ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 12-5156
(consolidated with No. 12-5157)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

El Paso Natural Gas Company
and
Navajo Nation, Appellants

v.

United States of America, et al., Appellees

On Appeal from the United States District Court
for the District of Columbia
Hon. Richard J. Leon, District Judge

FINAL REPLY BRIEF FOR APPELLANT NAVAJO NATION

Paul E. Frye
William Gregory Kelly
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111
(505) 296-9400

Harrison Tsosie, Attorney General
David A. Taylor, Attorney
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Box 2010
Window Rock, AZ 86515
(928) 871-6345

Attorneys for Appellant Navajo Nation

January 18, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASES

II. STATUTES

III. REGULATIONS

IV. OTHER AUTHORITIES

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

"AIARMA" means the American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701 *et seq.*

"AOC" means the September 2010 Administrative Order on Consent between the federal Environmental Protection Agency and the Bureau of Indian Affairs regarding the Tuba City Open Dump.

"APA" means the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*

"BIA" means the Bureau of Indian Affairs, an agency of the United States Department of the Interior.

"CERCLA" means the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*

"DOE" means the United States Department of Energy.

"EPA" means the United States Environmental Protection Agency.

"IHS" means the Indian Health Service, an agency of the United States Department of Health and Human Services.

"ILODCA" means the Indian Lands Open Dump Cleanup Act, 25 U.S.C. § 3901 *et seq.*

"NOV" means EPA's 2000 Notice of Potential Landfill Closure Violation, issued under RCRA related to the Open Dump.

"NPL" means CERCLA's National Priorities List.

"RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*.

"RI/FS" means the Remedial Investigation/Feasibility Study contemplated under the AOC.

"UMTRCA" means the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7901 *et seq*.

"1985 Cooperative Agreement" means the 1985 cooperative agreement, No. DE-FC04-85AL26731, between DOE, the Navajo Nation, and the Hopi Tribe.

SUMMARY OF ARGUMENT

The legacy of the United States' nuclear program haunts the Navajo Nation ("Nation"). "Uranium mining has left the Navajo Nation with a legacy of over 500 abandoned uranium mines . . . , four inactive milling sites, a former dump site, contaminated groundwater, . . . and environmental and public health concerns." Bureau of Indian Affairs, *et al., Health and Environmental Impacts of Uranium Contamination in the Navajo Nation: Five-Year Plan* 4 (2008).[1] This case concerns three sites, the Tuba City, Arizona, Open Dump ("Open Dump"), and the nearby Rare Metals Mill ("Mill") and Highway 160 Dump Site. The Mill and the Highway 160 Dump Site were used exclusively to support the Government's Cold War efforts. Milling there left tailings piled in a manner permitting hazardous materials to leach into the principal source of drinking water for Navajo and Hopi Indians in the region, the Navajo Aquifer. The Open Dump is a federal facility used for decades to dump medical, hazardous, and other solid wastes in violation of federal law; it, too, sits atop the Navajo Aquifer.

The Nation's Complaint sought to remedy these conditions, invoking the Indian Lands Open Dump Cleanup Act ("ILODCA"), the American Indian Agricultural Resource Management Act (AIARMA"), the Resource Conservation and

---

[1] http://www.gov/region9/superfund/navajo-nation/pdf/NN-5-Year-Plan-June-12.pdf.

Recovery Act ("RCRA"), the Uranium Mill Tailings Radiation Control Act ("UMTRCA"), and the federal trust duty. The United States contends that ILODCA does not create a private right of action, but, like the court below, fails to analyze the factors required to be considered in determining congressional intent. All of those factors indicate that Congress intended that tribes could sue to enforce rights conferred by ILODCA. And while AIARMA does include a provision preserving federal sovereign immunity, the plain language of AIARMA shows that Congress intended to preclude suits under AIARMA only in *tribal* court, but not in federal courts. The Administrative Procedures Act ("APA") provides a waiver of federal sovereign immunity and a right of action to enforce both ILODCA and AIARMA in any event.

Contrary to the Government's view, the federal trust duty is not merely a tool by which the United States controls tribal resources, nor is it a superfluous label to describe federal duties already prescribed by specific statutes and regulations. ILODCA, AIARMA, and the relevant provision of UMTRCA were all enacted to preserve and particularize the federal trust duty to Indian tribes, and the leading case interpreting RCRA in the Indian context imposed liability on federal agencies, and not the affected tribe, largely because of the trust relationship. The Nation does not argue that Congress' placement of the lands at issue in an express trust *by itself*

implicates enforceable trust duties, as erroneously contended by the Government. However, full fiduciary duties do inhere because of that express congressional trust, laws specifying how that trust should be administered, and the Government's control, supervision and use of those lands.

UMTRCA precluded litigation by the Nation arising out of the Government's performance of remedial work at the Mill but does not preclude the Nation's claims here. The Nation seeks to enforce independent statutory and regulatory duties to complete Mill remediation, take appropriate action to restore groundwater being polluted by the mill tailings, comply with EPA-imposed design criteria, and meet environmental standards prescribed by Congress specifically for tribal lands. The Cooperative Agreement was entered into to fulfill UMTRCA's requirements and should be read consistent with those provisions, and not to preclude the Nation's claims arising long after DOE's performance of remedial work was concluded. The Nation's UMTRCA claims, like those under ILODCA and AIARMA, allege discrete, site-specific, violations of statutory and regulatory requirements, and satisfy any final agency action requirement of the APA.

