ORAL ARGUMENT IS NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12-5156 & 12-5157

EL PASO NATURAL GAS COMPANY,
Plaintiff-Appellant,

and

NAVAJO NATION,
Invervenor-Appellant
v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

Appeal from the U.S. District Court for the
District of Columbia, No. 07-00905
(Hon. Richard J. Leon).

FINAL BRIEF FOR THE FEDERAL DEFENDANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici: All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant El Paso Natural Gas Co.

(B) Rulings Under Review: References to the rulings at issue appear in the Briefs for Appellants El Paso Natural Gas Co. and Navajo Nation.

(C) Related Cases: This case was before this Court previously as Numbers 10-508- and 10-5090. The decision of this Court is published at *El Paso Natural Gas Co. v. United States*, 632 F.3d 1272 (D.C. Cir. 2011). No other related case is pending in this or any other court.

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GLOSSARY

1850 Treaty	Treaty with the Navajo, 9 Stat. 974 (1850)
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
BIA	United States Bureau of Indian Affairs
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675
Energy	United States Department of Energy
EPA	United States Environmental Protection Agency
EPNG	El Paso Natural Gas Company
Indian Agricultural Act	American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3746
Indian Lands Open Dump Act	Indian Lands Open Dump Cleanup Act, 25 U.S.C. §§ 3901-3908
Mill Tailings Act	Uranium Mill Tailings Radiation Control Act 42 U.S.C. §§ 7901-7925
RCRA	Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6922k
The Dump	Tuba City Open Dump
The Mill site	Tuba City Uranium Processing Mill Site
The Workplan	Remedial Investigation/Feasibility Study Workplan

JURISDICTIONAL STATEMENT

El Paso Natural Gas Company asserted claims against the United States under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901-7925, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Docket 1, 7, JA 51, 82. The Navajo Nation intervened as a plaintiff, and its complaint, in addition to joining EPNG's claims, asserted claims under several other federal and tribal statutes. Docket 41, JA 139. On March 27, 2011, the district court dismissed the Nation's non-RCRA claims, some for lack of jurisdiction, and some for failure to state a claim (the district court had jurisdiction of those latter claims under 28 U.S.C. §§ 1331 and 1362). Docket 67, JA 3. On March 21, 2012, the district court dismissed EPNG's and the Nation's pending RCRA claims for lack of jurisdiction, Docket 81, JA 27, and it entered final judgment as to all claims that same day, Docket 82, JA 49.

EPNG filed a timely notice of appeal on May 15, 2012, and the Nation filed a timely notice of appeal on May 17, 2012. Docket 83 & 85, JA 186, 188. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed EPNG's and the Nation's RCRA claims because they challenge an ongoing CERCLA removal action and are therefore barred by CERCLA section 113(h), which removes federal court jurisdiction over "any challenges" to a removal or remedial action.

2. Whether the district court correctly dismissed the Nation's claims under the American Indian Agricultural Resource Management Act and the Indian Lands Open Dump Cleanup Act because neither statute creates a private right of action and the Nation failed to challenge a discrete failure to act that is legally required by either statute.

3. Whether the district court correctly dismissed the Nation's claims that the United States as trustee has violated any alleged fiduciary duties owed to the Nation.

4. Whether the district court correctly dismissed the Nation's Uranium Mill Tailings Radiation Control Act claim because that Act "precludes judicial review" under the APA, the Nation has released any

such claims against the United States, and the Nation fails to challenge a discrete failure to act that is legally required by the Act.

5. Whether the district court correctly dismissed claims related to the Highway 160 Site as moot because Congress has appropriated funds for cleanup at that site, the scope of work agreed upon by the Nation and the Department of Energy has been completed, and the Nation has released the United States from any claims arising out of that cleanup.

6. Whether the district court correctly dismissed the United States' counterclaim without prejudice because it is moot.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Briefs for Appellants EPNG and the Navajo Nation.

STATEMENT OF THE CASE

EPNG sued a number of federal agencies asserting claims under the Uranium Mill Tailings Radiation Control Act, which we will call the "Mill Tailings Act," and the Resource Conservation and Recovery Act, or RCRA, at three sites near Tuba City, Arizona, and other unspecified sites that are no longer at issue. The Navajo Nation intervened to assert those same claims and several alleged violations of other federal and tribal laws. Essentially, the Plaintiffs claim that the United States has

failed in various ways to properly clean up solid and hazardous wastes at those three sites. The district court dismissed EPNG's Mill Tailings Act claims (as well as the identical claims brought by the Nation), and in a previous appeal this Court affirmed that dismissal. The district court then dismissed the remainder of the Plaintiffs' claims in two orders. Both EPNG and the Nation appeal, and this Court consolidated the appeals.

STATEMENT OF FACTS

This case involves three different sites near Tuba City, Arizona: a former uranium processing mill, an open dump, and what the parties call the "Highway 160 Site." The case also involves a number of federal and tribal statutes. In this section, we describe the sites, including the statutory provisions primarily relevant at each site (though there is some overlap), and the procedural history of this litigation.

I. THE TUBA CITY MILL AND THE MILL TAILINGS ACT

A. The Tuba City Mill

The Rare Metals Corporation of America and its successor, EPNG, operated a uranium processing mill near Tuba City, Arizona between 1956 and 1966. Docket 41 ¶ 30, JA 149. The Mill is located within the Navajo Nation Reservation approximately five miles east of Tuba City,

Arizona. *Id.* ¶¶ 4, 21, JA 142, 147. During its ten years of operations, the Mill processed about 800,000 tons of uranium ore. *Id.* ¶ 4, JA 142. Uranium is generally found in metal-bearing ore, which must then be processed to extract the uranium. After the uranium is extracted, the leftover material is called tailings, and the tailings are radioactive.

B. The Mill Tailings Act

In 1978 Congress enacted the Mill Tailings Act to address potential radiation health hazards to the public caused by uranium mill tailings. 42 U.S.C. § 7901(a). The Act provides, among other things, for a program of assessment and remedial action at inactive mill sites to stabilize and control mill tailings in a safe and environmentally sound manner, and to minimize or eliminate radiation health hazards to the public. *Id.* § 7901(b)(1). The Act grants the Department of Energy primary responsibility for carrying out this program. *Id.* §§ 7912-7918.

Several provisions of the Mill Tailings Act are relevant in this appeal. First, the Mill Tailings Act requires within one year after November 8, 1978, that the Secretary of Energy designate inactive uranium mill sites at or near twenty specifically-identified locations, including the Mill at Tuba City, Arizona, as "processing sites" requiring

remedial action. *Id.* § 7912(a)(1). The term "processing site" is defined by the Act to include property "in the vicinity" of sites where all or substantially all uranium was produced for sale to any federal agency and which "is determined by the Secretary, in consultation with the [Nuclear Regulatory] Commission, to be contaminated with residual radioactive materials derived from such site." *Id.* § 7911(6)(B).

Once a site is designated as a processing site, the Mill Tailings Act requires Energy to select and perform remedial actions with the concurrence of the Nuclear Regulatory Commission and in consultation, as appropriate, with affected Indian Tribes. *Id.* § 7918. Those remedial actions must be performed in accordance with general standards promulgated by the United States Environmental Protection Agency. *Id.* EPA promulgated final general standards to govern stabilization, control, and cleanup of residual radioactive materials (primarily mill tailings) at inactive uranium processing sites in January 1983. *See* 48 Fed. Reg. 590 (Jan. 5, 1983); 40 C.F.R. Part 192. With the exception of authority to perform groundwater restoration activities, Energy's authority to perform remedial action under the Mill Tailings Act ended on September 30, 1998. 42 U.S.C. § 7922(a)(1).

For sites on tribal land, like the Tuba City Mill, the Mill Tailings Act directs Energy, to the greatest extent practicable, to enter into cooperative agreements with Indian tribes to perform remedial actions. 42 U.S.C. § 7915. Each such agreement must contain "terms and conditions" that "require" that the "Indian tribe and any person holding any interest in such land shall execute a waiver (A) releasing the United States of any liability or claim thereof by such tribe or person concerning such remedial action, and (B) holding the United States harmless against any claim arising out of the performance of any such remedial action." *Id.* § 7915(a)(1).

C. Remediation of the Mill under the Mill Tailings Act

Following passage of the Mill Tailings Act in 1978, Energy designated the Mill as a "processing site" as required by the Act. Energy then remediated the site under the Mill Tailings Act program. On January 17, 1985, before starting remedial actions at the Mill, Energy entered into a cooperative agreement with the Navajo and Hopi Tribes under 42 U.S.C. § 7915. Docket 52-4, JA 195. Under the Cooperative Agreement, Energy is "responsible for selecting and performing remedial actions at the Tuba City millsite and vicinity properties," with

the parties "mutually under[standing] that the Tribes will participate in the selection and performance of such remedial actions." *Id.* 5, JA 202. "Remedial actions" are defined to mean:

> the assessment, design, construction, renovation, reclamation, decommissioning, and decontamination activities of [Energy], or such person as it designates, in order to stabilize and control residual radioactive materials at a millsite, vicinity property or depository site in a safe and environmentally sound manner that will minimize or eliminate radiation health hazards to the public which may exist at the sites.

Id. 4, JA 200. The Cooperative Agreement further provides that Energy will pay all costs it incurs in performing remedial actions, and that Energy will reimburse the Tribes for certain costs incurred by the Tribes performing remedial actions. *Id.* 7, JA 204.

Consistent with Congress' direction in the Mill Tailings Act, 42 U.S.C. § 7915, the Tribes in entering the Cooperative Agreement broadly released claims that might be asserted against the United States related to performance of remedial actions at the Tuba City processing site and designated "vicinity properties." The release, in relevant part, states that:

> Each Tribe, to the extent it holds any interest in the millsite or any vicinity property or depository site where remedial actions are performed under this Agreement, on its own

> behalf, hereby: (a) releases the Government from, and holds the Government harmless against, any liability or claim thereof by the Tribe arising out of the performance of any remedial action on such millsite, vicinity property or depository site.

Docket 52-4 at 17-18, JA 214-15.

After entering into the Cooperative Agreement, the Navajo and Hopi Tribes concurred in the selected design for the Tuba City processing site and executed the Remedial Action Plan and Site Design for Stabilization of the Inactive Uranium Mill Tailings Site at Tuba City, Arizona. Docket 52-2, JA 237.

After the remedial action plan was finalized, all uranium mill tailings from on-site piles, debris from demolished buildings, and windblown tailings were moved and stabilized in an engineered, five-sided disposal cell on site. Docket 52-3, JA 317. The five-sided disposal cell occupies an area of 50 acres on the 145-acre site. *Id*. In addition, Energy has an active remediation system for contaminated ground water which has been in full-scale operation since mid-2002. *Id.* The objective of the system is to pump groundwater from the portion of the aquifer defined by a uranium plume, treat the water by distillation to remove contaminants, and return the treated water to the aquifer.

Energy installed additional extraction wells in 2005 to decrease the time needed to achieve remediation goals. *Id.* Energy also increased the existing treatment plant capacity through various efficiency improvements in 2004. *Id.*

Energy manages the Mill site according to a site-specific Long-Term Surveillance Plan to ensure that the disposal cell systems continue to prevent release of contaminants to the environment. *Id.*, JA 319. Under provisions of this plan, Energy conducts annual inspections of the site to evaluate the condition of surface features, performs site maintenance as necessary, and monitors groundwater to verify the continued integrity of the disposal cell. To date, Energy has spent approximately $65 million performing remedial actions at the Mill. *Id.*

II. THE HIGHWAY 160 SITE

The Highway 160 Site is located north of the Mill site and across Highway 160, within the Navajo Nation Reservation. Docket 41 ¶ 9, JA 143. The Highway 160 Site is approximately 16 acres in size and was believed to contain residual radioactive materials derived from the Mill. Docket 65-4 at 8, JA 426.

In response, Congress passed the Energy and Water Development and Related Appropriations Act of 2009, Pub. L. No. 111-8, Div. C, 123 Stat. 524, 601-30, which provided Energy with a $5 million appropriation and authority to perform characterization and remediation of radiological contamination at the Highway 160 Site. 123 Stat. at 617-18. Energy and the Nation then agreed to two relevant modifications to the existing cooperative agreement. Those modifications provided that $4.5 million of the $5 million appropriation would be given to the Nation to perform response actions at the Site. Docket 65-3, JA 325; Docket 65-4, JA 420. Using the $4.5 million, the Nation took the lead in performing remediation work at the site. *Id.* Energy was to use the remaining $500,000 for technical assistance and administrative expenses. *Id.*

Cleanup of the Highway 160 Site began with a characterization phase to determine the vertical and lateral extent of contamination, and to determine the actual volume of contaminated material to be removed to remediate the Site. Docket 65-4 at 1, JA 425. After characterization, the Nation took primary responsibility for developing and implementing a remedial action plan. *Id.* at 5, JA 429. Remedial action consisted of

excavation of contaminated materials from the site and transportation to an offsite disposal facility, with clean backfill material used to fill excavated areas. *Id.* All of that work was completed by October 2011. The Nation finalized its Completion Report in early 2012, and in an August 2012 letter, the Nuclear Regulatory Commission noted its review and acceptance of the Nation's Completion Report and the Independent Verification Report submitted by Energy. No further monitoring will be necessary. *Id.* at 5, JA 429; 40 C.F.R. § 192.02 n.1.

