near Farmington, New Mexico and Aneth, Utah. The
6 witness has a clear recollection of the Aneth lease. Debtor's
7 predecessor as leaseholder in Utah was an entity known as Cross
8 Creek. Approximately 11 years ago, the Aneth well was operated by
9 Krystal, but the formal transfer of the lease from Cross Creek was
10 still in transition. Mr. Bennett issued non compliance notices
11 regarding signage and leakage at the site. The signage citation
12 was issued because a posted sign listed Cross Creek as operator.
13 Bennett knew Krystal was really the operator. Nonetheless, the
14 signage citation had to be issued to Cross Creek as the lease
15 assignment was delayed at the Bureau of Indian Affairs. This was
16 not an unusual violation, but had the citation been issued to
17 Krystal, it would have been rejected by the Nation's administra-
18 tive process, since the Krystal assignment was still pending. Oil
19 leakage was also a common citation. The witness has no memory of
20 Krystal not addressing the citations. He had an obligation to
21 follow up on them.

22 From 1997 through 1999 Krystal operated a well in Utah
23 that appeared to be producing. He witnessed Krystal make both
24 repairs and improvements to the sites. He doesn't have a specific
25 recollection whether New Mexico produced oil. The Utah site was
26 a mile deep and New Mexico was shallower. Utah had three pumping
27 jacks while New Mexico had one. There were also large water and
28 oil storage tanks. During this time he worked with a number of

1 Krystal's representatives, but never himself was a Krystal
2 employee. In his experience, it would take "forever" for the
3 federal government to approve lease assignments.

4 2. His Navajo Nation employment occurred between 1990
5 or 1991 and 2000, with a break for a few months to work on pipe
6 line operations. His recollection of the New Mexico Krystal lease
7 is more vague, but he does recall the New Mexico equipment, such
8 as flow lines and tanks was not new. The Nation was aware Krystal
9 was operating the wells through Bennett himself and his reports to
10 Nation petroleum engineers, Tribal Committees, the Director of the
11 Minerals Department and to other inspectors. While the witness
12 does not recall directly speaking to the Director, this officer
13 would receive the witness' written reports.

14 3. The federal approval delay occurred just as to the
15 Utah lease. The Nation's practice was to allow operation during
16 the delay, but the witness can't recall if the interim operation
17 was normally by the assignor or assignee. He can't recall the
18 last time he was physically present at either site. Although he
19 was aware of some dispute between the Nation and Krystal, he did
20 not pay attention to it. He would just inspect the equipment.
21 The Utah equipment was adequate for operational purposes and Mr.
22 Bennett saw it operating. He wrote citations for both of
23 Krystal's sites. The witness cannot recall how often he would
24 inspect the Krystal sites, but he would revisit within 30 days of
25 issuing a citation. The court finds witness Bennett to be a
26 knowledgeable, impartial and credible witness. June 27, 2011
27 testimony ("test.") of Johnny Bennett, Jr.

28 4. Carl Padilla has been an oil equipment manufacturer

1 in Farmington, New Mexico since 1990 or 1991. He has been a
2 certified oil pipe welder since 1977 and has extensive experience
3 working with a large variety of oil production equipment. He has
4 a number of competitors and is often required to submit competi-
5 tive equipment bids. He holds master mechanic and licensed
6 contractor designations. Although he has never before qualified
7 as an expert witness in a judicial proceeding, the court overruled
8 an objection and accepted his tender as an expert in oil equipment
9 valuation for this case.

10 5. He recalls being on the Utah site in the late 1990's
11 to assess a leaking oil tube. At the time the site equipment
12 included tank batteries, gas separators, a pump house, pump jacks
13 and a heat treater used to separate water from the oil. Debtor's
14 site also included equipment to separate natural gas from oil.
15 The witness believes Krystal utilized the natural gas to power on
16 site machinery. Mr. Padilla was contacted in 2009 and requested
17 to do a market valuation of the equipment. His appraisal consists
18 of a four-page letter, utilizing current values rather than 1999
19 values, which he understands to be the year Krystal was evicted.
20 Exhibit ("Ex.") 1 at p. 2. Page one identifies his experience in
21 Utah, his company and client information. It indicates he works
22 with many large producers throughout the San Juan Basin, which is
23 essentially the "Four Corners" area. Page two discusses a 42,000
24 gallon tank, approximately 21 feet in diameter and 20 feet tall
25 located at the Utah site. His company manufactures such equip-
26 ment. He has never before submitted a report for use in litiga-
27 tion or such a valuation report. He did not consult with anyone,
28 but just obtained prices from the vendors he works with and

1 estimated the labor costs of originally installing the items onto
2 the site.