Finally, EPA's and BIA's agreement to conduct the thirty-third study of the Open Dump over the past two decades does not qualify as the selection of a CERCLA removal action barring the Nation's RCRA claim. The qualifications in the EPA/BIA

agreement render it unenforceable, and the Government has not committed to any action or plan to clean up the Open Dump. "There is no support in [CERCLA] for such an open-ended prohibition on a citizen suit." *Frey v. EPA,* 403 F.3d 828, 834 (7th Cir. 2005).

ARGUMENT

I. THE NATION MAY ENFORCE ILODCA AND AIARMA IN FEDERAL COURT.

If ILODCA creates a private right of action, the Nation may pursue claims to redress a federal agency's violations of that law without alleging a final agency action under the APA. *See Trudeau v. FTC*, 456 F.3d 178, 187-88 (D.C. Cir. 2006). The court below ruled that ILODCA did not create a private right of action, listing but not analyzing the four *Cort* factors. JA15-17; *see Cort v. Ash*, 422 U.S. 66, 78 (1975). ILODCA satisfies all four factors, and the APA supplies any necessary waiver of federal sovereign immunity for the Nation's claims under both ILODCA and AIARMA.

A. ILODCA SATISFIES THE FOUR *CORT* FACTORS AND PROVIDES A PRIVATE RIGHT OF ACTION.

ILODCA satisfies the four *Cort* factors. First, the Nation is one of the class of Indian tribes for whose special benefit ILODCA was passed. ILODCA applies only to open dumps on tribal lands, requiring federal agencies to provide the necessary

technical and financial support to clean them up. Second, ILODCA both imposes mandatory obligations on the United States and recognizes that the tribes do not have the resources to remedy the problem. *E.g.*, 25 U.S.C. §§ 3901(b)(6), 3904.

Congressional intent to create a private right of action for tribes is underscored by its legislative history, and the District Court's rejection of legislative history in this respect, JA17 n.7, was error. The objective of the *Cort* analysis is to ascertain congressional intent; thus "the *Cort* analysis *requires* consideration of legislative history." *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979) (emphasis added); *see Thompson v. Thompson*, 484 U.S. 174, 179-87 (1988) (citing *Cort* with approval and considering context, language, and legislative history).[2] The open dump problem was "among the most serious threats" to tribes, S. Rep. No. 103-253 (1994) at 1, and ILODCA's sponsor expressed great frustration with federal foot-dragging and finger-pointing, 139 Cong. Rec. 7315 (1993) (remarks of Sen. McCain). The centrality of the trust relationship is evident throughout the legislative history, *see, e.g.*, H.R. Rep. No. 103-783 at 4-5 (1994) ("[a]ll of these responsibilities are based

[2] *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001), cited by the court below, is not to the contrary. *Alexander* states only that "the interpretive inquiry *begins* with the text and structure of the statute." 532 U.S. at 288 n.7 (emphasis added). In *Alexander*, Congress' intent not to create a right of action could be clearly discerned from the text and structure of the statute, so any further search for Congress' intent was not warranted.

on the underlying trust responsibility"); the Government was understood to have "a *continuing obligation* . . . to ensure that these landfills meet the Federal landfill criteria," *id.* at 9 (emphasis added); and ILODCA was passed in response to *Blue Legs v. BIA*, 867 F.2d 1094 (8th Cir. 1989), which predicated a federal duty to clean up open dumps on tribal lands on the trust duty, *id*. at 1100, *see* H.R. Rep. No. 103-783 at 5.

That legal context "clarifies text."[3] It defies logic to believe that, under these circumstances, Congress would *not* have intended the tribes to have a means to compel the BIA and other federal agencies to comply with ILODCA's mandatory provisions. *See also United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 226-27 (1983) (recognizing damages remedy for breach of trust because it would be "anomalous" for Congress to have created a right to the value of Indian trust resources without granting Indians a right of action to obtain damages if Government breached its obligations).

Third, the creation of a private right of action to require federal agencies to inventory, assess, consult, and provide the necessary means to clean up open dumps as required by 25 U.S.C. § 3904 is entirely consistent with ILODCA's express purposes to "identify the location of open dumps on Indian lands . . . , assess the

[3] *Alexander, supra* n.2, 532 U.S. at 288.

relative health and environmental hazards posed by such dumps; and . . . provide financial and technical assistance to Indian tribal governments . . . to close such dumps in compliance with applicable Federal standards and regulations." *See* 25 U.S.C. § 3901(b); *Thompson*, 484 U.S. at 183. The District Court's uncertainty in this respect, JA17, is inexplicable. The fourth *Cort* factor also unequivocally favors the creation of a private right of action, because states generally have no ability to regulate Indian trust lands. *See*, *e.g.*, 25 C.F.R. § 1.4(a) (2012); *Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, P.C.*, 467 U.S. 138, 142 (1984) (principle that Indian lands are "beyond the legislative and judicial jurisdiction of state governments" is reflected in State Enabling Acts); *see McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175-76 & nn.13-14 (1973) (concerning Arizona's Enabling Act).

Because ILODCA creates a private right of action, it is unnecessary for the Nation to allege a final agency action under the APA, *Trudeau*, 456 F.3d at 187-88, and the dismissal of the Nation's ILODCA claim should be reversed.