The Nation—as part of the most recent amendment to the cooperative agreement—agreed to a broad release of claims that might be asserted against the United States related to performance of remedial actions at the Highway 160 Site. Docket 65-4 at 2, JA 421; 42 U.S.C. § 7915.

III. THE TUBA CITY DUMP AND RELEVANT STATUTES

A. The Dump

The Dump is a 30-acre landfill about four miles southwest of the Mill. Docket 65-2 ¶ 12, JA 343-44. Twenty-eight acres are on the Hopi Tribe's Reservation and two acres are on the Navajo Nation Reservation. *Id.* The Dump was reportedly used between the late 1950s and 1997 as a dump site receiving waste from local communities. *Id.* ¶

13, JA 344. Very limited documentation exists on the types of waste disposed at the Dump, though the majority of waste appears to be ordinary household trash. *Id.* ¶ 14, JA 344.

B. Relevant Statutes

Actions to remediate the Dump and the claims brought in this litigation implicate a number of federal statutes, which we briefly summarize here.

1. RCRA

In 1976 Congress enacted RCRA, 42 U.S.C. §§ 6901-6992k, primarily "to reduce the generation of hazardous waste and to ensure the proper treatment, storage and disposal of that waste which is nonetheless generated." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). RCRA contains a citizen suit provision, 42 U.S.C. § 6972, which permits a person to bring a civil suit against any person alleged to be "in violation of any permit, standard, regulation, condition, requirement, prohibition, or order" issued under RCRA. *Id.* § 6972(a)(1)(A). A person may also bring a civil suit against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial

endangerment to health or the environment." *Id.* § 6972(a)(1)(B). In addition, a person may bring suit against the EPA Administrator where there is alleged a failure of the Administrator to perform a nondiscretionary duty under RCRA. *Id.* § 6972(a)(2).

RCRA allows citizen suits only in certain limited circumstances. To ensure that citizen suits are not duplicative or disruptive of federal remediation efforts, subsections 6972(b)(1)(b) and (2)(B) bar commencement of citizen suits in certain instances where the United States is acting to address the alleged endangerment.

2. CERCLA

In 1980 Congress enacted CERCLA, 42 U.S.C. §§ 9601-9675, "to provide a mechanism for the prompt and efficient cleanup" of hazardous substances. *United States v. City & Cnty. of Denver*, 100 F.3d 1509, 1511 (10th Cir. 1996). CERCLA directs the President to publish a National Contingency Plan, which then serves to guide federal, state, tribal, and private actions responding to releases of hazardous substances. 42 U.S.C. § 9605. CERCLA also prescribes specific statutory requirements for the response process and cleanup standards. *Id.* §§ 9604, 9616, 9617, 9621.

CERCLA authorizes the President to initiate removal or remedial actions, consistent with the National Contingency Plan, whenever there is a release or substantial threat of release of hazardous substances. *Id.* § 9604(a)(1). The President has delegated the authority for administering CERCLA to the Administrator of EPA and to other Department heads. *See* Exec. Order No. 12,580, 3 C.F.R. 193 (1988); 42 U.S.C. § 9615.

Section 113(h) of CERCLA addresses the timing of judicial review of removal and remedial actions. Section 113(h) provides that "[n]o Federal court shall have jurisdiction under Federal law other than [diversity jurisdiction] . . . to review any challenges to removal or remedial action selected under [CERCLA section 104]." 42 U.S.C. § 9613(h), *See Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000) (section 113(h) "effectuates a 'blunt withdrawal of federal jurisdiction'") (citation omitted). Section 113(h) itself provides limited exceptions to its jurisdictional bar, which no one claims are applicable here.

In curtailing federal court jurisdiction through section 113(h), Congress intended to preclude any judicial involvement or interference

in CERCLA removal or remedial actions until after such actions are complete. As the House Report explains, "there is no right of judicial review of . . . selection and implementation of response actions until after the response action [sic] have been completed to their completion [sic]." H.R. Rep. No. 99-253(I), at 81 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2863.

3. The American Indian Agricultural Resource Management Act

The American Indian Agricultural Resource Management Act, or "Indian Agricultural Act," recognizes the government-to-government relationship between the United States and Indian tribes and the general trust relationship to protect and conserve Indian agricultural lands consistent with the United States' fiduciary obligation. 25 U.S.C. §§ 3701-3746. The Indian Agricultural Act directs the Secretary of the Interior to approve an agricultural resource management plan, developed by and in consultation with the affected Tribe, *id.* § 3711(b)(1)-(2), and for the leasing terms of Indian agricultural lands, *id.* § 3715. In carrying out the agricultural management plan, the "Secretary shall comply with tribal laws and ordinances pertaining to Indian agricultural lands," unless otherwise prohibited by Federal law.

Id. § 3712(b). The Indian Agricultural Act does not itself set forth specific trust duties and states that "[n]othing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian trust lands or natural resources, or any legal obligation or remedy resulting therefrom." *Id.* § 3742.

4. The Indian Lands Open Dump Cleanup Act

The Indian Lands Open Dump Cleanup Act, or "Indian Lands Open Dump Act," directs the Director of the Indian Health Service, in conjunction with EPA, to study and inventory open dumps on Indian lands, including the geographic location of all open dumps, to evaluate the contents and assess the threat to public health and the environment posed by the open dump, and to develop cost estimates for the closure and postclosure maintenance of dumps. 25 U.S.C. §§ 3901-3908. The statute directs the Indian Health Service to "provide financial and technical assistance to the Indian tribal government . . . to carry out the activities necessary to (1) close such dumps; and (2) provide for postclosure maintenance of such dumps." *Id.* § 3904(b). "Priorities on specific Indian lands . . . shall be developed in consultation with the Indian tribal government . . . ." *Id.* § 3904(c).

5. The 1850 Treaty between the United States and the Navajo Nation

The United States entered into a Treaty with the Navajo Nation on September 9, 1850, under which the Navajo Nation conceded the United States' exclusive authority to regulate commerce with the Navajo Nation and the United States. Article I "placed [the Navajo Nation] under the exclusive jurisdiction and protection of the Government of the said United States . . . ." *See* Treaty with the Navajo, September 9, 1849, Ratified September 9, 1850, Proclaimed September 24, 1850, 9 Stat. 974. The most significant part of the 1850 Treaty was a peace pact reciting that "hostilities between the contracting parties [the United States and the Navajo Nation] shall cease, and perpetual peace and friendship shall exist . . . ." *Id.* Art. II.

C. Response Actions at the Dump

In 1998, BIA undertook to close the Dump. Docket 65-2 ¶ 14, JA 344. Among other actions, BIA consolidated the Dump's remaining solid waste, installed a cover over a portion of the Dump, and fenced a portion of the Dump to limit access. *Id.* In February 2000, EPA issued to BIA a notice of violation under RCRA and directed BIA to complete closure of the Dump and to conduct further investigations into

subsurface soils and groundwater conditions. Since then, BIA, with the active participation of EPA, the Hopi Tribe, and the Navajo Nation, has conducted or sponsored, at a cost of more than $4.5 million, various studies to characterize the Dump conditions. *Id.*

In 2008, BIA committed to conduct a remedial investigation/feasibility study at the Dump. *Id.* ¶ 15. On September 10, 2010, BIA and EPA entered into an Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study, which, we will refer to as the "Administrative Settlement," under CERCLA sections 104, 107 and 122, 42 U.S.C. §§ 9604, 9607 and 9622. Docket 65-2, JA 333.

Under the Administrative Settlement, BIA agrees to conduct and complete a remedial investigation and feasibility study under EPA's oversight. *See* 42 U.S.C. § 9604. The remedial investigation shall "consist of collecting data to characterize site conditions, determining the nature and extent of the contamination at or from the Site, assessing risk to human health and the environment and conducting treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered."

Docket 65-2 ¶ 31, JA 349. The feasibility study shall "determine and evaluate . . . alternatives for remedial action to prevent, mitigate or otherwise respond to or remedy the release or threatened release of hazardous substances, pollutants or contaminants from the Site." *Id.*

Additionally, BIA completed in June 2009 a study of potential interim actions that may be needed to address risk to public health and the environment prior to the completion of the remedial investigation and feasibility study. *Id.* ¶ 15, JA 344-45. That study concluded that fencing of the unfenced portion of the Dump was prudent to prevent risks arising from direct contact with exposed waste. *Id.* Soon thereafter, with financial assistance from the Indian Health Service, BIA fenced that portion of the Dump. *Id.* In addition, using funding provided by BIA, EPA has completed an investigation of a portion of the Site located near one monitoring well installed in the shallow, downgradient groundwater. *Id.* The data developed as a result of this work will be incorporated into the remedial investigation portion of the remedial investigation/feasibility study. *Id.*

IV. PROCEDURAL HISTORY

EPNG filed this lawsuit in May 2007, bringing claims under the Mill Tailings Act and RCRA, which are joined by the Nation as intervenor. EPNG initially characterized as its "primary" claim for relief the Mill Tailings Act claim which sought to challenge a purported Energy "determination" not to include the Dump and the Highway 160 Site within the Tuba City "processing site." Docket 11 at 1, JA 122; Docket 7 ¶¶ 70, 88-102, JA 105, 111-14. The district court granted the United States' motion to dismiss EPNG's claim because the Mill Tailings Act precludes judicial review and entered judgment under Rule 54(b). Docket 23, 24, 40, JA 127, 137, 138. On appeal, this Court affirmed. *El Paso Natural Gas Co. v. United States*, 632 F.3d 1272 (D.C. Cir. 2011).

The district court then turned to EPNG's and the Nation's other claims, which primarily relate to the Dump and the Highway 160 Site. The first set of claims is under RCRA. 42 U.S.C. §§ 6972(a)(1)(A), 6972(a)(1)(B) and 6972(a)(2). In their subsection (a)(1)(B) claim, the Plaintiffs allege that the United States has contributed to, or is contributing to, the past or present handling, storage, treatment,

transportation, or disposal of solid or hazardous waste at the Dump and Highway 160 Site which may present an imminent or substantial endangerment to health or the environment. Docket 7 ¶ 83, JA 110; Docket 41 ¶ 81, JA 164. The Plaintiffs seek, among other relief, a court order compelling the United States to perform clean-up activities to abate alleged imminent threats to human health or the environment at both sites. Docket 7 ¶ H, JA 37; Docket 41 ¶ I.3, JA 174. In their subsection (a)(1)(A) claims, the Plaintiffs allege that the United States treated, stored, or disposed of waste at the Dump and Highway 160 Site in violation of RCRA requirements. Docket 7 ¶¶ 105-09, JA 115-16; Docket 41 ¶¶ 76-77, JA 162-63. In their subsection (a)(2) claim, the Plaintiffs contend that EPA has failed to perform an alleged nondiscretionary duty to conduct an annual inspection of the Dump and Highway 160 Sites. Docket 7 ¶ 111, JA 116; Docket 41 ¶ 82, JA 164.

Beyond the claims asserted by both plaintiffs, the Nation alone brought certain additional claims under the American Indian Agricultural Resource Management Act (the Second Claim for Relief), the Mill Tailings Act (the Third and Fourth Claims for Relief), the Navajo Nation Clean Water Act (the Eighth Claim for Relief), and the

Indian Lands Open Dump Cleanup Act (the Ninth Claim for Relief). Docket 41, JA 165-70. The Nation also claims the United States breached specific trust duties found in RCRA, the Mill Tailings Act, the Clean Water Act, the Navajo Nation's Clean Water Act, the 1850 Treaty, and federal common law (the Tenth Claim for Relief). *Id.*

The United States first moved to dismiss all of the Nation's non-RCRA claims for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Docket 52. While that motion remained pending, the United States moved to dismiss EPNG's and the Nation's RCRA claims as barred by CERCLA section 113(h). Docket 65. The district court granted both motions in separate orders. Docket 67, 81, JA 3, 27. These consolidated appeals followed.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal of a claim for either lack of jurisdiction or failure to state a claim on which relief can be granted. *Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011). Each claim in this case falls in one of those two categories.

EPNG argues in its statement on the standard of review that CERCLA section 113(h) is not a jurisdictional bar. EPNG Br. 18-20. But

that section provides that "[n]o Federal court shall have jurisdiction under Federal law other than section 1332 of title 28 (relating to diversity of citizenship jurisdiction) . . . to review any challenges to removal or remedial actions selected under [CERCLA section 104]." 42 U.S.C. § 9613(h). This Court has described section 113(h) as a "blunt withdrawal of federal jurisdiction," *Oil, Chem. & Atomic Workers Int'l Union*, 214 F.3d at 1382, and that is the better view as it comports with the plain language of the statute. As the Supreme Court explained in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006), "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed." Congress clearly stated that section 113(h)'s limitations deprive federal courts of "jurisdiction under Federal law." And in the same sentence it excepted from that limitation suits based on diversity jurisdiction, one of the two "basic statutory grants of federal-court subject-matter jurisdiction." *Id.* at 513. Congress's use of the word "jurisdiction" combined with its explicit reference to the diversity jurisdiction statute make plain that section 113(h)'s limitations are

jurisdictional. *See Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1218-20 (9th Cir. 2011).