3 6. In 2009, he traveled to Krystal's former site near
4 Farmington, New Mexico for purposes of the valuation. He had not
5 previously been on this property. Certain items absolutely have
6 to be located at an oil drilling site to allow operations. The
7 New Mexico equipment appeared to not have been recently used and
8 was in a fair to poor condition. His valuation represents what it
9 would cost to put the Farmington site into operation. He has
10 engaged in the manufacture or re manufacture of surface oil
11 pumping equipment since 1991. Before starting his own company, he
12 was the employee of others in the industry since 1976, principally
13 his father. He holds no formal appraisal certifications and
14 essentially appraised equipment he never saw. His values are for
15 new or nearly new equipment. He received information verbally
16 from Krystal's representative, such as well depth. He did not
17 previously know Krystal's representative.

18 7. Transportation and installation costs were added to
19 equipment values. No written documents or list of property was
20 provided by Krystal. The witness had not visited the Utah site
21 when Cross Creek was the lessee. He has never before worked for
22 Krystal. He has experience in purchasing used equipment from a
23 plugged or abandoned well. He wouldn't pay the prices he quotes
24 for market value since he is in business to make money and must
25 acquire property at less than normal market value. He doesn't
26 consider his letter to be an appraisal and is not familiar with
27 professional appraisal practices. Instead, he believes his four
28 page letter is a proposal from him to sell equipment to a buyer.

1 He did not consider the costs of abandoning the site, plugging the
2 well or environmental clean up costs.

3 8. The costs of new, as compared to nearly new
4 equipment is within ten to fifteen per cent of each other.
5 Customers don't request old or equipment that "sort of" works.
6 Instead, Padilla used values for equipment that meets established
7 operating requirements. He obtained the well depth for the
8 Farmington site during his visit, as it was listed on signage.
9 The Utah depth was provided verbally by Krystal. No other
10 information was provided verbally. All other information, other
11 than the Utah well depth was acquired by the witness personally.
12 He didn't travel to Utah. The witness provided the New Mexico
13 values based on what he recalled seeing on site or what would be
14 needed for operations.

15 9. While he has not previously done business directly
16 with Krystal, he has had business dealings previously with
17 Krystal's principal owners, the Nicholson brothers. In the mid
18 1990's he moved equipment for the brothers and built oil tanks for
19 them. He last did business with the Nicholson brothers two to
20 three years ago. He did not receive compensation for his four
21 page letter. Padilla will be paid his out of pocket travel
22 expenses and \$50 per hour for his time in testifying. If he was
23 attempting to purchase the New Mexico equipment he valued for
24 resale, he would agree to pay more than salvage value, perhaps
25 \$100 to \$150 per ton. A single tank weighs 9,000 pounds. He
26 would personally pay approximately the same values for the Utah
27 items. His proposal letter represents replacement values.

28 10. His prior work for the Nicholson brothers in the

1 1990's involved repairing a fire box, disassembling and reassem-
2 bling a Lupton, Arizona plant and a 60-day maintenance job that
3 cost \$12,000 to \$15,000. He has never been involved in plugging
4 a well and provided no-cost information on such action. He
5 considers that cost a property owner expense. Currently Padilla's
6 Farmington business, CIP, Inc. is trending downward. When
7 business is better, his company's gross revenues run between two
8 to three million dollars per year. In slow times, he feels
9 fortunate to gross a million dollars yearly. Test. of Carl
10 Padilla, Ex. 1. The fact finder's assessment is that Mr. Padilla
11 is a credible, experienced and fair witness who admits when he
12 lacks knowledge. The court finds his testimony and opinions
13 credible, but they do not rise to the level of an experienced,
14 licenced appraiser.