B. THE ADMINISTRATIVE PROCEDURES ACT WAIVES FEDERAL SOVEREIGN IMMUNITY FOR THE NATION'S CLAIM UNDER AIARMA.

"Federal action is nearly always reviewable for conformity with statutory obligations." *NAACP v. Secretary of HUD*, 817 F.2d 149, 152 (1st Cir. 1987)

(Breyer, J.). The APA provides a generic cause of action in favor of persons aggrieved by agency action, *Trudeau*, 456 F.3d 188; *see generally Mitchell II*, 463 U.S. at 227 n.32, and provides the necessary waiver of federal sovereign immunity in non-statutory review cases such as the Nation's claims under ILODCA and AIARMA,[4] *Trudeau*, 456 F.3d at 186-87.

The Department of Justice strenuously objected to AIARMA's requirement that the Government comply with tribal laws in managing tribal agricultural lands, contending such a requirement would be a "radical departure." Congress rejected that position: "If there is any 'radical departure' that is relevant . . . it is the notion that the Secretary of the Interior, in his management of Indian trust lands, is not bound by tribal zoning or land use laws. . . . If the Secretary has not previously recognized such tribal authority, then certainly the provisions of this section [§ 3712] are much needed." 138 Cong. Rec. S. 34,629 (1992) (reproducing Committee letter to Justice Department). That section uses mandatory language throughout, and the legislative history unequivocally supports the imposition of mandatory duties. *See, e.g.*, S. Rep. No. 103-186 (1993) at 9 (purpose of AIARMA is to "make clear" that tribal laws "shall be binding on the Secretary") H.R. Rep. No. 103-367 (1993) at 14, 17, 24; 139

[4] Breach of trust claims also fall under this category. *Cobell v. Babbitt*, 30 F.Supp. 2d 24, 30 n.7 (D.D.C. 1998).

Cong. Rec. H. 29,235 (1993) (remarks of Rep. Richardson, as sponsor). The Justice Department seeks to gain in this Court what it lost in the halls of Congress.

As the court below noted, 25 U.S.C. § 3712(d) provides that "[t]his section does not constitute a waiver of the sovereign immunity of the United States,[5] nor does it authorize *tribal justice systems* to review actions of the Secretary." JA16 (quoting 25 U.S.C. § 3712(d)) (emphasis added). Plainly, Congress only precluded "tribal justice systems" from reviewing federal conduct under 25 U.S.C. § 3712. *See Beverly Health & Rehab. Svcs., Inc. v. NLRB*, 317 F.3d 316, 321 (D.C. Cir. 2003) (regarding application of canons to avoid surplusage and *expressio unius*). Congress did not preclude *federal courts* from reviewing actions, and the APA provides the requisite waiver of federal sovereign immunity. *See, e.g., Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2209-10 (2012); *Trudeau*, 456 F.3d at 186-88; *Cobell v. Norton*, 240 F.3d 1081, 1094 (D.C. Cir. 2001).

C. ANY "FINAL AGENCY ACTION" REQUIREMENT FOR REVIEW OF FEDERAL ACTION OR INACTION UNDER ILODCA AND AIARMA IS SATISFIED.

The Nation's claims under ILODCA and AIARMA are not constrained by any final agency action requirement. The APA typically applies to review of final agency

[5] Such language is inconsistent with a private right of action and the Nation no longer asserts that AIARMA creates one. *See FDIC v. Meyer*, 510 U.S. 471, 483-84 (1994).

action. 5 U.S.C. § 704. But although the APA provides the requisite waiver of sovereign immunity for claims under ILODCA and AIARMA, the APA's non-jurisdictional final agency action requirement does not restrict such non-statutory review claims. *Trudeau*, 456 F.3d at 184, 186-87.

Even if there were such a requirement, the Nation would satisfy it. The Nation seeks to remedy federal delay and inaction and violations of clear statutory duties imposed by AIARMA and ILODCA, in discrete, site-specific, instances. The Nation does not challenge any agency's accomplishment of broad programmatic objectives, as suggested by the Government. For over 18 years, the IHS Director has failed to consult with the Nation regarding the Open Dump and has failed to provide technical and financial support to close it and ensure postclosure maintenance of it, as required by ILODCA. The Government has similarly acted in violation of the permitting requirements of the Navajo Clean Water Act and Civil Trespass Act in its management of these agricultural lands for well over a decade, in violation of AIARMA's requirement that the Government comply with tribal environmental and other laws. *See* 25 U.S.C. § 3712(b).

So, even if final agency action were required, these violations of law would satisfy any such requirement. Finality is a pragmatic concept, and courts have considerable discretion to assess the reasonableness of agency delay. *Cobell*, 240

F.3d at 1096. Unreasonable delay permits suit under the APA and federal courts may address claims that a federal agency is under an unequivocal duty to act and does not. *Cobell*, 240 F.3d at 1095; *Sierra Club v. Thomas*, 828 F.2d 783, 793-94 (D.C. Cir. 1987). As shown in the Nation's opening brief, at 31-32, the Government's failure to conform its actions at the Open Dump to congressional mandates for well over a decade satisfies this Court's standards for finding that its delay is unreasonable and that a suit to conform agency action to ILODCA's and AIARMA's commands is proper under the APA. *See In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (six-year delay "egregious").