SUMMARY OF ARGUMENT

I. The district court correctly dismissed the RCRA claims seeking particular remedial actions at the Dump for lack of jurisdiction. Section 113(h) of CERCLA provides that federal courts do not have jurisdiction to review challenges to a removal or remedial action selected under CERCLA section 104, with some exceptions that no one contends apply here. EPA and BIA entered into an administrative order on consent under CERCLA section 104 that requires BIA, under EPA's oversight, to perform a remedial investigation/feasibility study at the Dump. Those actions fall within CERCLA's definition of a "removal" action and neither EPNG nor the Nation contend that the remedial investigation/feasibility study is not a removal action.

EPNG and the Nation seek injunctive relief that would affect BIA's efforts, with EPA oversight, to identify the nature and extent of contamination and evaluate remedial alternatives to respond to or remedy any release or threatened release of hazardous substances at the Dump. A court order to complete particular remedial actions would

necessarily interfere with the ongoing effort to evaluate and choose the appropriate remedial actions at the Dump. Because the RCRA claims challenge an ongoing removal action, they are barred by section 113(h).

II. The district court also correctly dismissed the Nation's other statutory claims related to the Dump. Neither the Indian Agricultural Act nor the Indian Lands Open Dump Act contains a private right of action, and there is no indication in either statute that Congress sought to implicitly create one. Thus, any applicable cause of action must come from the APA. The Nation did not challenge any final agency action or nondiscretionary agency action unlawfully withheld for either of the two statutes and thus did not state a claim under the APA.

The Indian Agricultural Act provides that the Secretary of the Interior shall "conduct all land management activities" in accordance with "all tribal laws and ordinances," and contains a general obligation on the Secretary to "comply with tribal laws and ordinances pertaining to Indian agricultural lands." Such general directives to comply with the law do not create the kind of "discrete" agency responsibility to act that may be compelled under the APA. Similarly, the Indian Lands Open Dump Act requires certain "financial and technical assistance" to

close open dumps, which is a broad mandate that imposes no specific duty with respect to how much or what type of assistance to provide. It is therefore not the kind of provision that creates a discrete obligation to act that is enforceable through suit under the APA.

III. The Nation's claims under the Mill Tailings Act fare no better. That Act requires tribes, when they enter into a cooperative agreement with the United States under the Act, to waive claims arising out of the remedial actions. Thus, the Mill Tailings Act evidences Congress's intent to preclude APA review of agency remedial actions under the Act, and the APA therefore does not apply as a vehicle to review the Nation's claims. But even if the APA applies, the Nation has released all of its claims against the United States, including any claim for failure to act under section 706(1) of the APA. Finally, the Nation has failed to identify a discrete failure to act and thus failed to state a claim under the APA.

IV. The district court also correctly dismissed the Nation's breach of trust claims. Breach of trust claims must focus on the enforcement of fiduciary duties in circumstances where Congress has set forth a specific duty for the federal government to carry out. In the absence of a

specific duty that has been placed on the government with respect to the Nation and remediation of the Mill, the Dump, or the Highway 160 Site, the United States' general trust responsibility is discharged by compliance with generally applicable regulations and statutes. None of the statutes that the Nation relies on place such a specific duty on the government and the Nation's breach of trust claims were therefore properly dismissed. Further, to the extent the breach of trust claims are related to the Dump, they are barred by CERCLA section 113(h) for the same reasons that the RCRA claims are barred.

V. All claims related to the Highway 160 Site are moot. Congress has appropriated funds to clean up that site, and the Nation and the Department of Energy entered into a cooperative agreement and agreed to the scope of work to be done with those funds. Those cleanup measures have been completed, and the Nation released the United States from any claims arising from that cleanup when it signed the cooperative agreement. As for EPNG, it earlier agreed that cleanup of the Site would obviate the need to decide its claims there, and it does not have standing in any event to assert those claims on its own.

VI. Finally, the district court correctly dismissed the United States' counterclaim as moot. EPNG seeks to have the counterclaim dismissed with prejudice, but because EPNG actually seeks to review the district court's denial of EPNG's earlier motion to dismiss, which is normally not immediately reviewable on appeal, the better course in the event of reversal on EPNG's other claims would be to remand the matter to the district court. Regardless, the United States' counterclaim states a claim under RCRA. RCRA's citizen suit provision explicitly allows suit by any person, and defines any person to include the United States. Further, that the allegations in the counterclaim are conditional on EPNG or the Nation prevailing in their claims is neither unusual nor prohibited.

The district court correctly dismissed each of the claims in this case. Its judgment should therefore be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED CLAIMS UNDER RCRA AS BARRED BY CERCLA § 113(h).

The EPA and BIA have exercised authority under CERCLA section 104 to enter into the Administrative Settlement and are engaged in ongoing efforts to address releases or threatened releases of hazardous substances at the Dump through the remedial investigation/feasibility study. The RCRA claims in this lawsuit challenge those efforts by seeking injunctive relief that would displace them. CERCLA section 113(h) provides that courts do not have jurisdiction to adjudicate challenges to ongoing CERCLA removal actions. 42 U.S.C. § 9613(h). The district court therefore correctly dismissed the RCRA claims.

A. CERCLA section 113(h) bars the RCRA claims in this lawsuit.

CERCLA section 113(h) provides that "[n]o Federal court shall have jurisdiction" under federal law, with some exceptions not relevant here, "to review any challenges to removal or remedial action selected under section 9604 of this title." *Id.* Thus, for the section 113(h) bar to apply, two conditions must be met. First, the relevant agency must have initiated a removal or remedial action. Second, the claims at issue must

be a "challenge" to that removal or remedial action. *See* 42 U.S.C. § 9613(h); *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Here, both conditions are easily satisfied.

First, EPA and BIA's activities at the Dump are a "removal action" under CERCLA section 104. EPA and BIA entered into the Administrative Settlement under CERCLA section 104, and that Administrative Settlement requires BIA, under EPA's oversight, to perform a remedial investigation/feasibility study at the Dump site. Docket 65-2, JA 333.

CERCLA's statutory definition of "removal" is broad and includes preliminary activities that are necessary first steps in any cleanup action, including "actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . . ." 42 U.S.C. § 9601(23). The definition of removal also includes "action taken under [CERCLA section 104(b)]," *id.*, which in turn provides that whenever action is authorized under section 104(a), the President "may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release . . . , the source and

nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment." *Id.* § 9604(b)(1). The statutory definition of removal thus includes the remedial investigation/feasibility study that EPA and BIA have initiated at the Dump. Indeed, neither EPNG nor the Nation contends that the remedial investigation/feasibility study does not constitute a removal action under the definitions provided in CERCLA.[1]

Second, the RCRA claims related to the Dump "challenge" an ongoing removal action. Through the remedial investigation/feasibility study BIA, under EPA oversight, will identify the nature and extent of contamination and evaluate remedial alternatives to respond to or

[1] If the statutory language and the Plaintiffs' failure to contest the point were not enough, courts have uniformly concluded that a remedial investigation/feasibility study, in particular, fits within the category of "removal action" selected under CERCLA section 104. *See*, *e.g.*, *Razore*, 66 F.3d at 238-39 (holding remedial investigation/feasibility study is removal action under CERCLA and dismissing RCRA claims that would affect ongoing removal action); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1023 (3d Cir. 1991) (holding that section 113(h) applied because the EPA had begun removal action once it had communicated its intent to conduct a remedial investigation/feasiblity study); *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996) ("a [remedial investigation/feasibility study] is a removal action"); *APWU v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003) ("'Removal actions' are defined broadly to include not only the cleanup and removal [of hazardous substances], but also the undertaking of studies, investigations, testing and other information gathering activities . . . .").

remedy any release or threatened release of hazardous substances at the Dump. A remedial investigation/feasibility study is a necessary step in any CERCLA remedial action. *See* 40 C.F.R. Part 300.

At the same time, EPNG and the Nation seek a court order directing the United States to "perform cleanup activities necessary to abate present and imminent threats to human health or the environment" at the Dump. Docket 7 ¶ H, JA 118; Docket 41 ¶ I.3, JA 174. The request for injunctive relief seeks the court's intervention in EPA and BIA's ongoing response action and calls for the court to step in to order the performance of specific actions at the Dump. Therefore, this suit is a "challenge" precluded by CERCLA section 113(h) because the relief sought would require the court to preempt EPA and BIA's ongoing remedy selection process—itself a removal action—and would necessarily entail the court's direct interference in the ongoing response action.

The case law overwhelmingly supports the conclusion that any suit seeking injunctive relief that would interfere with an ongoing removal or remedial action is a "challenge" precluded by CERCLA section 113(h). *See*, *e.g.*, *Cannon v. Gates*, 538 F.3d 1328, 1335 (10th Cir.

2008) (holding that a suit requesting injunctive relief ordering the remediation of the property "would undoubtedly interfere with the Government's ongoing removal efforts"); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995) (no jurisdiction over a challenge in which plaintiffs asked the court to second-guess the appropriateness of remedial action and sought an injunction requiring compliance with RCRA permitting requirements); *Razore*, 66 F.3d at 239-40 (no jurisdiction to entertain a suit that, if successful, would "dictate specific remedial actions and . . . alter the method and order for cleanup . . . prior to a determination of the ultimate remedial plan," in violation of 113(h)); *Alabama v. EPA*, 871 F.2d 1548, 1559 (11th Cir. 1989) (holding that a suit requesting injunctive relief constitutes a challenge for purposes of section 113(h)).[2] In short, the district court correctly dismissed the RCRA claims for lack of jurisdiction.

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[2] Furthermore, CERCLA section 113(h) bars suits under any federal law, including RCRA, when its prerequisites are met. *See Cannon*, 538 F.3d at 1332-36 (dismissing RCRA citizen suit claims because claims challenged response action and were barred by CERCLA section 113(h)); *OSI, Inc. v. United States*, 525 F.3d 1294, 1297-99 (11th Cir. 2008) (same); *APWU*, 343 F.3d at 624-25 (2d Cir.) (same); *Clinton Cnty. Comm'rs v. EPA*, 116 F.3d 1018, 1026-28 (3d Cir. 1997) (same); *McClellan Ecological Seepage Situation*, 47 F.3d at 328-30 (9th Cir.) (same); *Ark. Peace Ctr.*, 999 F.2d at 1217-18 (8th Cir.) (same); *N. Shore*

The district court also correctly dismissed the RCRA claims with prejudice. EPNG argues that dismissal should have been without prejudice because section 113(h) "affects the timing but not the availability of judicial review." Br. 21. Dismissal without prejudice means "dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim." *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001). But EPNG cannot return later with the same RCRA claim because section 113(h) flatly removes federal court jurisdiction of challenges to removal or remedial actions under federal law unless one of its exceptions apply, and none of those exceptions allow RCRA claims challenging completed removal or remedial actions. *See* 42 U.S.C. §§ 9613(h)(1)-(5).

The basis for calling section 113(h)'s bar a limitation on the "timing" of review is an exception allowing citizen suits filed under CERCLA alleging that a completed removal or remedial action was taken in violation of the requirements of CERCLA. 42 U.S.C. § 9613(h)(4). But that exception does not allow a challenge under other

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Gas Co. v. EPA, 930 F.2d 1239, 1241-44 (7th Cir. 1991) (same); *see also Oil, Chem. & Atomic Workers*, 214 F.3d at 1382 (dismissing NEPA claim on basis of § 113(h)).

federal laws, including RCRA, to a completed removal or remedial action. Because there is no applicable exception for RCRA claims, the RCRA claims challenging the removal action in this case are barred even after that removal action is complete. The district court's dismissal of the RCRA claims challenging the removal action was therefore appropriately with prejudice. *See Freeman v. FDIC*, 56 F.3d 1394, 1406 (D.C. Cir. 1995) (affirming dismissal on merits "with prejudice" after finding lack of jurisdiction, "on grounds that the district court was statutorily barred from hearing the claims."). *But see Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C. Cir. 1999) (affirming dismissal for lack of jurisdiction with prejudice, but modifying order to dismissal without prejudice because "dismissals for lack of jurisdiction are not decisions on the merits").

B. EPNG cannot demonstrate that section 113(h) does not bar its RCRA claims.

In its brief on appeal, EPNG (joined by the Nation in its brief) advances four arguments to avoid the conclusion that its RCRA claims are barred by CERCLA section 113(h). As explained below, none of EPNG's arguments is persuasive.

1. EPA and BIA's authority to act under CERCLA is not subject to challenge and the agencies were authorized to act under CERCLA in any event.