15 11. George Cunningham is a certified appraiser who owns
16 his own firm and has done two to four appraisals a week since the
17 1990's. He visited the New Mexico site on March 16, 2007 to make
18 an inspection and take photographs. Mr. Cunningham also visited
19 the Utah site on the same day for an inspection and photographs.
20 He contacted two suppliers to the New Mexico site and appraised
21 the assets he could view. He didn't calculate the exact pipeline
22 dimensions, but based his estimate on a supplier's information.
23 He used equipment valuations from 2009, but adjusted for an
24 assumed better condition earlier. He estimates approximately the
25 same well depth for each location. He concedes he erred by using
26 an incorrect figure for tubing values. Mr. Cunningham learned
27 what had been on the Utah site by interviewing others. According
28 to Mr. Nicholson, Padilla had erred by assuming one too many pump

1 jacks. He adjusted for this error by reducing value by \$12,000.
2 At the time he testified, his estimated hypothetical fair market
3 value for the missing equipment was 4.25 million dollars.

4 12. The witness cannot recall if he previously has
5 appraised oil and gas equipment. While he appraised the equipment
6 he actually saw in New Mexico, his hypothetical valuations for
7 missing machinery would not qualify as a formal appraisal. For
8 purposes of the valuations, he assumed a valid lease was in effect
9 and that the equipment was operating and producing income. For
10 the New Mexico valuation, he assumed the equipment would be in
11 better condition than what he observed. His assumption of
12 equipment condition was based on an equipment list provided by
13 John Deets, which the witness verified through two vendors. He
14 was told there were three pump jacks operating in Utah with
15 another about to be placed into service. It would be a signifi-
16 cant factor had he received definitive information that the jacks
17 had actually been in place for 30 years. The appraisal's
18 effective date was December of 1999. It reflects fair market
19 value for equipment in continuous use.

20 13. Cunningham reviewed no financial documents, except
21 for the drilling leases. If operational leases were not in place,
22 the items would have received a lower valuation. His instructions
23 were to value the equipment at fair market value in continuous
24 operation at its present location. If some of the machinery was
25 actually 30 years old and operating, it would have to have
26 received appropriate maintenance including newer replacement
27 parts. His total appraised value, including \$75,000 for the New
28 Mexico machinery and installation costs is 4.25 million dollars.

1 He didn't inquire regarding what Krystal originally paid for the
2 equipment. This would not be relevant. This valuation reflects
3 what it would cost to replace the missing property and does not
4 necessarily require all new items. Hypothetical valuations are
5 not considered a formal appraisal, but are commonly utilized in
6 loss situations, such as an insurance fire loss. Such valuations
7 are approximately five to ten per cent of the witness' work.
8 Test. of George Cunningham, Ex. 2. The court finds this witness'
9 testimony and opinions to be direct, honest, credible and
10 professional.

11 14. Bruce Nicholson is Krystal's vice president. The
12 Gallup, New Mexico family business consisted of retail gasoline
13 stations, including some located on the Nation's reservation land.
14 He was raised on the Monument Valley reservation and spent most of
15 his life there. His girl friend, an enrolled member of the
16 Nation, signed the debtor's bankruptcy filings. The witness
17 attended a 1997 meeting with officials of the Bureau of Indian
18 Affairs ("BIA"), the Amoco Production Company and officials of the
19 Nation. The meeting was driven by Amoco's desire to obtain
20 assurances from the Nation for approval of the transfer of
21 operating rights from the Cross Creek Corporation to Krystal. The
22 Nation did not want Cross Creek to continue on the reservation.
23 Mr. Nicholson's father handled negotiations for the family
24 business. Debtor paid Cross Creek more than \$300,000 for the Utah
25 rights and \$100,000 for the New Mexico rights. The witness is
26 unsure why his father wanted to enter the drilling business.
27 Neither he nor his father knew much about gas and oil production.
28 The Cross Creek application for assignment of the Utah well is

1 dated May 28, 1997. Krystal felt it was appropriate to start
2 operations, as they believed the Nation had approved the transfer.
3 No difficulties occurred with the Tribe until 1999.

4 15. A report was generated for the Utah site, listing
5 Krystal as operator. Other paperwork and a bond were also created
6 for the transfer. This included a tax document submitted to the
7 Nation by Krystal. The Utah well was operating at this time. A
8 \$150 receipt to pay for the public filing of the Utah and New
9 Mexico leases reflects the public nature of the transfer. Both
10 locations operated in 1997 through 1998 by Krystal, using its
11 employees. However, the family retail store office employees
12 administered Krystal employee records.

