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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

KRYSTAL ENERGY CO., INC.,

District Court: No. 2:12-cv-00079-FJM
Bankruptcy Case: No. 2:01-bk-00166-SSC
Adversary Proceeding: No. 2:01-ap-00171-GBN

KRYSTAL ENERGY CO., INC.,
Plaintiff
vs.
NAVAJO NATION,
Defendant

**NOTICE OF FILING DEFENDANT'S REPLY
IN SUPPORT OF:**

**OBJECTIONS TO BANKRUPTCY COURT'S
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

-AND-

**REQUEST FOR *DE NOVO* REVIEW AND
INDEPENDENT DETERMINATION BY
DISTRICT COURT**

The Defendant, the Navajo Nation (“Navajo Nation), by and through its counsel, hereby gives notice of the filing in the United States Bankruptcy Court for the District of Arizona of the attached *Reply in Support of: Objections to the Bankruptcy Court’s Proposed Findings of Fact and Conclusions of Law and Request for De Novo Review and Independent Determination by the District Court*

DATED: April 1, 2012.

NAVAJO NATION DEPARTMENT OF JUSTICE
Harrison Tsosie, Attorney General

/s/MRG

By: _____
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File an Answer/Response/Objection:

2:01-ap-00171-GBN KRYSTAL ENERGY CO. INC. v. THE NAVAJO NATION

Type: ap Chapter: v

Disposition: Transfer to Another District Judge: GBN

Case Flag: Exhibits, Appeal

Office: 2 (Phoenix)

Lead Case: 2-01-bk-166

U.S. Bankruptcy Court

District of Arizona

Notice of Electronic Filing

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Case Number: [2:01-ap-00171-GBN](#)
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Reply in Support of: Objections to Bankruptcy Court's Proposed Findings of Fact and Conclusions of Law and Request for De Novo Review and Independent Determination by District Court filed by WILLIAM NOVOTNY of MARISCAL, WEEKS, MCINTYRE, & FRIEDLANDER on behalf of THE NAVAJO NATION (related document(s)[227] Memorandum/Opinion Decision, [228] Generic Order, [241] Objection). (NOVOTNY, WILLIAM)

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15 **UNITED STATES BANKRUPTCY COURT**
16 **DISTRICT OF ARIZONA**

15 KRYSTAL ENERGY CO., INC., 16 17 18 19 20 KRYSTAL ENERGY CO., INC., 21 22 23 24 25 26	<p>Debtor.</p> <p>Plaintiff,</p> <p>vs.</p> <p>NAVAJO NATION,</p> <p>Defendant.</p> <p>(Chapter 11 Case)</p> <p>District Court: No. 2:12-cv-00079-FJM</p> <p>Bankruptcy Case: No. 2:01-bk-00166-SSC</p> <p>Adversary Proceeding: No. 2:01-ap-00171-GBN</p> <p>DEFENDANT'S REPLY IN SUPPORT OF:</p> <p>OBJECTIONS TO BANKRUPTCY COURT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</p> <p>-AND-</p> <p>REQUEST FOR <i>DE NOVO</i> REVIEW AND INDEPENDENT DETERMINATION BY DISTRICT COURT</p>
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1 The Defendant, the Navajo Nation (“Navajo Nation), submits this Reply in
 2 support of its Objections to the Bankruptcy Court’s Proposed Findings of Fact and
 3 Conclusions of Law and Request for *De Novo* Review and Independent
 4 Determination by this Court [Adversary Docket No. 241] (“Objections”) in
 5 accordance with 28 U.S.C. § 157(c)(1) and Rule 9033 of the Federal Rules of
 6 Bankruptcy Procedure. The Opposition Brief [Adversary Docket No. 247] filed by
 7 the Plaintiff Krystal Energy Co., Inc. (“Krystal”) seriously deviated from the claim,
 8 the issues, and the law that are applicable to this matter. Krystal failed to rebut,
 9 and in most instances failed to even address, the points raised in the Objections.

10 As detailed in the Navajo Nation’s Objections, and undisputed by Krystal,
 11 the only claim which was subject to the evidentiary hearing in the Bankruptcy Court
 12 was a statutory claim for “turnover” under 11 U.S.C. § 542. The Bankruptcy
 13 Court’s Findings and Conclusions expressly declined to address the claim for
 14 alleged violation of the bankruptcy automatic stay and did not address whether the
 15 application to transfer the leases to Krystal was lawfully denied or whether the
 16 Navajo Nation had lawfully ejected Krystal from the subject well sites. Those
 17 issues were not necessary to the analysis of the “turnover” claim.¹

18 Instead, as the Bankruptcy Court correctly noted, the only issue to be
 19 addressed at the hearing was “what damages are to be awarded for the Nation’s
 20 refusal to return or allow Plaintiff to retrieve its equipment from the terminated
 21 leaseholds.” (Findings, p. 16, ¶ 4) (emphasis supplied).