II. FEDERAL LAW IMPOSES FULL FIDUCIARY DUTIES ON THE GOVERNMENT BECAUSE THE LANDS AT ISSUE ARE SUBJECT TO AN EXPRESS CONGRESSIONAL TRUST, THE APPLICABLE STATUTES DIRECT FEDERAL AGENCIES IN THEIR ADMINISTRATION OF THE TRUST, AND THE GOVERNMENT HAS OCCUPIED AND CONTROLLED THE LANDS.

The Complaint alleges that the Open Dump and the Mill are located on lands subject to an express congressional trust in favor of the Nation. JA171 (¶ 124). ILODCA, AIARMA and the relevant provision of UMTRCA were all intended to preserve and effectuate the trust and to particularize the manner in which federal agencies were to carry out their trust duties. 25 U.S.C. §§ 3701(2), 3702(1), 3712 (AIARMA); 3901(a)(5), (b)(3), 3904 (ILODCA); *compare* 42 U.S.C. § 7915(a)(2)

(cooperative agreements with tribes under UMTRCA must ensure that remedial actions on tribal lands are "selected and performed in accordance with section 7918") *with id.* § 7913(b) (no such requirement for cooperative agreements with states); H.R. Rep. No. 95-1480 (Part II) (Sept. 30, 1978) ("Report") at 39 (UMTRCA not intended "to affect the responsibilities of the Secretary of the Interior as trustee for any Indian tribe"). The Complaint alleges and the Nation demonstrated that the United States has physically occupied and used those lands. JA171 (¶ 125); JA389 (¶¶ 3-4). The Complaint further alleges that the United States is allowing those lands and the underlying water resources to fall into ruin in contravention of federal trust duties and the treaty and statutes that provide the contours of those duties. *E.g.*, JA144, 148, 155-57, 159-62, 166 (¶¶ 15, 25-26, 53, 58, 64-72, 92). These allegations state a claim for relief and the District Court had jurisdiction over that claim.

The express trust, coupled with federal occupation and use of the trust property, establishes a trust duty not to let that property fall into ruin, satisfying even the more rigorous jurisdictional requirements of the so-called Indian Tucker Act. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). ILODCA, AIARMA, and the special standards of UMTRCA applicable to tribal lands provide the "contours" of additional trust duties. *See Mitchell II*, 463 U.S. at 224; *Cobell v. Norton*, 392 F.3d 461, 471 (D.C. Cir. 2004). The courts may then look to common law trust principles

to particularize further those fiduciary duties. *Cobell*, 392 F.3d at 472. Subject matter jurisdiction is conferred over, and the APA waives sovereign immunity for, such trust claims. *Cobell*, 240 F.3d at 1094.

The Government's answer brief misstates both the Nation's position and controlling law. The Nation has never contended that the mere fact that the lands at issue are held in an express trust is sufficient for the imposition of full fiduciary duties. Rather, the Complaint and the Nation's brief assert that the combination of the express congressional trust, the Government's control and occupation of the land, and statutes that recognize specific trust duties in the management of that land do. *E.g.*, JA145, 171 (¶¶ 16(g), 121-26); NN Br. at 46-54; *compare* US Br. at 81, 82.

The Government relies primarily on four cases that do not even concern property held in trust, and misunderstands the ones that do.[6] In the first, *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995), the tribes sought to mandamus the Attorney General to file meritless "off-reservation water rights claims." *Id.* at 1484. *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), *cert. denied*, 552 U.S. 824 (2007), concerned a claim that federal approval of a gold mine "located upriver from the Tribes' reservation" breached trust duties,

[6] The trust duty requires, at a minimum, compliance with generally applicable statutes even when the claim does not concern management of trust resources. NN Br. 52-53.

although no treaty required the Government to regulate third parties for the tribes' benefit. *Id.* at 803. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468 (9th Cir. 2000), concerned a challenge to an approval of another off-reservation gold mine (on lands ceded by the tribe), where the tribe made no claim that any of its substantive rights would be affected. *Id.* at 478-79. Finally, *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980),[7] was an action by native Alaskans with no reservation land or treaty rights to enjoin the Secretary of the Interior from carrying out a lease sale of "federal properties." *Id.* at 591; *see McClanahan*, 411 U.S. at 176 n.15. These are all inapposite. None involves damage to tribal resources held under an express trust and occupied and controlled by federal agencies or subject to statutes expressly intended to advance the trust.

The Government's discussion of the trust relationship rehashes the same arguments it unsuccessfully made in the extended *Cobell* litigation. The Government claims that *Shoshone-Bannock* stands for the proposition that an enforceable trust obligation arises only from an "unambiguous provision by Congress that clearly outlines a federal trust responsibility." US Br. 78-79 (omitting internal quotation

[7] Also cited as *National Wildlife Fed. v. Andrus*. *See, e.g., Cobell*, 240 F.3d at 1098.

marks).[8] But *Shoshone-Bannock*, even in its off-reservation context, actually stands for the proposition that the Government may not be forced to take any specific action "unless a treaty, statute or agreement imposes, *expressly or by implication*, that duty." 56 F.3d at 1482 (emphasis added).