13 16. In April or May of 1999, business operations were
14 greatly disrupted by an FBI seizure of essentially all business
15 records. While the debtor was never indicted, other business were
16 prosecuted concerning non payment of government fuel taxes. The
17 State of Texas shut down the family stores. Mr. Nicholson, whose
18 father was Navajo, made the mistake of not paying fuel taxes.
19 Following plea bargaining in September or October of 2001, the
20 witness plead guilty and was sent to prison for two years. He
21 also agreed to stay out of the service station business. His
22 brother received a one year sentence. The seized business records
23 were sent to a location in Lubbock, Texas, where they remained for
24 years. The witness was released in 2004 and has completed his
25 probation obligations. Attempts were made to locate the documents
26 through correspondence with the United States Attorney for the
27 Northern District of Texas and the State of Texas, to no avail.
28 Although on some date the records were made available, no one from

1 the family obtained them. Once the records were seized, all
2 operations stopped. In a December 8, 1999 letter, the BIA advised
3 Nicholson that at the Nation's request, the federal government
4 would not approve transfer of the Cross Creek leases to Krystal,
5 due to Krystal's ineligibility under Navajo law " . . . and due
6 to other concerns of the Navajo Nation." Unlike Cross Creek,
7 debtor was directed to stop all drilling operations and immedi-
8 ately leave the reservation. The witness complained that Cross
9 Creek was allowed to remain in possession and transfer its leases
10 when it ran into difficulty with the Nation.

11 17. Amoco was instructed to immediately take over
12 operation of the lease. The witness was informed the Nation would
13 not approve future lease transfers to his family members.
14 Nicholson did not return to see the Utah site again until 2007.
15 By then, all machinery had been removed. He estimates he visited
16 the Utah location 30 to 40 times prior to the ejectment and
17 verified that the Utah equipment listed on page two of Mr.
18 Padilla's valuation was actually installed there. The Utah well
19 had a depth of between 5,000 and 6,000 feet. Less of an invest-
20 ment was made in the Farmington, New Mexico lease, but the witness
21 saw the Farmington equipment installed and operating between 1997
22 and 1999. Krystal obtained a 1998 bond for the Utah leasehold
23 which the BIA did not sign. The Nation and BIA did not sign the
24 oil and gas lease assignments that the witness signed on May 28,
25 1997. Nicholson was not concerned about the delay as he had been
26 advised formal approval took time. Test. of Bruce Nicholson, exs.
27 1, 4-9, 11-12, 16, 26, 34-36, 38. The court finds the witness to
28 be credible on the subject of his company's dealings with the

1 Nation.

2 18. Donald E. Ross is a geologist and certified general
3 appraiser with 40 years experience with expertise in mines and
4 minerals. His assignment was to determine the forced liquidation
5 value of the equipment as of March 6, 2008 for the Nation, "as is"
6 and "where is." His final value estimate is \$8,300 with a 12
7 month marketing period for the Farmington equipment. He did a
8 field visit, talked with individuals and examined comparable
9 values. One of the people he consulted was Barbara Padilla, the
10 wife of plaintiff's witness Carl Padilla. A tribal official
11 informed Ross that the property contained a 210-barrel tank. He
12 denied that he is mistaken and Farmington had a 380-barrel tank,
13 although he did not see signage indicating a 210-barrel tank. The
14 witness doubts the tank size would impact his opinion. His report
15 does not discuss underground piping as he was unable to view it.
16 The well had been abandoned and plugged. He has previously worked
17 for the Nation and hopes to receive future assignments from them.
18 His valuation is not a fair market valuation, which values
19 property on an ongoing producing basis. He did not do a hypothet-
20 ical valuation regarding missing machinery. He summarized that
21 the appraised items were " . . . old idle equipment sitting out on
22 the desert." Ross' appraisal contemplates disposition by auction
23 or for salvage. He has no opinion regarding the value as of
24 December of 1999. Test. of Donald E. Ross, ex. QQ at p. ii and at
25 pgs. 17, 25. The court finds the witness knowledgeable, but
26 argumentative on cross examination. Since this expert witness did
27 not key his value opinion to the date of plaintiff's exclusion
28 from the sites, his opinion is of limited value to the fact

finder.