22 Accordingly, at least for current purposes, the Navajo Nation concedes its
 23 responsibility to Krystal for the value of the personal property of Krystal which

24 ¹ Krystal’s invocation (Opposition Brief p. 19) of an unrelated 30-year old case
 25 asserting a post-petition seizure of leased premises by the Navajo Nation is irrelevant for
 26 a variety of reasons, including that the ejection in this case has not been found to be
 wrongful, and that it took place 2 years before Krystal’s bankruptcy filing.

1 Krystal had brought to the sites and/or had a right to remove at the time of its eject-
2 ment in December 1999. However, the law is clear that Krystal bears the burden
3 to prove both its rights in particular personal property which it was denied the
4 opportunity to remove and the value of that particular property in December 1999.
5 As noted in the Navajo Nation's Objections, there was a failure of proof by Krystal
6 as to any legal rights that Krystal held in any particular identified personal property
7 which Krystal owned or had brought to the sites; and likewise, there was a failure
8 of proof of the value of such particular property had it been permitted to be
9 removed.²

10 **I. KRYSTAL'S OPPOSITION IS RIDDLED WITH IRRELEVANT LEGAL**
11 **ARGUMENTS AND CITATIONS.**

12 The Navajo Nation's Objections accurately describe the standard of
13 independent, *de novo* review of the Bankruptcy Court's Findings and Conclusions
14 which is required in this case under both 28 U.S.C. § 157(c)(1) and Bankruptcy
15 Rule 9033, and the cases applying that standard. Krystal's Opposition seeks to
16 avoid the applicable standard by mis-citation of a variety of inapplicable cases and
17 authorities.

18 For example, Krystal's Opposition Brief (pp. 14-15) cites numerous cases for
19 the very different and irrelevant standard of review to be applied by the Federal
20 Courts of Appeal to the findings, conclusions, and judgments of an Article III
21 District Court at trial.

22 Krystal's Opposition Brief also improperly relies upon several cases
23 addressing a statutory exception to the general rule that all findings and rulings of

24
25 ² The record establishes that Krystal's financial records, which might have enabled
26 it to provide some evidence of what equipment it had brought to the sites, had been
seized and apparently lost in an unrelated criminal investigation. There has not been any
suggestion that this lack of records was in any way caused by the Navajo Nation.

1 a magistrate judge are subject to independent *de novo* review by the District Court.
 2 United States v. Remsing, 874 F.2d 614, 617-18 (9th Cir., 1989); Laxalt v.
 3 McClatchy, 116 F.R.D. 455, 456 (D. Nev., 1986). Those cases applied a more
 4 deferential standard of review to decisions by magistrate judges solely under an
 5 exception to the otherwise required *de novo* review, pursuant to 28 U.S.C. §
 6 636(b)(1)(A), which applies only to certain limited pretrial determinations by a
 7 magistrate judge.

8 Nothing in the cases or any other authority cited by Krystal remotely
 9 suggests that the findings and conclusions of either a magistrate judge or the
 10 Bankruptcy Court in a dispositive proceeding are subject to anything other than a
 11 completely independent, *de novo* review by the District Court. Indeed, one of the
 12 cases cited by Krystal itself, Goldstein v. Hawaii Medical Service Association, 297
 13 F. Supp. 2d 1259, 1261 (D. Hawaii, 2003), states the applicable standard most
 14 clearly and succinctly: “*De novo* review mandates that the [District] Court consider
 15 the matter anew, the same as if it had not been heard before and as if no decision
 16 previously had been rendered.” Id., citing United States v. Silverman, 861 F.2d
 17 571, 576 (9th Cir., 1988).³

18 Similarly, Krystal’s Opposition Brief (pp. 16-19) engages in an irrelevant
 19 discussion regarding the various components or measures of damage generally
 20 applicable to tort and conversion claims, ignoring the fact that the only claim at

22 ³ Krystal’s citation of Menlo Logistics, Inc. v. Western Express, Inc., 269 Fed.
 23 Appx. 715 (9th Cir., 2008) is likewise inapplicable because it involved an appeal to the
 24 Court of Appeals from a District Court judgment on a jury verdict, in a case in which a
 25 magistrate judge had served as the trial judge (presumably by consent of the parties).
 26 Krystal’s citation of Financial Management Advisors, LLC v. American International
 Specialty Lines Insurance Company, 506 F.3d 922 (9th Cir., 2007) is equally inapposite
 insofar as that case involved an appeal from a summary judgment which had been
 granted by a District Court judge, to which a markedly different standard of review
 obviously applies.

1 issue here is a statutory claim for “turnover,” the damages measure for which is
2 established both by the statute itself and by the various rulings of the Bankruptcy
3 Court and the District Court on a prior appeal in this case – the value of the
4 particular personal property which is established by Krystal to be its property and
5 which should have been turned over to Krystal in December 1999. Krystal has
6 never asserted a claim for “conversion.” The only damages measure that applies
7 here is that for a “turnover” claim under 11 U.S.C. § 542.