EPNG begins with a new twist on its ever-evolving view on the presence of hazardous waste at the Dump. EPNG Br. 21-31. In its complaint, EPNG repeatedly alleged that radioactive waste from the Mill and other hazardous waste had been illegally disposed at the Dump. Docket 7 ¶¶ 1, 2, 7-9, 13, 17, 19-22, 68, 69, 71, 76, 77, 79-87, 92-94, 101, 102, 105, 108, 111, JA 83-116. When the United States moved to dismiss because it was implementing a CERCLA response action, EPNG contended that the district court should assume jurisdiction because whether or not any hazardous waste present at the Dump occurred naturally was "intertwined with the merits," Docket 73, and sought discovery to disprove its own allegations about the release of hazardous substances at the Dump, Docket 74. Now, EPNG has gone a step further and completely abandoned its allegations to argue that any hazardous material at the Dump is "most likely" a naturally occurring substance, and thus CERCLA section 104 does not authorize the United States to act at the Dump, and section 113(h) therefore does not apply. EPNG Br. 21-31. The Nation restates its belief that radioactive waste

from the Mill is present at the Dump, thus disagreeing with the fundamental premise of EPNG's argument, but it purports to join that argument anyway. Br. 54 n.12.

EPNG relies on section 104(a)(3)(A), which states that the "President shall not provide for a removal or remedial action . . . of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." 42 U.S.C. § 9604(a)(3). EPNG, relying primarily on the remedial investigation/feasibility study Workplan, contends that any hazardous substances at the Dump are naturally occurring, and thus the agencies did not have authority to act under section 104. EPNG Br. 25-27. EPNG is wrong for a number of reasons.

First, EPNG's challenge to EPA's authority to act under CERCLA section 104 is itself a challenge to the response action that is prohibited by CERCLA section 113(h). There can be no question that the agencies *are* acting under section 104 and that, as explained above, the action is a "removal" action under CERCLA. The Administrative Settlement invokes CERCLA section 104 and makes clear that the agreement "is

issued under the authority vested in the President of the United States by sections 104, 107, and 122 of CERCLA." Docket 65-2 at 1, JA 335.

EPNG challenges the agencies' *authority* to act under those sections, but that argument is itself an explicit "challenge" to the ongoing removal action and is therefore barred by section 113(h). Section 113(h) precludes "any" challenge to the United States' response actions under CERCLA. "Any" challenge necessarily includes a challenge to EPA's authority to take a specific action under CERCLA. *See City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865, 876-77 (9th Cir. 2009) (holding section 113(h) barred challenge to authority to issue unilateral administrative order under CERCLA because "whether or not a UAO exceeds the EPA's statutory authority necessarily depends on factual considerations unique to that UAO, specifically, whether the issuance of the particular UAO in question met the *substantive* requirements of the statute").

Otherwise, a potentially responsible party, such as EPNG, who seeks to avoid any financial responsibility for a cleanup could readily evade the section 113(h) jurisdictional bar simply by characterizing its suit as a challenge to the validity of EPA's determination that there has

been a release or threatened release of hazardous substances. Creating such a loophole in section 113(h) would largely eviscerate Congress's intent to prevent time-consuming litigation by potentially responsible parties, as well as interfere with CERCLA's goal of effecting the prompt cleanup of hazardous waste sites. *See Oil, Chem. & Atomic Workers Int'l Union v. Pena*, 62 F. Supp. 2d 1, 5 (D.D.C. 1999) ("It simply cannot be denied that Congress intended to preclude all litigation which would delay, or worse, halt governmental efforts to clean hazardous waste sites."), *aff'd*, 214 F.3d 1379 (D.C. Cir. 2000). EPNG's argument challenging the agencies' authority to act under CERCLA must therefore be rejected as itself an impermissible challenge to a removal action.[3]

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[3] EPNG also challenges the Administrative Settlement, claiming it is a "nullity," because EPA did not give an opportunity for notice and comment on the Administrative Settlement as allegedly required by CERCLA section 122(i). Br. 26 n.4. That argument is an impermissible challenge to the response action and is incorrect. Section 122(i) requires notice and comment only for de minimis settlements under 122(g), which the Administrative Settlement is not, and for cost-recovery settlements under 122(h) for claims by the United States under section 107. 42 U.S.C. § 9622(i). The only costs EPA is getting from BIA under the Administrative Settlement are EPA's costs for oversight of the work performed by BIA, which are specifically required by 104(a)(1) as a condition for EPA to allow BIA to perform the remedial investigation/feasibility study. 42 U.S.C. § 9604(a)(1).

Second, even if a challenge to the agencies' authority to act under CERCLA were permitted, the undisputed facts demonstrate that the agencies have such authority here. EPA expressly determined in the Administrative Settlement that there is an actual or threatened release of hazardous substances at the Dump. Docket 65-2 ¶ 20, JA 346. ("The conditions described in Paragraphs 12-17 above constitute an actual and/or threatened 'release' of a hazardous substance from the Site . . . ."). EPNG attempts to undermine that conclusion by pointing to snippets from the Workplan, EPNG Br. 25-26, but it ignores that the Workplan itself notes some evidence that EPNG's predecessor, Rare Metals, disposed of waste from the Mill at the Dump. Docket 73-6 to 8, JA 392 (noting that "area residents recall seeing trucks from the Rare Metals facility dumping wastes at the [Dump]" and noting that a ceramic ball typical of what would have been used in milling operations was observed on the surface of the Dump). Thus, both the Administrative Settlement and the Workplan support the agencies' conclusion that there is an actual or threatened release of hazardous substances at the Dump.

Moreover, EPNG's and the Nation's own complaints repeatedly allege the release of hazardous substances at the Dump. Docket 7 ¶¶ 1, 2, 7-9, 13, 17, 19-22, 68, 69, 71, 76, 77, 79-87, 92-94, 101, 102, 105, 108, 111 (alleging disposal of RCRA hazardous waste at the Dump or disposal of residual radioactive waste from former Tuba City uranium mill), JA 83-116; Docket 41 ¶¶ 15, 20, 23-27, 58-59, 61, 64-73, 76, 79-83 (same), JA 144-65. EPNG attempts to escape its own pleading by focusing on "naturally occurring" uranium and casting its allegations as only "alternative" allegations. Br. 29-30. But EPNG plainly alleged the disposal of *both* non-naturally occurring "hazardous waste" and non-hazardous solid wastes. Docket 7 ¶ 81, JA 109 (alleging that Defendant Health and Human Services has "disposed of medical waste and other solid and hazardous waste" at the Dump). And EPNG made abundantly clear in its district court briefing that the fundamental purpose of its action is to establish responsibility for hazardous, non-naturally occurring "residual radioactive materials." Docket 11 at 4-5, JA 125-26. Indeed, in the prior appeal in this case, EPNG stated in its brief that the "radioactive waste that contaminated these two parcels came from

the Mill, a fact that no one disputes." Op. Br. at 7, No. 10-5080 (D.C. Cir. Sept. 20, 2010).

EPNG's about-face following dismissal does not call into question the finding in the Administrative Settlement that there is an actual or threatened release of hazardous substances at the Dump sufficient to invoke CERCLA section 104. And, of course, the Nation continues to hold the view that hazardous substances were released at the Dump. Br. 54 n.12. There being no actual dispute over the agencies' authority to act under CERCLA, the district court correctly concluded that the agencies are authorized to proceed under CERCLA and section 113(h) bars the RCRA claims in this case.

2. CERCLA section 113(h) bars challenges to a selected removal action regardless of whether the removal action contains an "objective indicator" of a schedule for completion.

EPNG's second argument is that its RCRA suit should be allowed to proceed despite section 113(h) because the Administrative Settlement is only the latest in a long line of studies and does not require the BIA to complete the remedial investigation/feasibility study or commit either agency to performing remedial work. Br. 31-34. The Nation makes a similar argument in its brief. Br. 54-58. In making the

argument, both EPNG and the Nation rely on the Seventh Circuit's decision in *Frey v. EPA*, 403 F.3d 828 (7th Cir. 2005). But *Frey* is inconsistent with what this Court has called section 113(h)'s "blunt withdrawal of federal jurisdiction," *Oil, Chem. & Atomic Workers*, 214 F.3d at 1382, and distinguishable from this case in any event.

In *Frey*, the Seventh Circuit considered whether a group of citizens could bring a citizen suit under CERCLA after the only remedial action selected for the site had been completed, but while EPA was still doing investigative work in preparation for other remediation. 403 F.3d at 832-33. The plaintiffs contended that because section 113(h) only bars "challenges to removal or remedial action *selected*," and the only selected remedial action was complete, they could maintain their suit until some other remedy was selected in a formal record of decision. 403 F.3d at 833-35. The Seventh Circuit refused to "go so far as to hold that EPA must have issued either a ROD or a ROD Amendment before it obtains the breathing room afforded by § 113(h)." *Id.* Nevertheless, the Seventh Circuit concluded that the Frey group could maintain its suit because EPA had completed the only selected remedy and had not provided any "objective indicator that allows for an external evaluation,

with reasonable target completion dates, of the required work for a site" but had instead continued a "desultory testing and investigation process of indefinite duration." *Id.*

Frey does not help EPNG or the Nation because it did not consider a challenge to a selected removal action, as is the case here. In *Frey*, the court considered what activities short of the actual selection of a remedial action were sufficient to invoke section 113(h)'s bar, and concluded that "active remedial planning" would not do so unless it was accompanied by an objective indicator of the time frame for selecting a remedy. *Id.* But *Frey* explicitly concluded that the investigation and studies at issue in that case did *not* constitute a *removal a*ction either, *id.* at 835-36, and section 113(h) equally bars challenges to remedial and *removal* actions selected.

Here, it is uncontested that the remedial investigation/feasibility study is not just "active remedial planning," but instead constitutes a section 104 removal action that has been selected by EPA. *See also supra* note 1. Thus, the remedial investigation/feasibility study is not an activity that is preliminary to a selected section 104 removal action, it *is* the selected removal action itself. *Frey* does not stand for the

proposition that where a remedial or removal action has actually been selected by the EPA there must be some objective indication of the time to complete that action to forestall judicial review. Adopting that requirement would graft a new requirement onto the plain language of section 113(h), which "strips federal court jurisdiction once the Government has begun" a CERCLA removal action. *Cannon*, 538 F.3d at 1333. The Seventh Circuit did not hold that selected removal or remedial actions in *Frey* are subject to such a requirement, and this Court should decline EPNG's and the Nation's invitation to do so here.

But even if such an objective indicator were required for the completion of a removal action EPA has selected, the Administrative Settlement provides it. The Administrative Settlement requires BIA to conduct a remedial investigation/feasibility study under an EPA-approved schedule set forth specifically in the Workplan. Docket 65-2 ¶¶ 5, 6, 9, 11(t), 25, 31, JA 336-50; Docket 73-6 to 8 at 112, JA 417. The Workplan schedule includes a start date and finish date for 48 specific tasks and subtasks that must be completed by BIA. Docket 73-6 to 8 at 112, JA 417. The EPA-approved schedule contained in the Workplan and any modifications thereto are an enforceable part of the

Administrative Settlement. Docket 65-2 ¶¶ 11(t), 33, JA 343, 351. BIA is subject to stipulated penalties for failure to comply with any of the requirements in the Workplan, including the specified time schedules set forth in the Work Plan. Docket ¶ 60, JA 366.

EPNG's argument to the contrary rests on the possibility, accounted for in the Administrative Settlement, that Congress will not appropriate sufficient funds to carry out the cleanup. Br. 34. But whether the Administrative Settlement said so or not, a lack of appropriations is always a possibility, and no court could compel an agency to expend money not appropriated by Congress. U.S. Const. art. I, § 9, cl. 7; *City of Houston v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1428 (D.C. Cir. 1994).

EPNG also suggests that the theoretical possibility that, at the conclusion of the required remedial action/feasibility study, EPA could determine that no further remediation work is necessary makes jurisdiction proper now. Br. 34. But section 113(h) nevertheless requires dismissal of challenges to ongoing CERCLA removal action. *See, e.g.*, *Razore*, 66 F.3d at 239 (although selection of a "no-action" alternative following conclusion of a remedial investigation/feasibility study is

"theoretically possible," the court cannot "ignore the clear mandate of section 113(h)" and allow challenge to proceed).

Finally, EPNG's and the Nation's attempts to characterize the remedial investigation/feasibility study as just another study in an endless stream of studies, and the agencies' choice to proceed through CERCLA as a last-ditch effort designed to avoid suit, though irrelevant, fail. EPNG Br. 28, 31-32; NN Br. 55-58. Those arguments are contrary to the presumption of regularity afforded administrative agency decisionmakers. *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978). Moreover, CERCLA is precisely intended and designed to remedy threats to human health and the environment posed by historic waste disposal activities, and thus, CERCLA is a suitable statutory authority for addressing contamination at the Dump under other federal laws, including RCRA. 42 U.S.C. § 9621(d).