19. To the extent any of the following conclusions of law should be considered findings of fact, they are hereby incorporated by reference.

CONCLUSIONS OF LAW

1. To the extent that any of the above findings of fact should be considered conclusions of law, they are hereby incorporated by reference.

2. Jurisdiction of the Chapter 11 bankruptcy case to which this adversary proceeding is related is vested in the United States District Court for the District of Arizona. 28 U.S.C. §1334(a). That court has referred all cases under Title 11 of the United States Code, all adversary proceedings and all contested matters arising under Title 11 or related to a bankruptcy case to the United States Bankruptcy Court for the District of Arizona. 28 U.S.C. §157(a), District General Order 01-15(1). The Nation has denied this court has core bankruptcy jurisdiction to resolve this proceeding by entering a final order or judgment. Answer to second amended complaint at ¶ 4, dkt. 64. The Nation was scheduled as a disputed unsecured creditor, but did not file a bankruptcy claim against the estate. Schedule F at p. 2.

3. While plaintiff alleges this court has core bankruptcy jurisdiction to liquidate the damages claim as an estate asset², see 28 U.S.C. §157(b)(2)(O), care should be taken to not transgress the limits of bankruptcy court jurisdiction. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* 102 S.Ct.

²Second amended complaint at p. 2,

1 2858,2862-80 (1982)(Unconstitutional for bankruptcy court to
2 decide a state law contract claim against an entity not otherwise
3 part of the bankruptcy case), *Stern v. Marshall*, 131 S.Ct. 2594,
4 2611-13 (2011)(Bankruptcy Court lacks Constitutional authority to
5 enter a final judgment on estate's state law counterclaim to
6 bankruptcy claim). Accordingly, the court will enter proposed
7 findings and conclusions. §157(C)(1).

8 4. This court has not adjudicated whether the Nation's
9 refusal to approve the lease transfer was wrongful. Rather, this
10 court is determining what damages are to be awarded for the
11 Nation's refusal to return or allow plaintiff to retrieve its
12 equipment from the terminated leaseholds. *Navajo Nation v.*
13 *Krystal Energy Co. Inc.* 2008 WL 2477084 at pgs. 2-3 (D. Az.
14 2008)(Partially granting leave to appeal). This court's ruling,
15 finding the Nation liable has been affirmed. *Navajo Nation v.*
16 *Krystal Energy Co., Inc.* 2008 WL 4446703 at p. 6 (D. Az. 2008)("In
17 contrast, the uncontroverted facts, as set forth in the record
18 through depositions by eye witnesses, establish that in December
19 1999, Navajo Nation officials evicted Krystal employees from the
20 well sites, took equipment that belonged to Krystal for transport
21 from the site, and chained and locked the well sites, telling
22 Krystal's employees that they could not return.").

23 5. It is troubling that plaintiff could not produce its
24 own internal records to establish exactly what equipment was
25 located on which site, its condition and dates and costs of
26 acquisition. However, the uncontroverted testimony is that the
27 entirety of plaintiff's business records were removed by law
28 enforcement. Given the incarceration of two family members, it is

1 understandable that no one else apparently followed up on the
2 records' return, given that the family entities ceased operation
3 by the combination of the Nation's exclusion and criminal
4 prosecution of officers³. Efforts years later to locate the
5 documents were unsuccessful. Exs. 34-38. Accordingly, the court
6 will accept credible testimony regarding missing assets and their
7 hypothetical valuation by recognized experts. Nonetheless,
8 plaintiff ultimately bears the risk of non persuasion through
9 uncertainty.

10 6. This court's conclusions of law are reviewed *de*
11 *novo*. *California Franchise Tax Board v. Kendall (In re Jones)*, 657
12 F.3d 921, 924 (9th Cir. 2011). Its factual findings are reviewed
13 for clear error. *Hanf v. Summers (In re Summers)*, 332 F.3d 1240,
14 1242 (9th Cir. 2003). Findings of fact, whether based on oral or
15 documentary evidence will not be set aside unless clearly
16 erroneous. Due regard is given to the bankruptcy court's
17 opportunity to judge the credibility of witnesses. Rule 8013,
18 *F.R.B.P.* The appellate court accepts the bankruptcy court
19 findings, unless upon review, it has the definite, firm conviction
20 a mistake was committed. *Ganis Credit Corp. v. Anderson (In re*
21 *Jan Weilert RV, Inc.)*, 315 F.3d 1192, 1196 (9th Cir.), *amended by*
22 326 F.3d 1028 (9th Cir. 2003). The appellate court may affirm on
23 any ground supported by the record. *Jones, Id., Stevens v. NW*
24 *Nat'l Ins. Co. (In re Siriani)*, 967 F.2d 302, 304 (9th Cir. 1992).