This Court has rejected the Government's reliance on snippets from *Shoshone-Bannock* and *North Slope Borough* in cases involving Indian trust assets. *E.g., Cobell*, 240 F.3d at 1098-99; *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1317 (2007). Oddly, the Government also cites *White Mountain* for the proposition that "[t]he 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." US Br. 79. That is the *opposite* of what *White Mountain* stands for. The statute at issue in that case simply placed the property in trust and did *not* "expressly subject the Government to duties of management and conservation." 537 U.S. at 475. Nonetheless, "the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee" based on "the fundamental common-law duties of a

[8] The language quoted by the Government and in *Shoshone-Bannock* is from *North Slope Borough*, decided shortly after *United States v. Mitchell*, 445 U.S. 535 (1980), but before the landmark decision in *Mitchell II*.

trustee . . . to preserve and maintain trust assets." *Id*.

The Government would make the trust duty illusory and the trust language in ILODCA and AIARMA (and other statutes in Title 25) mere surplusage. "Stated differently," the Government urges, "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." US Br. 80. That misreads *Mitchell II*, *White Mountain*, and the *Cobell* cases, and defies common sense. "If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996); *accord Cobell*, 240 F.3d at 1098-99; *Cobell*, 455 F.3d at 304.

In *White Mountain*, the duty not to allow the trust property to fall into ruin was inferred by the trust status of the property and the Government's actual use of it. In *Mitchell II*, full fiduciary duties flowed from the Government's control and supervision of the trust resource under a comprehensive set of laws and regulations. 463 U.S. at 225-26; *see Cobell*, 392 F.3d at 471. Here, all of these factors are present. Nonetheless, the Government concludes, "[i]n short, that the sites are located on trust land does not negate the requirement for specific statutory duties." US Br. 83. As in *Cobell*, those duties are "not far to seek." 392 F.3d at 470.

III. NEITHER UMTRCA NOR THE 1985 COOPERATIVE AGREEMENT BARS THE NATION'S UMTRCA CLAIMS.

The Nation alleged that the Government is violating UMTRCA in specific ways at the Mill. These include DOE's failure to complete remediation of the Mill notwithstanding the September 1998 statutory deadline, the present failure of DOE's purported remedial action notwithstanding the requirement that it be effective for at least 200 years, and DOE's delay in remediating contaminated groundwater at the Mill. JA142-43, 156, 166-67 (¶¶ 7, 57, 91-98); *see* 42 U.S.C. §§ 7912(a)(1), 7922(a)(1) (concerning time for completion of remedial action); *id.* §§ 7915(a)(2), 7918(a)(1) (requiring compliance with EPA standards); 40 C.F.R. § 192.02(a) (remedial action must be effective for "at least 200 years").

The Government contends that the Nation cannot enforce UMTRCA's substantive requirements because 42 U.S.C. § 7915(a)(1) requires that the Nation release the United States from any claim concerning the "remedial action" at the Mill and hold it harmless from claims arising out of the "performance of any such remedial action" and because the 1985 Cooperative Agreement does so.[9] If the Government's

[9] UMTRCA's requirement that tribes waive certain claims in cooperative agreements provides no clear and convincing evidence of a legislative intent to overcome the APA's presumption of reviewability. *See, e.g., Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 601 (D.C. Cir. 2007); *cf.* US Br. 71-73.

expansive reading of the release were correct, it would insulate the United States from any liability to the Navajo Nation for all eternity for any reason based on its design and performance of the remedial action, even if that remedial action consisted of merely placing a bed sheet on the massive tailings pile.

UMTRCA's structure, clear indications of legislative intent (informed by the Justice Department's own views), and applicable canons of statutory construction show that the Government's position is incorrect. The Government's view that its selection (or design) of a remedial action is itself tantamount to a remedial action, *see* US Br. 74, is inconsistent with § 7915(a). The waiver provision of § 7915(a)(1) requires tribes to hold the United States harmless against "any claim arising out of the *performance* of any such remedial action" and the very next subsection, § 7915(a)(2), requires that the "remedial action shall be *selected and performed* in accordance with section 7918." If "performance" included "selection," as the Government contends, the words "selected and" would be surplusage, contrary to a basic principle of statutory construction. *See Secretary of Labor v. National Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009).

Any ambiguity in the extent and nature of the claims waived by the Nation under UMTRCA is removed by its legislative history. The waiver provision of § 7915(a)(1) was not in the original bill, but the bill reported out by the Committee

on Interstate and Foreign Commerce did include that language. DOE had sought a *broader* release and waiver provision, one that "provided for a release of liability *from enactment of the legislation through the completion of the remedial action*." Report at 48 (reproducing letter from DOE Deputy Secretary O'Leary to House Subcommittee) (emphasis added); H.R. Rep. No. 95-1480 (Part I) (Aug. 11, 1978) at 27 (DOE explains that its proposed broader release and waiver "would not affect the U.S. liability, if any, either prior to or after completion of the remedial action"). DOE would have preferred the broader release but was ultimately "pleased that the concept of a limited release of liability has been accepted by the Subcommittee." *Id.* at 48. DOE's broader release would not have barred claims accruing after the deadline for DOE's completion of the remedial action; the more limited one adopted by Congress surely did not. *See Peoples v. United States Dep't of Ag.*, 427 F.2d 561, 565 n.9 (D.C. Cir. 1970) (wording of statute was not confined in the way proposed by the Department of Justice; "[c]ertainly, . . . the scope of the act was not shrunk to less than the ambit reflected in the Department of Justice proposal").