While RCRA provides EPA alternative authority to obtain certain clean-up operations, it applies to a narrower class of hazardous materials than CERCLA "hazardous substances." Among other things, RCRA excludes from its definition of "solid waste," "source, special nuclear, or byproduct material as defined by the Atomic Energy Act." 42

U.S.C. § 6903(27). Here, the Plaintiffs themselves alleged that this exclusion applies and prevents EPA from addressing any residual radioactive waste at the Dump under its RCRA authority. Docket 7 ¶¶ 8, B, JA 87, 117; Docket 41 ¶ C.2, JA 34-35 (seeking declaration that waste in the Dump constitutes "source, special nuclear or byproduct material" under the Atomic Energy Act excluded from coverage under RCRA). Thus, the Plaintiffs' current insistence that EPA erred in electing to use CERCLA authority at the Dump rings hollow. In any event, EPA's decision to use its CERCLA authority instead of, or as a supplement to, its RCRA authority is a "policy question [] appropriate for agency resolution." *Apache Power Co. v. United States*, 968 F.2d 66, 69 (D.C. Cir. 1992).

The remedial investigation/feasibility study also adds a great deal to the existing studies. As explained in the Workplan, previous investigations provided significant insight into the environmental threats at the Dump. Docket 73-6 to 8 at 36, JA 405. The activities under the Administrative Settlement will be focused on filling remaining data gaps by gathering the additional data necessary to select a final site remedy that will both comply with applicable

requirements and be protective of human health and the environment. *Id.* at 36, 43-44, JA 405, 411-12. The Workplan describes in detail the additional non-duplicative necessary work that will be conducted to fill data gaps. *Id.* Furthermore, under the National Contingency Plan, a remedial investigation/feasibility study must be completed before selecting a CERCLA "remedial action." 42 U.S.C. § 9604; 40 C.F.R. § 300.430.

3. The Plaintiffs' RCRA claims are barred by section 113(h) even if they were filed before the agencies initiated the removal action under the Administrative Settlement.

a) The plain language of section 113(h) bars challenges to removal actions even if contained in a lawsuit filed before the particular removal action began.

EPNG's third argument is that its RCRA claims are not barred because they were filed before the agencies entered into the Administrative Settlement and thus were not filed as "challenges" to that removal action. Br. 35-46. But it makes no difference whether the RCRA claims were, at the time of the filing of this lawsuit, challenges to the Administrative Settlement. The relevant question is whether the claims are, at this point, challenges to the Administrative Settlement. Just as with any other jurisdictional issue, jurisdiction must persist throughout the lawsuit, and if at any time a court loses jurisdiction over

the case, the case must be dismissed. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). The RCRA claims are *now* challenges to a removal action, and that is enough to invoke section 113(h)'s withdrawal of jurisdiction.

Nothing in the plain language of section 113(h) suggests that a court has jurisdiction to review what would otherwise clearly be a challenge to a removal action because at the time the lawsuit was filed there was no removal action to challenge. Section 113(h) precludes federal question jurisdiction to "review *any* challenges" to a removal or remedial action under section 104. 42 U.S.C. § 9613(h). The statute thus strips federal courts of jurisdiction to review a lawsuit if, at any time, that suit constitutes a challenge to a removal or remedial action under section 104. *River Village West LLC v. People Gas Light & Coke Co.*, 618 F. Supp. 2d 847, 852 (N.D. Ill. 2008) ("A plain language reading of § 113(h) demonstrates that the provision makes no reference to the timing issues presented by Plaintiffs and speaks in general terms of the inability of federal courts to hear challenges to removal or remedial actions.").

b) Applying section 113(h) here is consistent with congressional intent.

While the plain language of section 113(h) alone is dispositive, EPNG also misses the mark in characterizing its position as consistent with congressional intent. It is not. Through section 113(h), Congress sought "to limit the public's ability to challenge EPA cleanup decisions and bolster CERCLA's goal of granting the EPA full reign to conduct or mandate uninterrupted clean-ups." *Jach v. Am. Univ.*, 245 F. Supp. 2d 110, 114 (D.D.C. 2003). It would plainly frustrate congressional intent to allow EPA's cleanup decisionmaking process to be eliminated, or EPA's cleanup decisions to be undermined or postponed by litigation, whether litigation was filed before or after formal commencement of an EPA section 104 response action. EPNG points to nothing in the legislative history or case law that supports its characterization of legislative intent. Br. 38-40.

To the contrary, all of the legislative history and case law that EPNG points to fully supports application of the jurisdictional bar here. For example, the House Report cited by EPNG notes that the provision will "ensure that there will be *no delays* associated" with a legal challenge to an action under section 104. H.R. Rep. No. 99-253(V), at

25-26 (1985). It makes no difference whether the challenge was filed before or after the removal action was undertaken—delay is delay, and Congress sought to prevent delay. Similarly, none of the cases EPNG relies on, Br. 39-40, stands for any proposition other than that Congress sought to bar challenges to EPA's cleanup activities, and none suggests that the timing of the challenge makes any difference. Finally, the paucity of case law on this subject is not, as EPNG suggests, evidence that Congress did not intend for section 113(h) to apply in this case. Br. 40. Instead, it demonstrates that EPNG's and the Nation's fears that EPA uses section 113(h) as a "sword" to defeat previously filed lawsuits is unfounded.

c) Applying section 113(h) here does not conflict with RCRA's citizen suit provisions.

EPNG also argues that applying section 113(h) to bar a previously filed RCRA lawsuit is inconsistent with RCRA's citizen suit provisions. Br. 41-46. But it is well established that section 113(h) bars suits under any federal law, including RCRA, when its prerequisites are met, notwithstanding that courts might otherwise have been able to exercise jurisdiction. *See supra* note 2. Thus, whether jurisdiction would have existed under the terms of another statute absent section 113(h) is not

relevant. This is particularly clear with respect to the RCRA citizen suit provision, inasmuch as section 113(h) was enacted two years after the RCRA citizen suit provision. Section 113(h):

> was drafted and approved with full knowledge of a citizen's ability to file a [RCRA] suit seeking the abatement of an imminent and substantial endangerment to the public health and the environment. Had Congress intended to leave suits initiated under this provision untouched by § 113(h), it could have crafted an exception for such suits.

River Vill., 618 F. Supp. 2d at 852-53. Congress did not craft an exception for RCRA citizen suits, and this Court should decline to read one into the statute.

In any event, the limitations in the RCRA citizen suit provision on which EPNG focuses actually buttress the application of section 113(h). It is not the case, as EPNG argues, that interpreting section 113(h) as Congress intended "renders certain RCRA provisions meaningless." Br. 41, 45-46. Each of the distinct limitations on suit set forth in CERCLA and RCRA may or may not apply to particular suits and particular claims. As relevant here, the language in section 113(h) by its terms prohibits "challenges to removal or remedial action selected under section [104]." 42 U.S.C. § 9613(h). In contrast, the restrictions in the RCRA citizen suit provision do not require any consideration of whether

a particular suit constitutes a "challenge" to CERCLA removal or remedial action. Thus, the restrictions in RCRA's citizen suit provision, 42 U.S.C. § 6972(b)(2)(B), might apply in instances where the CERCLA jurisdictional bar does not. This would be the case, for example, in instances where EPA "is actually engaging in a removal action," *id.*, but where the complaint does not "challenge" the removal or remedial action and therefore is not subject to the section 113(h) bar. For the reasons we have set forth, the Dump claims here constitute a challenge to a section 104 CERCLA action and therefore are subject to the section 113(h) jurisdictional bar.

EPNG also argues that RCRA's provisions requiring a potential plaintiff to notify the EPA before filing suit mean that if notice is given, and EPA does not begin a CERCLA removal or remedial action in response, then a RCRA citizen suit is fair game and remains so even after EPA selects a removal or remedial action. Br. 44-46. But notice requirements apply to all three RCRA citizen suit causes of action, are in separate subsections from the RCRA bar on the commencement of endangerment suits where removal actions are underway, and clearly are intended to allow EPA to take RCRA enforcement action—not to

prompt EPA to start CERCLA response actions. 42 U.S.C. § 6972(b)(1)(A), (b)(2)(A), (c). It would be quite odd for Congress to have adopted a scheme whereby notice of intent to sue under RCRA is designed to prompt action under CERCLA, such that an otherwise barred CERCLA lawsuit would be permitted if the agency failed to begin CERCLA action within the RCRA notice period.

4. The RCRA claims challenge the Administrative Settlement.

EPNG's final argument is that section 113(h) does not apply because the RCRA claims "will not delay or otherwise affect any CERCLA response action at the site." Br. 47-55. EPNG is mistaken. EPNG first relies on *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), to argue that it does not seek to question any final CERCLA remedy, but only seeks to compel compliance with Part 258 of the RCRA regulations. Br. 47-48. But *Colorado* is readily distinguishable from the circumstances here. In *Colorado*, the Tenth Circuit found that section 113(h) did not bar the State of Colorado's enforcement of state hazardous waste laws at a federal facility. In reaching this result, the Court relied on CERCLA section 114, which provides that "[n]othing in [this chapter] shall be construed or interpreted as preempting any State

from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." *Id.* at 1576 (quoting 42 U.S.C. § 9614). Thus, the Court limited its holding to an action brought by a State to enforce requirements that are not in conflict with a CERCLA cleanup. [4]

In *Cannon* the Tenth Circuit later confirmed that its decision in *Colorado* was limited to actions by a State to enforce state hazardous waste programs, concluding that citizen suit claims under RCRA brought by private parties were barred by CERCLA section 113(h). 538 F.3d at 1335-36. Similarly, in *Denver*, 100 F.3d at 1514, the Tenth Circuit distinguished *Colorado* and held that the city and county of Denver were barred by section 113(h) from enforcing local hazardous waste laws. *See also Ark. Peace Ctr.*, 999 F.2d at 1218 ("The Tenth

[4] EPNG misses the point when it argues that a RCRA enforcement action is proper because Congress prohibited RCRA endangerment claims while a CERCLA section 104 action is actively proceeding but did not extend that prohibition to RCRA enforcement claims. Br. 51. While such suits may not be prohibited by RCRA, that says nothing about whether they are prohibited by the later-enacted CERCLA section 113(h). As we have explained at length, section 113(h) is a "blunt withdrawal of jurisdiction," *Oil, Chem. & Atomic Workers*, 214 F.3d at 1382, regardless of whether jurisdiction would have been proper under another statute.

Circuit [in *Colorado*] limited its holding to an action brought by a state. . . .").

EPNG's contention that its claims seeking to enforce the RCRA municipal solid waste landfill regulations in 40 C.F.R. Part 258 cannot interfere with the Administrative Settlement is misplaced. Br. 53-55. The Part 258 regulations are intended to apply to municipal solid waste landfill units, as opposed to landfills that receive hazardous waste. *See* 40 C.F.R. § 258.1(b). Thus, the specific requirements of Part 258 are, in fact, not necessarily appropriate for a landfill that has received hazardous waste.

For example, the Nation has characterized "excavation and out-of-Indian country, off-site disposal of waste materials" (that is, clean closure) as the "only appropriate remedy" at the Dump. Docket 41 ¶ 1, JA 140. Assuming, solely for sake of discussion, that EPA were to select a "clean closure" remedy following conclusion of the remedial investigation/feasibility study, such remedy would be outside the scope of the Part 258 closure regulations. Part 258 regulations do not provide for excavation and off-site disposal of waste materials as the prescribed closure procedure, but instead contemplate that waste will be left in

place, with the installation of a "cover system that is designed to minimize infiltration and erosion." 40 C.F.R. § 258.60.

Further, both EPNG and the Nation sought very specific injunctive relief that would interfere with the ongoing response action. One need look no further than the first paragraph of the Nation's complaint, in which the Nation avers that it has "consistently asserted that the only appropriate remedy for the [Dump] is 'clean closure,' i.e., the excavation and out-of Indian country, off-site disposal of the waste materials . . . ." Docket 41 ¶ 1, JA 140; *id.* ¶ 14, JA 144 ("clean closure" is the only appropriate remedy); *id.* ¶ I.6, JA 174 (requesting entry of an order that would require United States to "provide financial and technical assistance to the Navajo Nation to carry out the activities necessary to effect clean closure of the [Dump]"). Thus, the Nation has made clear that it seeks to foreclose implementation of any response action that EPA might select other than "clean closure" (that is, any remedy that leaves waste materials in place or that contains such waste materials within Indian country). Any injunctive relief that determined the remedy would necessarily short-circuit the CERCLA process already underway.

Similarly, the Nation appended a declaration in the district court further clarifying the Nation's position that installation of a groundwater remediation system is "immediately necessary." Docket 73-9 ¶ 7, JA 438. Thus, the Nation has made clear that it seeks to foreclose any response action that does not include immediate installation of a groundwater treatment system. That relief undoubtedly challenges the ongoing removal action because it would preempt EPA's consideration of the results of the remedial investigation/feasibility study and determine what the appropriate remedy should be.