25 7. Defendant's expert appraisal is of lesser utility,
26

27 ³Apparently, family member Brian L. Nicholson received contact regarding
28 the record's return but either never followed up or did not retain them.
Nicholson test., Ex. 35.

1 as it has an effective date years after defendants' forced shut
2 down of two operating well sites. Further, it is calculated at
3 salvage value, based on equipment that sat for years unused in
4 the desert. Those are not the facts of this case. Plaintiff's
5 experts appraised for replacement value equipment that until
6 December of 1999 was actively utilized in two producing sites.
7 Had the Nation accepted its responsibility and either let the
8 operating equipment be removed or sold in place, precisely the way
9 plaintiff originally acquired its interests, value would have been
10 maximized. This the Nation did not do. It should not benefit for
11 this failure through a valuation technique.

12 8. Plaintiff's Cunningham appraisal, prepared by an
13 independent professional, supported by the extensive personal
14 industry experience of Carl Padilla, is far more valuable in
15 establishing the value for the operating assets as existing in
16 place during December of 1999. Given the uncertainty caused by a
17 necessary hypothetical appraisal for missing assets and plain-
18 tiff's complete failure to produce contemporaneous business
19 records to document the loss, the appraised value for both
20 locations will be reduced to four million dollars.

21 **ORDER**

22 The court will recommend that the United States District
23 Court issue a final judgment, supported by these proposed findings
24 and conclusions of four million dollars in favor of plaintiff and
25 against defendant. Plaintiff may apply to the Bankruptcy Court
26 Clerk for an award of costs and, if appropriate, apply to this
27 court for an award of attorneys fees.
28

1 Copies emailed this 6th day
2 of January, 2011, to:

3 Adam B. Nach
4 LANE & NACH, P.C.
5 2025 N. Third Street
6 Suite 157
7 Phoenix, AZ 85004
8 Email: adam.nach@azbar.org
9 Attorney for Plaintiff

10 Lisa Perry Banen
11 LANE & NACH, P.C.
12 2025 N. Third Street
13 Suite 157
14 Phoenix, AZ 85004
15 Email: lisa.banen@LANE-NACH.com
16 Attorney for Plaintiff

17 Marcelino R. Gomez
18 Assistant Attorney General
19 Navajo Nation Department of Justice
20 P.O. Box 2010
21 Window Rock, AZ 86515
22 Email: mrgomez1952@yahoo.com
23 Attorney for Defendant

24 By: /s/Rachael M. Stapleton
25 Judicial Assistant
26
27
28

Notice Recipients

District/Off: 0970-2

User: brennerc

Date Created: 1/9/2012

Case: 2:01-ap-00171-GBN

Form ID: pdf008

Total: 7

Recipients submitted to the BNC (Bankruptcy Noticing Center) without an address:

dft THE NAVAJO NATION

TOTAL: 1

Recipients of Notice of Electronic Filing:

aty	ADAM B. NACH	adam.nach@azbar.org
aty	J. KENT MACKINLAY	kent@mackinlaylawoffice.com
aty	LISA PERRY BANEN	lisa.banen@LANE-NACH.com

TOTAL: 3

Recipients submitted to the BNC (Bankruptcy Noticing Center):

pla	KRYSTAL ENERGY CO. INC.	P.O. BOX 87	LUPTON, AZ 86508
aty	MARCELINO R. GOMEZ	NAVAJO NATION DEPT OF JUSTICE	ASST ATTORNEY
	GENERAL	PO BOX 2010	WINDOW ROCK, AZ 86515
ust	U.S. TRUSTEE	OFFICE OF THE U.S. TRUSTEE	230 NORTH FIRST AVENUE SUITE
	204	PHOENIX, AZ 85003	

TOTAL: 3