8 **II. KRYSTAL HAS FAILED TO ESTABLISH THE PARTICULAR PERSONAL**
9 **PROPERTY WHICH KRYSTAL OWNED OR IN WHICH KRYSTAL HAD**
10 **RIGHTS, AS THE BASIS FOR ITS TURNOVER CLAIM.**

11 Krystal’s Opposition Brief does not dispute the assertion in the Navajo
12 Nation’s Objections that a “turnover” claim requires the Plaintiff/Debtor (i.e. Krystal)
13 to establish particular personal property which it owned or otherwise had the right
14 to remove. However, Krystal’s Opposition simply fails to address the absence of
15 proof on this core issue of Krystal’s rights in any particular personal property on the
16 basis of which Krystal claims damages.

17 Indeed, by far the largest component of Krystal’s claim for damages is based
18 upon the alleged “value” of the underground wells and well casings, in which
19 Krystal has not even alleged – much less proven – that it held ownership rights.
20 Instead, Krystal’s Opposition Brief is simply silent in the face of the case authority
21 cited in the Navajo Nation’s Objections (Calpine v. Arizona Department of
22 Revenue, 221 Ariz. 244, 248, 211 P.3d 1228, 1232 (App., 2009)), and the original
23 leases themselves, both of which establish that permanent improvements placed
24 on leased tribal lands and “attached to the realty,” such as the wells and well
25 casings, become part of the real property of the tribe as lessor, not personal
26 property of the lessee. Moreover, Krystal failed both at the Bankruptcy Court

1 hearing and in its Opposition Brief to present any evidence or argument as to
2 Krystal's ownership rights in any other particular identifiable personal property at
3 the well sites.

4 **III. KRYSTAL'S ONLY EVIDENCE OF "VALUE" WAS FATALLY FLAWED.**

5 The Navajo Nation will not repeat here the discussion in its initial Objections
6 (pp. 11-15) as to the legally inappropriate measures of claimed value which were
7 presented at the hearing by Krystal's valuation witnesses, Mr. Padilla (who testified
8 inappropriately as to the current cost to replace all equipment and improvements at
9 the well sites with totally new equipment at today's prices) and Mr. Cunningham
10 (who testified inappropriately as to the value "in continued use" of all improvements
11 at the well sites if they had remained in place and continued to be productive).
12 Krystal's Opposition Brief fails to even acknowledge the issue of the propriety of
13 these approaches to value in a "turnover" case such as this, much less attempt to
14 defend them.

15 Suffice it to say that the valuation approaches utilized by Mr. Padilla and Mr.
16 Cunningham simply failed to address the only proper valuation question in this
17 case: what was the fair market value of the particular personal property which
18 Krystal held rights in (if any) and should have been permitted to remove from the
19 sites in 1999? Indeed, both Mr. Padilla and Mr. Cunningham readily conceded that
20 they had not considered this measure or theory of value. (Transcript, p. 62, ll. 3-9;
21 p. 106, ll. 1-6; p. 107, l. 18; p. 108, l. 3).

22 Krystal's Opposition Brief also fails to address the Navajo Nation's Objection
23 that the great majority of the "value" to which Mr. Padilla and Mr. Cunningham
24 expressed an opinion (even under an inapplicable valuation theory) was attribut-
25 able to the underground wells and well casings themselves, in which, as discussed
26

1 above, Krystal held no ownership rights and could not have expected to "remove"
2 from the sites upon ejectment from the leased property.

3 Instead, as pointed out in the Navajo Nation's Objections, the only
4 expression of opinion on the appropriate value approach which appears in the
5 record is to be found in Krystal's own under-oath bankruptcy schedules, which
6 stated that the value of Crystal's own equipment at the two sites was \$400,000.
7 (Schedule B—Schedule of Personal Property; Administrative Case Docket No. 9).

8 **IV. CONCLUSION.**

9 For the reasons discussed in the initial Objections and in this Reply, the
10 Navajo Nation is entitled to an independent, *de novo* review by this Court of the
11 record in the Bankruptcy Court proceedings, and an independent decision with
12 respect to the following dispositive issues:

- 13 • That Krystal failed to meet its burden to establish its rights in identifi-
14 able personal property or equipment which allegedly should have been
15 turned over to Krystal in December, 1999 by the Navajo Nation.
- 16 • That Krystal failed to meet its burden to establish the value of any per-
17 sonal property or equipment which should have been turned over to
18 Krystal by the Navajo Nation in December 1999.
- 19 • That the valuation opinions of Mr. Padilla and Mr. Cunningham were
20 inapplicable to the proper element of damages recoverable on a
21 "turnover" claim under 11 U.S.C. § 542, and hence irrelevant.
- 22 • That this Court should enter judgment for the Navajo Nation and
23 against Krystal on the ground that Krystal failed to meet its burden of
24 proof as to the particular property or equipment subject to Krystal's
25 "turnover" claim, or its value; or that this Court alternatively should
26 entertain additional proceedings and/or evidence (either in the District
Court or the Bankruptcy Court) on the issues raised by the Navajo
Nation's Objections.

1 DATED: March 30, 2012.

2 **NAVAJO NATION DEPARTMENT OF JUSTICE**
3 Harrison Tsosie, Attorney General

4 /s/MRG

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6 Marcelino R. Gomez

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