But even if Plaintiffs' requests for relief had been limited to their more general requests for the court to order the United States to perform "necessary" response actions at the Dump, their requests for "necessary" injunctive relief also plainly seek to interfere with the United States' response actions. The relief sought would require the court to preempt EPA's technical judgments as to what response actions are "necessary" and the appropriate timing and sequencing of response actions. For example, the Tenth Circuit in *Cannon* observed that the plaintiffs' RCRA claims had generally requested "injunctive relief

ordering the remediation of their property" and based on this request alone, the Tenth Circuit concluded plaintiffs' suit "would undoubtedly interfere with the Government's ongoing removal efforts." 538 F.3d at 1335. Indeed, "'[n]early every court to address the scope of section 113(h) has concluded that litigation which interferes with even the most tangential aspects of a cleanup action is prohibited.'" *Jach*, 245 F. Supp. 2d at 114 (citation omitted).

Finally, EPNG's argument that the conclusion that section 113(h) bars their RCRA action necessarily eliminates BIA's obligation to comply with RCRA is misplaced. Br. 51-53. A conclusion that federal courts do not have jurisdiction to review an action is not the same thing as a conclusion that the federal government does not have to comply with the statute. RCRA, and its obligations on the BIA, remain in force; they are simply not enforceable in federal court insofar as they impermissibly challenge a CERCLA removal or remedial action. 42 U.S.C. § 9613(h). Indeed, to the extent RCRA applies or is relevant and appropriate, CERCLA requires any remedial action selected under section 104 to require a "level or standard of control" that at least attains RCRA's standards. 42 U.S.C. § 9621(d)(2)(A).

II. THE DISTRICT COURT CORRECTLY DISMISSED THE NAVAJO NATION'S INDIAN AGRICULTURAL ACT AND INDIAN LANDS OPEN DUMP ACT CLAIMS.

The Nation contends that the district court erred in dismissing two of its other statutory claims that are primarily related to the Dump.[5] In its complaint, the Nation's second claim alleges that the Indian Agricultural Act incorporates tribal law by reference, and the federal government has thus violated the Indian Agricultural Act by failing to comply with tribal law. Docket 41 ¶¶ 84-88, JA 165-66. The Nation's ninth claim alleges that the Indian Health Service "has failed and refused to consult with the Navajo Nation" in violation of the Indian Lands Open Dump Act. *Id.* ¶¶ 116-120, JA 170. Neither the Indian Agricultural Act nor the Indian Lands Open Dump Act contains a private right of action. The Nation did not challenge any final agency action or nondiscretionary agency action unlawfully withheld for either of the two statutes and thus did not state a claim under the APA.

[5] To the extent those claims are related to the Dump, they challenge the ongoing removal action there and are barred by CERCLA section 113(h) for the same reasons the RCRA claims related to the Dump are barred.

A. The Indian Agricultural Act

The Nation contends that the federal government has violated the Indian Agricultural Act by failing to comply with two tribal laws—the Navajo Clean Water Act and the Navajo Nation Civil Trespass Act. Br. 28. It argues that section 3712 of the Indian Agricultural Act implicitly creates a private right of action allowing the Nation to sue for violations of tribal law. Br. 38-45. But in doing so it ignores section 3712(d) of the Act, which explicitly provides that "[t]his section does not constitute a waiver of the sovereign immunity of the United States." 25 U.S.C. § 3712(d). As the Supreme Court has explained, when determining whether Congress created an implied right of action, the "first inquiry is whether there has been a waiver of sovereign immunity." *FDIC v. Meyer*, 510 U.S. 471, 483-84 (1994). Only if there is a waiver does "the second inquiry"—whether the substantive law provides an avenue for relief—"come[] into play." *Id.* at 484.

Here, Congress expressly retained sovereign immunity in the Indian Agricultural Act, and thus the Court cannot imply a private

right of action under that statute.[6] The Nation argues that section 3712(d) simply prevents the United States from being sued in tribal court, Br. 43-44, but that ignores that section 3712(d) clearly contains two separate clauses with separate meanings: it provides that the section is not a waiver of sovereign immunity "*nor* does it authorize tribal justice systems to review actions of the Secretary." 25 U.S.C. § 3712(d) (emphasis added).

No private right of action being available under the Indian Agricultural Act, the Nation argues that it states a claim under the APA because the Secretary failed to act in compliance with the law. Under the APA, a federal court can only remedy a "failure to act" that

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[6] Though under this Court's precedent, the "APA's waiver of sovereign immunity applies to any suit whether under the APA or not," *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C.Cir.1996)), and thus may waive immunity against suits seeking to enforce the Indian Agriculture Act through injunctive relief, Congress's reservation of the United States' sovereign immunity in the Indian Agriculture Act itself is good evidence that Congress did not intend to create a right of action under that Act. Instead, any right of action is contained in the APA. And, as even the Nation recognizes, there is hardly ever reason to find that Congress implicitly created a right of action in the substantive statute because the APA provides a cause of action. *See*, *e.g.*, *Godwin v. Sec'y of HUD*, 356 F.3d 310, 312 (D.C. Cir. 2004). The Court therefore should not use the APA's waiver of sovereign immunity to infer a right of action under a statute that itself expressly reserves the United States' sovereign immunity.

amounts to withholding an action that is both "discrete" and "legally *required*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004). The Indian Agricultural Act provides that the Secretary of the Interior shall "conduct all land management activities" in accordance with "all tribal laws and ordinances," 25 U.S.C. § 3712(a), and contains a general obligation on the Secretary to "comply with tribal laws and ordinances pertaining to Indian agricultural lands," *id.* § 3712(b). Such general directives to comply with the law do not create the kind of "discrete" agency responsibility to act that may be compelled under the APA. And, as the district court observed, a general obligation to act in compliance with tribal law *when the agency acts* does not impose an "affirmative duty to act for the purpose of preventing violations of tribal law." Docket 67 at 16, JA 18. The Nation seeks an order requiring the Secretary to comply with its laws, but the APA does not authorize federal courts to "enter general orders compelling compliance with broad statutory mandates" like the ones on which the Nation relies. *SUWA*, 542 U.S. at 66-67.

Further, the Nation alleges that the Secretary is violating its laws by, for example, failing to get a permit and failing to abate a trespass, it

does not allege that either the Navajo Clean Water Act or Navajo Nation Civil Trespass Act impose the kinds of discrete, mandatory duties that may be compelled under the APA. Navajo Nation Code Ann. tit. 4 § 1321; *id.* tit.16 § 2203. Nor, as the district court pointed out, has the Nation alleged that the Secretary failed to comply with tribal laws while "conducting land management activities." Docket 67 at 16, JA 18. There being no failure to take a discrete action that is legally required, the Nation's APA claim based on the Indian Agricultural Act was properly dismissed.

B. The Indian Lands Open Dump Act

The Indian Lands Open Dump Act also does not create a private right of action. The Act provides for IHS to study and inventory open dumps on Indian lands, including the geographic location of all open dumps, evaluate the contents and assess the threat to public health and the environment posed by the open dump, and to develop cost estimates for the closure and postclosure maintenance of such dumps. 25 U.S.C. §§ 3903-3904. The statute directs the IHS to "provide financial and technical assistance to the Indian tribal government . . . to carry out the activities necessary to (1) close such dumps; and (2) provide for

postclosure maintenance of such dumps." *Id.* § 3904(b). That assistance is to be made "available on a site-specific basis in accordance with priorities developed by the Director." *Id.* § 3904(c). "Priorities on specific Indian lands . . . shall be developed in consultation with the Indian tribal government." *Id.*

Those statutory provisions do not reflect Congress's intent to create a private right of action. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."*Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). In conducting that inquiry, statutory intent is determinative. *Id.* (citing *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 812, n.9 (1986) (collecting cases)). Without statutory intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.*

The Indian Lands Open Dump Act simply does not contain the type of "rights-creating language" the Supreme Court has found necessary to imply a right of action. *Id.* at 288. As in *Sandoval*, the

provisions of the Act do not focus on the individuals protected or the recipients of funding, "but on the agencies that will do the regulating." *Id.* at 289. For example, the Act instructs the agency to conduct inventories, determine relative severity, and develop cost estimates—not the sort of rights-creating provisions that the Supreme Court has found create implied rights of action. Indeed, even the provision the Nation relies primarily upon, section 3904(b), makes its "financial and technical assistance" subject to the "priorities developed" by the agency. 25 U.S.C. § 3904(b), (c). And where a statutory provision is "phrased as a directive to federal agencies engaged in the distribution of public funds," there is "far less reason to infer a private remedy in favor of individual persons." *Sandoval*, 532 U.S. at 289 (quoting *Univs. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 772 (1981) and *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-91 (1979)).

It also does not matter in the analysis that the statute was created for the benefit of Indian tribes. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Supreme Court held that the consultation requirement of the American Indian Religious

Freedom Act—a statute created for the benefit of Indian tribes—does not create a private right of action. *Id.* at 455.

Moreover, the Nation's main argument in the district court regarding the Indian Lands Open Dump Act concerned the alleged failure of the Indian Health Service to consult with the Nation. Docket 41 ¶¶ 116-120, JA 170. But consultation provisions do not create private rights of action. *See*, *e.g.*, *Lyng*, 485 U.S. at 455; *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (National Historic Preservation Act does not create a private right of action).

Further, as even the Nation notes, Br. 27, because the APA already supplies a right of action, it would be an extraordinary case indeed to find that Congress implicitly created a separate private right of action to enforce an obligation against the federal government. *See*, *e.g.*, *Godwin*, 356 F.3d at 312 (holding that section of the Fair Housing Act confers no right of judicial review when the Secretary declines to issue a housing discrimination charge). As this Court explained, that is true regardless of whether ordinary APA review was available (and, in that case, it construed the APA to bar review), because the Court is obligated to presume that Congress intended the APA to provide the

remedy for challenges to federal agency action, and that "Congress would make explicit any intent to create a cause of action in these circumstances." *Godwin*, 356 F.3d at 312. Thus, it is important not only that APA review is the presumptive means for review of federal agency action, but also that courts should be especially wary of adopting new means of review of agency action even where the APA otherwise limits the availability of judicial review.

And here, the Nation cannot state a claim under the APA either because it has not identified a final agency action it is challenging or a failure to take discrete, required action under the Indian Lands Open Dump Act. Once again, the Nation focuses on the Act's direction that the agency provide "financial and technical assistance" to close the dump and provide postclosure maintenance, claiming that provision creates a discrete obligation to act. Br. 32. But the instruction to provide "financial and technical assistance" is a general statutory obligation and imposes no specific duty with respect to how much or what type of assistance to provide and is therefore not the kind of provision that creates a discrete obligation to act. *See*, *e.g.*, *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009).

Moreover, that assistance is itself made conditional by the very next section in the statute, which gives the agency the discretion to provide assistance "in accordance with priorities" developed by the agency in consultation with the tribes. 25 U.S.C. § 3904(c). Such discretionary language does not provide a cause of action under the APA for a failure to act.

III. THE DISTRICT COURT CORRECTLY DISMISSED THE NAVAJO NATION'S MILL TAILINGS ACT CLAIMS.

The Nation contends that the district court erred in dismissing its Mill Tailings Act claims (the third and fourth claims for relief in its complaint, which relate to remediation of the Mill) because the APA provides a waiver of sovereign immunity and cause of action for those claims, and they are seeking to compel agency action unlawfully withheld under the APA. Br. 18-26; 5 U.S.C. § 706(1). But by its terms the APA does not apply "to the extent that statutes preclude judicial review." 5 U.S.C. § 701(a)(1). As the Supreme Court recently explained, "in determining '[w]hether and to what extent a particular statute precludes judicial review,' we do not look 'only [to] its express language.'" *Sackett v. EPA,* 132 S.Ct. 1367, 1372-73 (2012) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)). Thus, although

the APA creates a "presumption favoring judicial review of administrative action," it "may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Block*, 467 U.S. at 349.

Both the express language and intent of the Mill Tailings Act demonstrate that Congress intended to preclude judicial review "concerning such remedial action" where a Tribe enters into a cooperative agreement with the United States to perform remedial action under that Act. 42 U.S.C. § 7915(a)(1). Congress provided that cooperative agreements "shall contain" terms and conditions, and that those terms and conditions "shall require" that Tribes "shall execute" a waiver "releasing the United States of *any liability or claim* thereof by such tribe . . . concerning . . . remedial action," and "holding the United States harmless against *any claim* arising out of the performance of any . . . remedial action." *Id.* (emphasis added).

By making the waiver of claims concerning the remedial action a mandatory component of any cooperative agreement, Congress evidenced its intent to preclude judicial review of claims against the United States concerning the remedial actions encompassed within the cooperative agreement. Here, the Nation executed such a waiver as part

of the 1985 cooperative agreement. Docket 52-4 at 17-18, JA 214-15. That waiver, consistent with the Act's direction, provides that the Tribe agrees to "release[] the Government from, and hold[] the Government harmless against, any liability or claim thereof by the Tribe arising out of the performance of any remedial action on such millsite, vicinity property or depository site." *Id*. Thus, if the Nation's claims fall within the terms of the statutorily mandated waiver, the Mill Tailings Act precludes review, and the APA does not apply.[7] 5 U.S.C. § 701(a)(1).