The Nation's construction of UMTRCA that the release concerns only activities conducted by DOE through the end of its remedial activities fits naturally with the requirement that remedial actions on Indian lands achieve particular standards, 42 U.S.C. § 7915(a)(2), with legislative history indicating that the

legislation is not intended to affect federal trust duties, Report at 39, and with the Cooperative Agreement itself, JA200 (defining "remedial actions" subject to the release as those taken "in a safe and environmentally sound manner that will minimize or eliminate radiation health hazards to the public"). The Government's interpretation does not, nor does it comport with rules of statutory and contract interpretation favoring tribes in resolving ambiguities in statutes and agreements. *See* NN Br. at 22.

The Government's view leads to absurd results. Under its interpretation, if the Mill damages the Navajo environment because of DOE's failure to comply with EPA standards, the Sierra Club or an individual Navajo land user could force compliance with UMTRCA, but the Nation could not. Similarly, the Nation would have to hold the Government harmless forever for any damage caused by DOE's violations of UMTRCA to neighboring landowners or tourists traveling on Highway 160, for example. That implies virtually unlimited potential liability[10] and an abrogation of Navajo sovereign immunity, but it is clear that a congressional abrogation of tribal sovereign immunity may *not* be implied but must be unequivocally expressed. *Vann v. Kempthorne*, 534 F.3d 741, 746-47 (D.C. Cir. 2008).

---

[10] *See Amoco Canada Petroleum Co., Ltd. v. Wild Well Control, Inc.*, 889 F.2d 585, 588 (5th Cir. 1989).

Finally, any requirement of final agency action is sufficiently alleged. Again, the Nation makes no sweeping claims implicating an agency's administration of broad policy objectives or statutory goals. The Government's present violation of EPA regulations at the Mill and its unreasonable delay in completing remediation and restoring groundwater at the Mill are site-specific, discrete claims that satisfy the APA. The fact that DOE's duty to restore groundwater is not subject to a deadline, US Br. at 76-77, is irrelevant. NN Br. at 25.

IV. THE NATION'S RCRA CLAIM IS NOT BARRED BY CERCLA SECTION 113(h).

A. THE AOC IS TOO VAGUE, UNCERTAIN, AND LATE TO BAR THE NATION'S RCRA CITIZEN SUIT CONCERNING THE OPEN DUMP.

1. No Presumption of Regularity Attaches to the Government's Change to a Purported CERCLA Remedy from its Longstanding Reliance on RCRA to Close the Open Dump.

The Open Dump is conceded to be a federal facility, JA276, used for dumping solid wastes and other hazardous materials, including some radioactive materials from the Mill, JA156-60 (¶¶ 58-59, 61, 65). The Open Dump is leaching dangerous chemicals into the Navajo Aquifer. JA144, 160 (¶¶ 15, 66, 67). It is comprised mostly of "ordinary household trash." US Br. 13. The Open Dump has been studied at least 32 times, the Government admits to violating RCRA there, the Government

has promised to close the Open Dump under RCRA, but it violated those promises for lack of funding. NN Br. 11. In 2000, the EPA issued a Notice of Potential Landfill Closure Violation ("NOV") under RCRA, but neglected to pursue it. *Id.* 12.

Contrary to the Government's contention, US Br. 48, no presumption of regularity insulates the Government's abrupt and unexplained, post-suit change from closing the Open Dump under RCRA to its new reliance on CERCLA. That presumption does not apply because of the Government's *ad hoc* and inconsistent judgments on that matter and because of the unrebutted showing of the Government's improper behavior regarding the Open Dump for the past two decades. *See NRDC v. SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979); *Fund for Animals v. Williams*, 245 F.Supp. 2d 49, 57-58 (D.D.C. 2003), *aff'd in part and vac. in part on other grds.*, 428 F.3d 1059 (D.C. Cir. 2005).

The two authorities cited by the Government on this point are not to the contrary. *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978), merely states the general principle, limits it to instances where there is an "accompanying explanation of the reasons underlying an administrator's decision" (lacking in the record here), and acknowledges that the presumption may be overcome. The other, *Apache Powder Co. v. United States*, 968 F.2d 66, 69 (D.C. Cir. 1992), is cited as support for the proposition that CERCLA is the proper choice over RCRA because RCRA

assertedly "applies to a narrower class of hazardous materials than CERCLA hazardous substances." US Br. 48-49. At the time *Apache* was decided, that proposition was arguable, because EPA's RCRA regulation authorizing clean-up of hazardous substances as defined under CERCLA but not defined as hazardous wastes under RCRA was then only proposed, and RCRA authority over such hazardous substances was then "at best an open question." 968 F.2d at 70. Since then, EPA's regulations have confirmed its authority under RCRA to address both CERCLA hazardous substances and mixed radioactive wastes. *See New Mexico v. Watkins*, 969 F.2d 1122, 1132 (D.C. Cir. 1992) (mixed radioactive wastes); 40 C.F.R. § 264.552(a)(1)(iii) (covering, under RCRA, non-hazardous waste under Corrective Action Management Unit).

2. *Frey* Is Persuasive Authority; the AOC Is Too Uncertain and Late to Bar the Nation's RCRA Citizen Suit.

The Nation demonstrated that the history of federal action at the Open Dump has been a "desultory testing and investigation process of indefinite duration,"[11] accompanied by promises of action broken because of lack of funding. NN Br. 11-14. The Nation also asserted that the Administrative Order on Consent ("AOC") entered between EPA and BIA simply called for the thirty-third study of the Open

[11] *Frey*, 403 F.3d at 835.