The Nation's two Mill Tailings Act claims fall within the terms of the waiver that the Nation signed in the 1985 cooperative agreement. Docket 52-4, JA 214. The Nation's only argument on appeal is the conclusory argument that its claims arise "after the purported completion" of the remedial action and thus do not arise from its performance. Br. 20, 22. A close look at the Nation's third and fourth claims for relief demonstrates that each of its claims arises out of the

[7] Even if the Mill Tailings Act does not preclude judicial review within the meaning of the APA, and the APA applies such that the district court had jurisdiction, the terms of the waiver release the United States from "any liability or claim arising out of the performance of any remedial action," which would include any claim under the APA. Thus, if the Nation's claims arise out of the performance of the remedial action, the waiver itself would bar an APA claim, and this Court could affirm the district court's dismissal on that basis.

performance of the remedial action as defined in the cooperative agreement.

The Nation mentions its third claim for relief only briefly and obliquely, when it refers to the requirement that the remedial action be designed to be effective for at least 200 years. Br. 18, 24. In its complaint, the Nation alleges that Energy's selected "design" for remedial action at the Mill does not comport with EPA's standard regarding the design of remedial actions at 40 C.F.R. § 192.02(a). But as the district court concluded, the "design" of the remedial action is part of the "performance" of that action under the express terms of the cooperative agreement. Docket 52-4 at 4, JA. 200 (defining "remedial action" to include "the assessment, design, construction, renovation reclamation, decommissioning, and decontamination activities"). Accordingly, a challenge to performance of the "design" of remedial action is, by definition, a challenge to performance of the remedial action under the terms of the cooperative agreement.

Further, the EPA standards at issue, by definition, apply to the "performance" of "remedial actions" taken by Energy under the Mill Tailings Act, and to nothing else. *See* 40 C.F.R. § 192.00 ("This subpart

applies to the control of residual radioactive material at designated processing or depository sites under Section 108 of [the Mill Tailings Act]"); 40 C.F.R. § 192.01 (defining "remedial action" to be "any action performed under Section 108" of the Mill Tailings Act). Thus, any challenge to Energy's compliance with the EPA standards at issue is, by definition, a challenge to Energy's performance of remedial actions under the Mill Tailings Act.

The Nation alleges in its fourth claim that the United States: (1) has failed "to take appropriate action" under the Mill Tailings Act related to groundwater remediation; and (2) has "failed to complete remedial action" by a purportedly applicable September 30, 1998 deadline. Docket 41 ¶¶ 94-98, JA 167. Under either formulation of the claim, the claim arises out of Energy's performance of remedial actions and is barred by the release. The "failure to take appropriate action" contention arises out of Energy's performance of allegedly "inappropriate" actions. The "failure to complete" contention arises out of Energy's allegedly untimely performance of remedial actions. Either way, the fourth claim is barred by the release.

Even if the waiver and release did not bar the Nation's claims, the judgment would have to be affirmed because the Nation failed to state a claim under the APA. The Nation argues it has stated a claim to compel agency action unreasonably delayed in its fourth claim for relief, Br. 23-26, but the district court correctly concluded that the Nation had failed to do so. Docket 67 n.4, JA 10 n.4.

The Supreme Court has made clear that a claim under APA section 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64. The Nation's complaint, its briefing in the district court, and its brief on appeal all fail to identify such a requirement for its fourth claim for relief, in either the statute or the implementing regulations. Indeed, nothing in the Act requires the agency to take any particular action, on any particular timeframe, with respect to groundwater restoration. *See* 42 U.S.C. §§ 7901-7925. The only two mentions of groundwater restoration in the statute are a direction to perform groundwater restoration at the Moab processing site, 42 U.S.C. § 7912(f)(3)(A), and a subsection making clear that, while the general authority to perform remedial actions expired in 1998, "the authority of

the Secretary to perform groundwater restoration activities . . . is without limitation," *id.* § 7922(a)(1). And while the regulations contain various provisions on groundwater, 40 C.F.R. § 192.02, the Nation's complaint fails to specify which provision it seeks to compel compliance with, and instead baldly states that "[Energy] has failed to take appropriate action to restore groundwater" without citation. Docket 41, JA 167.

There being no allegation of a "discrete" action that the United States has failed to perform with respect to groundwater restoration, the Nation has not stated a claim under the APA on which relief can be granted. *Karst Envtl. Educ. and Prot., Inc. v. EPA*, 475 F.3d 1291, 1297-98 (D.C. Cir. 2007) ("Because Karst has failed to allege that either EPA or HUD engaged in final agency action, we shall affirm the district court's dismissal of the complaint against those two agencies."); *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002) ("Although Tulare County refers to the existence of foresters on the ground, the complaint does not identify these foresters' acts with sufficient specificity to state a claim.")

IV. THE DISTRICT COURT CORRECTLY DISMISSED THE NATION'S CLAIMS BASED ON THE UNITED STATES' TRUST DUTIES.

With respect to all three sites at issue in the appeal, the Nation alleges that the United States has breached alleged fiduciary duties owed to the Nation.[8] Br. 49-54. None of the statutory provisions on which the Nation relies provides any specific fiduciary duties. There is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*")). While that general trust relationship allows the federal government to take discretionary actions in favor of Indian tribes, it does not impose a duty on the federal government to take action beyond complying with generally applicable statutes and regulations. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."). This Court has emphasized that "[w]ithout an unambiguous provision by Congress

[8] To the extent the Nation's breach of trust claims relate to the Dump and challenge the ongoing removal action, they are also barred by CERCLA section 113(h) for the reasons described above.

that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *Id.*

The Supreme Court has also distinguished between a general trust responsibility which the United States owes to all federally recognized Indian tribes and those specific fiduciary duties which arise when the United States manages Indian property pursuant to the standards prescribed in federal statutes and regulations. *Mitchell II*, 463 U.S. at 209, 217-218, 220-25; *United States v. Mitchell*, 445 U.S. 535, 541-43, 545-46 (1980) ("*Mitchell I*"); *Inter Tribal Council v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995). This distinction is the central principle affirmed by the Supreme Court in its decisions in *United States v. Navajo Nation*, 537 U.S. 488 (2003) and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). The only cognizable breach of trust claim is one founded upon a definite and express fiduciary duty imposed on the federal government by administrative regulation or Act of Congress. *Navajo*, 537 U.S. at 511; *White Mountain Apache*, 537 U.S. at 477; *see also United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2318 (2011) ("The trust obligations of the

United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law."). Stated differently, breach of trust claims must focus on the enforcement of fiduciary duties in circumstances where Congress has set forth a specific duty for the federal government to carry out.

In the absence of a specific duty that has been placed on the government with respect to the Nation and remediation of the Mill, the Dump, or the Highway 160 Site, the United States' general trust responsibility is discharged by compliance with generally applicable regulations and statutes. *N. Slope Borough v. Andrus*, 642 F.2d 589, 611-12 (D.C. Cir. 1980); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000) (Tribe's claim that BLM approval of gold mine violated trust obligations is satisfied by agency's compliance with NEPA). When a tribe asserts the applicability of a more demanding fiduciary duty, "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *United States v.*

Navajo Nation, 537 U.S. 488, 490 (2003). As discussed below, the statutes cited in the Nation's complaint do not meet this standard.

A. 25 U.S.C. § 640d-9

In its brief on appeal, the Nation relies primarily on the statute taking the land at issue into trust. 25 U.S.C. § 640d-9. In making its argument that the location of the Tuba City sites on trust property results in enforceable fiduciary duties, the Nation relies upon the Supreme Court's decision in *White Mountain Apache*. Br. 50. In doing so, the Nation ignores the actual analysis required by *White Mountain Apache* and other Supreme Court decisions applying the Tucker Act to Indian breach of trust claims, including *Navajo Nation*, *Mitchell II* and *Mitchell I*. "The claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *Mitchell II*, 463 U.S. at 216-17 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). The threshold showing required under the fair interpretation test is an identification of "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that establish the

"specific fiduciary or other duties" that the government has allegedly failed to fulfill. *Navajo Nation*, 537 U.S. at 506.

In claiming that all actions that occur on trust land result in enforceable breach of trust actions, the Nation fundamentally misapplies Supreme Court precedent and is contrary to the results in the *Mitchell I* and *Navajo Nation* decisions, insofar as the government had a trust relationship with the Tribes and held the resources at issue in those cases in trust (timber in *Mitchell I* and mineral resources in *Navajo*). Contrary to the Nation's arguments, in both decisions the Supreme Court found the specific claims and statutes at issue did not contain enforceable trust duties, and that general trust law played no role in supplementing the limited obligations established in the relevant statutes at issue in those cases. *Mitchell I*, 445 U.S. at 544 (Congress intended the United States to hold land " 'in trust' " under the General Allotment Act "simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation"); *Navajo I*, 537 U.S. at 507-08 (Indian Mineral Leasing Act imposes no "detailed fiduciary responsibilities" nor is the government "expressly invested with responsibility to secure 'the needs

and best interests of the Indian owner' "); *see also Jicarilla*, 131 S.Ct at 2324-25. Moreover, *White Mountain Apache* supports the same analysis and the Supreme Court noted that *Mitchell II* turned on an analysis of how specific "statutes and regulations," not common law principles, "define[d] . . . [the] contours of the United States' fiduciary responsibilities." *White Mountain Apache*, 537 U.S. at 474. The Court went on to explain that such a "source of law was needed to provide focus for the trust relationship," in order to "find a specific duty" owed by the government. *Id.* at 477. In short, that the sites are located on trust land does not negate the requirement for specific statutory duties.

B. The Mill Tailings Act

The Nation's breach of trust claim states that the alleged "violations of [the Mill Tailing Act's] requirements to encourage public participation and hold hearings, [and] failure to designate vicinity properties" also creates liability for the federal government on a breach of trust claim. Docket 41 ¶ 126, JA 171. But in the previous appeal this Court affirmed the dismissal on the claims alleging failure of the federal agencies to encourage public participation and alleging failure to designate vicinity properties under the Act. Therefore, the district court

correctly dismissed the breach of trust claim. *See Gros Ventre*, 469 F.3d at 814 (evaluating only the underlying environmental statutory claim and holding that the Tribes cannot allege an independent common law cause of action for breach of trust because the breach of trust claims are no different from what can be brought under the generally applicable environmental statutes).

The Complaint also claims that "other above-described actions and omissions taken contrary to law" breach the trust relationship. Docket 41 ¶ 126, JA 171. Even though it is not specific, the United States reads this sentence to mean that the Nation believes its other claims, which focus on Energy's actions under the Mill Tailings Act to stabilize and control mill tailings at the Mill site itself, have also resulted in a violation of the trust. Even though the Act arguably sets forth actions the federal government was to take with regard to uranium mill sites and vicinity properties, as stated above, the statute does not allow for challenges, and Energy has carried out remediation action at the Mill in compliance with the statute.

Finally, any claim based upon the Mill Tailings Act should be dismissed based upon the Nation's broad waiver of claims against the

United States related to the performance of remedial actions performed under that Act at the Mill. Docket 52-4 at 17-18 (waiving and holding the federal government harmless from "any liability or claim thereof by the Tribe arising out of the performance of any remedial action on such millsite, vicinity property or depository site."), JA 214-15. The waiver broadly includes any claims for breach of trust under the Mill Tailings Act, such as those being pursued here.

C. RCRA

The Nation claims the federal government violated RCRA by failing to remediate or require the remediation of environmental degradation at the sites. Docket 41 ¶¶ 74-83, 126, JA 162-65, 171. The Nation's Complaint does not set forth specific duties in RCRA, nor show how Congress has required the federal government to remediate sites in Indian country in a specific manner. In the absence of such a specific duty to carry out certain actions, the federal government cannot be forced to take specific action. *Shoshone-Bannock Tribes*, 56 F.3d at 1482 ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."). As such, the RCRA breach of trust claim was

properly dismissed because it did not set forth an independent cause of action and the alleged breach of trust claims are part and parcel of the claims brought under the generally applicable environmental statutes. *See Gros Ventre*, 469 F.3d at 814.

D. The Indian Agricultural Act and the Indian Lands Open Dump Act

The Nation claims that it also bases its breach of trust claim on specific statutory commands found in the Indian Lands Open Dump Act and the Indian Agricultural Act. Though it is unable to point to specific statutory provisions, the Nation claims the Indian Agricultural Act and the Indian Lands Open Dump Act codify preexisting trust duties "to be complemented with principles of general trust law." Br. at 52 (citing *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) ("*Cobell IV*")). "An Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Shoshone Bannock Tribes*, 56 F.3d at 1482. The Nation's invocation of the general trust duty and reference to *Cobell VI* does not establish an enforceable trust duty under either statute. Instead, a Court must look first for an unambiguous provision by Congress that clearly outlines a federal trust responsibility. *See*

Jicarilla, 131 S.Ct at 2324-25; *N. Slope Borough*, 642 F.2d at 612. And the Nation has failed to demonstrate that any provisions in the Indian Agricultural Act or the Indian Lands Open Dump Act show such an unambiguous intent by Congress to create an enforceable trust duty.