Dump (a Remedial Investigation/Feasibility Study, or "RI/FS"), and that even the duty to complete the RI/FS was so full of qualifications as to render it practically unenforceable. NN Br. 56-57.

The Government's response emphasizes the schedule of deliverables under the RI/FS that are subject to the many qualifications, US Br. 46-47 (noting that the RI/FS "includes a start date and finish date for 48 specific tasks and subtasks"), but does not address the qualifications themselves, except for one. That one is the qualification that BIA need not finish this thirty-third report of the Open Dump if it cannot get sufficient funding. *See* US Br. 47. But that very qualification makes this most recent study effort most problematic. After all, the Government has broken promises to take real action at the Open Dump precisely because of its failure to obtain funding for the past twenty years. NN Br. 11-12.

The RI/FS has no binding schedule. In the eighteen months that BIA has been conducting the RI/FS work, the date for completion has slipped from February 2013 to "2014" – *i.e.*, up to twenty-two additional months. *Compare* JA417 (original schedule) *with* EPA, Pac. Southwest, Region 9: Superfund, *Tuba City Open Dump* ("3. Remedial Investigation and Feasibility Study - Ongoing, Completion Estimated

in 2014").[12]

Moreover, the EPA's own *model* AOC[13] for RI/FSs has none of the free passes that it gave to the BIA for the completion of the Open Dump RI/FS. Rather, the model AOC requires the responsible party to "establish and maintain a financial instrument or trust account . . . funded sufficiently to perform the work," Model AOC at 27 ¶ 86; has no provisions for extensions, in contrast to the extensive, subjective and delay-inviting provisions in the Open Dump AOC, JA369-71; and excuses timely performance only for narrowly defined *force majeure* events, which expressly *exclude* lack of funding, Model AOC at 22-23 ¶¶ 65-69; *cf.* JA371-73. Indeed, the AOC for the Open Dump stresses that the Open Dump "involves unique circumstances in which both BIA and EPA have substantial interests," and because the AOC is "tailored to address these unique circumstances, and to accommodate the interests of both EPA and BIA at this Site, [it] is not intended to serve as a model for any other site." JA336.

Frey holds that, in circumstances like these, CERCLA § 113(h) does not bar

---

[12] Located at http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dec8ba325236842882574260074373 3/2a32894331dfa3b88825771200761e61!OpenDocument. *See* Add. 6.

[13] Google the EPA's National Service Center for Environmental Publications ("NSCEP") and search for 9835.3-1A. *See* Add. 9-40.

a citizen suit. 403 F.3d at 834 ("There is no support in [CERCLA] for such an open-ended prohibition on a citizen suit."). The Government attempts to distinguish *Frey* on the basis that the investigation and studies at issue in that case did not constitute a *removal action*, and that any RI/FS constitutes a "removal action that has been selected by EPA" which bars a citizen suit. US Br. 45. In fact, *Frey* permitted a citizen suit even after an RI/FS had been performed and after the Government had taken significant steps to remediate the sites. *See* 403 F.3d at 830-32. *Frey* rejected the Government's arguments, repeated here, that EPA's "ongoing investigation and testing of groundwater and soil contamination precludes review under [CERCLA]," 403 F.3d at 834, and that a challenge to "the process of investigation and analysis - by definition a 'removal' action" is a challenge to a CERCLA removal action, *id*. at 835 (quoting district court opinion). At any rate, the RI/FS in this case is a remedial action, not a removal action, for the following reasons.

Removal actions are temporary measures taken to protect against the threat of an immediate release of hazardous substances, whereas remedial actions are intended as permanent solutions. *Fort Ord Toxics Proj., Inc. v. California EPA*, 189 F.3d 828, 833-834 (9th Cir. 1999). The perceived immediacy of the threat is an important factor in deciding whether an action constitutes a "removal" or a "remedial" action. *See City of Moses Lake v. United States*, 416 F.Supp. 2d 1015, 1023-25 (E.D. Wash.

2005) (finding RI/FS part of remedial action where threat was not perceived by EPA as urgent or time-sensitive).

In this case, EPA first acted in February 2000 when it issued its RCRA NOV. Over a dozen studies were subsequently performed at the Dump but EPA took no action indicating it felt there was a threat requiring an immediate removal action. EPA required the RI/FS for the Open Dump not to determine whether it needs to take an immediate removal action, but rather to "identify and evaluate *remedial alternatives*." JA338 (emphasis added). As in *City of Moses Lake*, the EPA's own actions refute any contention that it considers the RI/FS for the Open Dump to be time-sensitive. As noted above, the schedule for completion of the RI/FS has already slid from February 2013 to "2014." The RI/FS is thus part of a remedial action, not a removal action. *See City of Moses Lake*, 416 F.Supp. 2d at 1023-25; 40 C.F.R. § 300.505(d)(2)(iii) (RI/FS may be a "remedial phase activity"); 42 U.S.C. § 6972(b)(2)(B)(ii), (iii) (distinguishing between CERCLA removal action and RI/FS).[14]

[14] The decisions relied on by the Government are not to the contrary. As noted in *City of Moses Lake*, the opinion in *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995), "did not expressly or impliedly preclude an RI/FS from being a 'remedial action' in appropriate circumstances." 416 F.Supp. 2d at 1024. Nor do any of the other cases cited by the Government.