V. ALL CLAIMS RELATED TO THE HIGHWAY 160 SITE ARE MOOT AND EPNG LACKS STANDING TO ASSERT ITS CLAIM ON ITS OWN.

A. The Highway 160 Site claims are moot.

The claims related to the Highway 160 Site are moot because Congress has appropriated funds to clean up that site and the cleanup measures agreed to by the Nation and Energy have been completed. Article III limits the judicial power of federal courts to live "cases" or "controversies." The live case-or-controversy requirement subsists "through all stages of federal judicial proceedings." *Lewis*, 494 U.S. at 477. Here, there is no present justiciable Article III case or controversy related to the Highway 160 Site for the Court to decide because "the question sought to be adjudicated has been mooted by subsequent developments." *Natural Res. Def. Council v. NRC*, 680 F.2d 810, 813-14 (D.C. Cir. 1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). In particular, claims related to the Highway 160 Site have been mooted by the following developments subsequent to the commencement of this

litigation: (1) Congress' passage in March 2009 of the Energy and Water Development and Related Appropriations Act of 2009, 123 Stat. at 601, 617, which provided Energy with a $5 million appropriation and authority to perform characterization and remediation of radiological contamination at the Highway 160 Site; and (2) entry of cooperative agreements between the Nation and Energy under authority of the Mill Tailings Act section 105.

In its agreements with the United States, the Nation has accepted $4.5 million in federal funding and has agreed to assume "overall responsibility for the Highway 160 Site characterization and remediation." Docket 65-4 at 9, JA 427. The Nation has further agreed on the scope of work to be performed at the Site and expressly released the United States of any liability or claim concerning the Nation's performance of such remedial actions. *Id.* at 2, JA 421. As a result of these developments, there is no longer any concrete and substantial controversy between the parties related to the Highway 160 Site, and no effective relief this Court could order with respect to cleaning that site up. Energy and the Nation agreed on what response actions were to

be performed by whom at the Site and how those actions were to be funded.

While the Nation contends that its release of the United States "of any liability or claim thereof . . . concerning" the remedial actions underway does not cover groundwater remediation or the RCRA claims the Nation still might conceivably wish to bring here, the district court correctly concluded that the release of "any liability or claim . . . concerning such remedial action" includes both of those possibilities. The release expressly covers "any liability or claim" "concerning such remedial action." Docket 65-4 at 2, JA 421. As the purpose of the agreement is to provide funding "for the environmental remediation of a site commonly referred to as the Highway 160 site," *id.*, and as the agreed upon scope of work is intended "to complete remediation of the Highway 160 Site," *id.* at 7, the release language plainly encompasses "any liability or claim concerning" "the environmental remediation of" the Highway 160 Site. Any claim seeking to compel performance of additional restoration actions beyond those agreed to in the scope of work—like additional groundwater restoration—is also a claim relating to and "concerning" "remedial action" at the Highway 160 Site, and falls

within the scope of the waiver. Because the Nation "has agreed on a remediation plan and released the United States from liability related to the Highway 160 site, there is no longer a live controversy." Docket 81 at 20, JA 46.

Indeed, EPNG, though it joins the Nation's argument on this point, EPNG Br. 55, earlier conceded that a ruling resulting in Energy's designation of the Highway 160 Site as a "vicinity property" under the Mill Tailings Act and performing remediation "would entirely resolve this matter and would obviate the need for any ruling on EPNG's secondary and alternative claims under [RCRA]." Docket 11 at 2, JA 124. Thus, EPNG has conceded that its RCRA claims related to the Highway 160 Site would be moot if cleanup of the Site could be addressed through remediation efforts by the United States—which is the result of the congressional appropriations. At this point, the principal relief with respect to the Highway 160 Site that EPNG sought to obtain– cleanup of that Site utilizing Federal funding – has already been obtained through Congress' 2009 appropriation of funds to Energy to perform cleanup and Energy's entry of the cooperative agreement with the Nation. EPNG's claim is therefore moot as well.

B. EPNG lacks standing to bring its RCRA claim on its own.

But even if EPNG's claim related to the Highway 160 Site is not moot, the district court correctly concluded that EPNG's claim must be dismissed because the Nation's claim is moot, and EPNG lacks standing to assert the claim on its own. The three elements of constitutional standing are: (1) a concrete, and actual or imminent injury-in-fact, that is (2) traceable to the alleged actions of the defendants, and (3) a substantial likelihood that the injunctive relief requested will redress that injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

Here, unlike in the typical RCRA citizen suit, EPNG is neither the present owner of the sites at issue, nor a nearby resident, business owner, nor a concerned citizen alleging that he or she suffers physical or aesthetic harm from contamination at the sites. Instead, EPNG's only alleged injury arises from the possibility that EPNG itself will be held liable, as a former operator of the Mill, for cleanup activities necessary to abate threats to human health and the environment posed by residually radioactive mill-related wastes–or the possibility that EPNG

will be held liable for personal injury claims arising from exposure to these wastes. Docket 7 ¶¶ 7, 76, 98, JA 86, 107, 113.

The possibility that EPNG will be held liable for cleanup activities at the sites, or for personal injury claims, in some speculative future litigation does not constitute a concrete, and actual or imminent, injury-in-fact. Indeed, in its amended complaint, EPNG does not point to any actual existing litigation against it other than referencing a personal injury suit filed by the Netzsosie family that involved mining, not milling, and has already settled. Docket 7 ¶ 76, JA 107; Docket 81 at 21, JA 47. And contrary to EPNG's argument, a dismissed counterclaim that the United States has stated is entirely contingent on EPNG prevailing on its RCRA claim, Docket 81 at 15 n.13, JA 41, is hardly a sufficient threat of injury to support EPNG's claim. That is especially so because maintenance of EPNG's claim would likely enhance, rather than diminish, the likelihood of their suffering the injury alleged.

Nor can EPNG meet the second and third elements of constitutional standing. Any potential liability that EPNG has is not "traceable to the alleged actions of the United States" but arises from EPNG's own actions as the operator of the former Tuba City uranium

mill. Further, there is no substantial likelihood that the injunctive relief EPNG requests under RCRA will redress its alleged potential economic injury. Even if EPNG were to succeed in obtaining injunctive relief requiring the United States to perform cleanup actions at the sites pursuant to authority of RCRA (as opposed to the cleanup efforts already underway), such injunctive relief would not remove any liability that EPNG itself may have at these sites as a result of its own actions as the former operator of the Mill. The district court's dismissal should therefore be affirmed.

VI. THE DISTRICT COURT CORRECTLY DISMISSED THE UNITED STATES' RCRA COUNTERCLAIM AS MOOT.

EPNG argues that the district court erred "in failing to dismiss" the United States' counterclaim. Br. 57-62. Of course, the district court did, in fact, dismiss the United States counterclaim—as moot. Docket 82, JA 49; Docket 81 at 15 n.13, 21, JA 41, 47. Because that dismissal was without prejudice, we assume EPNG is seeking dismissal with prejudice instead. Though this Court has noted that "[a] prevailing party may appeal a dismissal without prejudice on the grounds that it wants one with prejudice," *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 647 n.4 (D.C. Cir. 1998), the Court need not address the issue

if it affirms the dismissal of EPNG's complaint because the United States asserted a contingent counterclaim, *see id.* Indeed, given that what EPNG really seeks is an appeal of the district court's denial of its motion to dismiss the counterclaim, Docket 83, JA 186 (identifying order denying motion to dismiss in notice of appeal), in the event of a reversal on EPNG's RCRA claims the better course is to remand to the district court without addressing the United States' counterclaim.

Regardless, EPNG's arguments fail. The plain language of section 7002(a)(1)(B) authorizes the United States to bring a counterclaim against EPNG. Section 7002(a)(1)(B) states that "any person may commence a civil action" against any person to abate an imminent and substantial endangerment. 42 U.S.C. § 6972(a)(1)(B). RCRA further expressly defines "person" to include governmental agencies, including "each department, agency, and instrumentality of the United States." 42 U.S.C. §§ 6903(15); 6992e(b). Thus, according to the plain words of the statute, federal agencies are among the persons Congress authorized to bring a section 7002(a)(1)(B) action.

EPNG argues that Congress did not intend to authorize the United States to be able to bring a counterclaim because the EPA is

separately authorized to issue administrative orders and bring civil actions on behalf of the United States to abate conditions that may pose an imminent and substantial endangerment under RCRA section 7003(a), 42 U.S.C. § 6973(a). Br. 59. But the existence of a separate cause of action under section 7003(a) for EPA merely reflects Congress's intent to delegate primary enforcement of RCRA to EPA. While section 7003(a) authorizes EPA to bring an action to abate an imminent and substantial endangerment, it does not purport to limit the scope of actions that might be brought under section 7002(a)(1)(B), and, in particular, it does not limit the "persons" that may assert such actions.

And contrary to EPNG's suggestion, section 7002 actions by federal agencies other than EPA do not undermine or circumvent EPA's primary enforcement authority. No action may be commenced under section 7002(a)(1)(B), including actions by other federal agencies, until after EPA is given 90-days notice of the alleged endangerment. 42 U.S.C. § 6972(b)(2)(A). An action under RCRA section 7002(a)(1)(B) is prohibited in a number of circumstances, including where EPA has taken action pursuant to RCRA section 7003(a) or certain enumerated provisions of CERCLA. *Id.*§ 6972(b)(2)(B). Additionally, Congress gave

EPA the right to intervene in any action brought under section 7002(a)(1)(B). *Id.* § 6972(d).

Thus, in addition to informal coordination within the Executive Branch, there are statutory mechanisms in place to avoid any circumvention of EPA's primary enforcement authority and ensure that actions under section 7002(a)(1)(B) by other federal agencies complement, and do not frustrate, EPA's primary enforcement authority. Here, statutory notice of the intent to pursue a protective counterclaim was provided to EPA in April 2009 (Docket 55 ¶ 20, JA 177); therefore none of the statutory bars in section 7002(b)(2)(B) apply, and EPA's interests have been adequately addressed.

EPNG also notes, relying on legislative history, that Congress expressed its intent, in amending the definition of the term "person" in 1992, to ensure that federal agencies were subject to requirements of RCRA. But Congress also expressed its intent to ensure that "*all of the provisions* of [RCRA] apply in the same manner and to the same extent to both Federal and non-Federal persons." S. Rep. No. 102-67, at 5 (1991) (emphasis added). Nothing in this legislative history suggests that Congress specifically intended to prevent federal agencies from

bringing claims under section 7002, a right Congress had previously made available to all "persons" under the Act. Indeed, adopting that interpretation would be contrary to Congress's overriding purpose "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes." *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982); S. Rep. No. 98-284, at 59 (1983).

EPNG also contends that the United States has failed to state a claim because the counterclaim's allegations are conditional: the United States alleges that if EPNG or the Nation established an imminent and substantial endangerment in their suit, then EPNG is liable as well for that endangerment. Br. 61-62. The United States thus preserved its defenses to EPNG's claims while asserting a counterclaim that is contingent on EPNG's or the Nation's establishing that conditions exist which may present an imminent and substantial endangerment to health or the environment, and that the endangerment stems from a solid or hazardous waste as defined by RCRA. EPNG would have the United States choose between defending the allegations set forth in EPNG's complaint and foregoing any counterclaim, or conceding the

allegations set forth in the complaint and pursuing a counterclaim. But a defendant may properly assert a counterclaim against a plaintiff that is contingent on the outcome in the principal action. *Springs v. First Nat'l Bank of Cut Bank*, 835 F.2d 1293, 1296 (9th Cir. 1988) ("[A] counterclaim is not barred because recovery will depend on the outcome of the main action."); s*ee also* 6 Wright & Miller, Fed. Prac. & Proc. § 1411, n.3 (3d ed. 2010). Indeed, contingent or conditional counterclaims are frequently asserted in federal litigation. *See*, *e.g.*, *Sloan ex rel Juergens v. Urban Title Servs., Inc.*, 652 F. Supp. 2d 51, 61-62 (D.D.C. 2009) (addressing status of contingent counterclaims); *Atlas Air, Inc. v. Air Line Pilots Ass'n*, 69 F. Supp. 2d 155, 165 (D.D.C. 1999) (same), *rev'd on other grounds*, 232 F.2d 218 (D.C. Cir. 2000).

As a practical matter, if the United States could not assert its counterclaim at this time, that counterclaim might be deemed to arise from the same "transaction or occurrence" as EPNG's claim and be barred later under the Federal Rules. Fed. R. Civ. P. 13(a)(1)(A); *Springs*, 835 F.2d at 1295-96. In these circumstances, precluding the United States from asserting a contingent counterclaim would unfairly place the taxpayers at risk of bearing the full cost of cleaning up

contamination for which EPNG shares responsibility. Even if the counterclaim were not deemed compulsory, it would still be inefficient to have a separate later proceeding focused on EPNG's share of responsibility for any endangerment found in this proceeding, when such share of responsibility is based on events that have already occurred.

CONCLUSION

This Court should affirm the district court's orders dismissing the complaints in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set in this Court's order of November 27, 2012. Excepting the portions described in Circuit Rule 32(a)(1), the brief contains 19,983 words.

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