3. Both CERCLA and the APA Permit the Nation's RCRA Claims.

Section 113(h) is not as all-encompassing as the Government contends. Notwithstanding its language, courts have assumed jurisdiction over actions based on RCRA and complementary state law by a State notwithstanding ongoing CERCLA activities. *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994). CERCLA § 113(h) also does not bar challenges to federal CERCLA responses when the Government's actions consist of a "desultory testing and investigation process of indefinite duration." *Frey*, 403 F.3d at 835. And CERCLA does not bar challenges to remedial actions undertaken on federal facilities listed on CERCLA's National Priorities List ("NPL"). *Fort Ord*, 189 F.3d at 832-34; *City of Moses Lake*, 416 F.Supp. 2d at 1025. EPA has assumed authority as if this particular federal facility were listed on the NPL. *See* Executive Order 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) as amended, §§ 2(e)(1), 4(b)(1), 10 (reproduced at 42 U.S.C. § 9615) (delegating removal, remedial and enforcement authority under CERCLA sections 104 and 122 to heads of executive agency for releases *not* on the NPL where facility is under an agency's jurisdiction, and recognizing EPA's authority only for NPL-listed facilities).

The Nation's RCRA claim alleges that the Government is violating RCRA's

regulations and prohibitions under 42 U.S.C. § 6972(a)(1)(A), and that its Open Dump presents an imminent and substantial endangerment, in violation of 42 U.S.C. § 6972(a)(1)(B). JA162-64 (¶¶ 76, 79, 81). RCRA itself *permits* challenges to CERCLA removal or remedial actions when, as here, EPA has not filed a court action to require compliance with RCRA's regulations or when EPA is not diligently proceeding with a removal or remedial action to abate an alleged endangerment. *See* 42 U.S.C. § 6972(b)(1)(B), *Chico Serv. Station, Inc. v. Sol Puerto Rico, Ltd.*, 633 F.3d 20, 34-35 (1st Cir. 2011); 42 U.S.C. § 6972(b)(2)(B); *Acme Printing Ink Co. v. Menard, Inc.*, 812 F.Supp. 1498, 1510 (E.D. Wis. 1992); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1574 (5th Cir. 1988).

B. THE HIGHWAY 160 CLAIM IS NOT MOOT OR WAIVED.

The Nation's Complaint asserts that the Government is also violating RCRA at the Highway 160 Dump Site. JA162-65. Notwithstanding an appropriation of $5 million to clean up that site, it is uncertain whether groundwater is contaminated. JA436-37 ¶¶ 3-5. If so, the cost to remediate the Highway 160 Dump Site "will far exceed any monies remaining from the 2009 federal appropriation." JA437 ¶ 5.

The Government contends that the Nation's RCRA claim is moot because of the Nation's remediation of soils under a cooperative agreement that includes release language mirroring that of the 1985 Cooperative Agreement with DOE related to the

Mill, discussed above. *See* US Br. 87-90. The Government even claims that "[n]o further monitoring will be necessary," *id.* 12, although the regulation it cites actually provides that monitoring is not required to demonstrate compliance *only* "with respect to § 192.02(a) and (b)," because those subsections "appl[y] to design." 40 C.F.R. § 192.02 n.1. Groundwater is addressed in 40 C.F.R. § 192.02(*c*), which expressly concerns groundwater monitoring and which is *not* excepted from required monitoring. EPA's standards contemplate that groundwater monitoring will last "a few decades." *Groundwater Standards for Remedial Actions at Inactive Uranium Processing Sites*, 60 Fed. Reg. 2854, 2860 (Jan. 11, 1995).

The completion of surface cleanup and the waiver and release related to that limited remedial action do not moot the claim insofar as it concerns groundwater contamination at the Highway 160 Dump Site. The agreement carves out groundwater remediation by providing that the Nation "shall also continue to submit annual budgets for the Groundwater Compliance portion of the agreement and that budget will be revised separately," *see* NN Br. 58-59 (quoting agreement at ¶ 5), and the Government's bait-and-switch position to the contrary should not be honored.

V. CONCLUSION

For the above reasons, and for the reasons stated in the Nation's opening brief, the judgment of the District Court should be reversed and the case remanded for

further proceedings.

Respectfully submitted,

FRYE LAW FIRM, P.C.

/s/ Paul E. Frye

Paul E. Frye
10400 Academy Rd. Suite 310
Albuquerque, NM 87111
505-296-9400
pef@fryelaw.us

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of *Fed. R. App. P.* 32(a)(7)(B) because this brief contains 6,997 words, excluding the parts of the brief exempted by *Fed. R. App. P.* 32(a)(7)(B)(iii) and *Circuit Rule* 32(a)(1).

2. This brief complies with the typeface requirements of *Fed. R. Civ. P.* 32(a)(5) and the type style requirements of *Fed. R. Civ. P.* 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel Word Perfect X3 in 14 pt. Times New Roman font.

January 18, 2013 /s/ Paul E. Frye

CERTIFICATE OF SERVICE

I hereby certify that I mailed by U.S. Mail, postage prepaid, and electronically transmitted the foregoing to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants, this 18th day of January, 2013.

Jerry Stouck, Esq.
Greenberg Traurig, LLP
2101 L Street NW, Suite 1000
Washington, D.C. 20037

Christopher J. Neumann, Esq.
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202

Michael T. Gray, Esq.
United States Department of Justice
Environment & Natural Resource Division
Appellate Section
701 San Marco Blvd.
Jacksonville, FL 32207

s/ Paul E. Frye