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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 El Paso Natural Gas Company LLC,

10 Plaintiff,

11 v.

12 United States of America, et al.,

13 Defendants.
14

No. CV-14-08165-PCT-DGC

ORDER

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16 Plaintiff El Paso Natural Gas Company LLC brings claims against Defendants
17 United States of America, the Department of the Interior, the Bureau of Indian Affairs,
18 the U.S. Geological Survey, the Department of Energy, and the Nuclear Regulatory
19 Commission (collectively, the “United States”) under §§ 107 and 113 of the
20 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
21 El Paso seeks to recover response costs incurred in remediating 19 historical uranium
22 mines located on the Navajo Reservation (the “Mine Sites”). Doc. 55, ¶¶ 1-2.

23 El Paso has moved for summary judgment on its claim that the United States is an
24 “owner” of the Mine Sites under CERCLA. The Court previously resolved some of the
25 arguments made in the parties’ summary judgment briefing, but called for additional
26 briefing on the owner issue. *See El Paso Nat. Gas Co. LLC v. United States*, No. CV-14-
27 08165-PCT-DGC, 2017 WL 2405266 (D. Ariz. June 2, 2017). The parties have now
28 provided further briefing. Docs. 130, 133.

1 The parties stipulate that the United States has owned fee title to the Mine Sites
2 since at least 1952. Doc. 83, ¶¶ 23-24. The United States argues, nonetheless, that is not
3 an owner within the meaning of CERCLA because its ownership interest is limited – it
4 holds reservation land in trust for the benefit of the Navajo Nation.

5 After considering the broad remedial purposes of CERCLA, the ordinary meaning
6 of property ownership, the nature of the Navajo Nation and United States interests in
7 reservation land, and other relevant authorities, the Court concludes that the United States
8 is an owner under CERCLA. Because further factual development is needed, the Court
9 cannot at this time determine whether the United States is entitled to a limit on its liability
10 under CERCLA § 107(n) based on its role as a fiduciary.

11 **I. CERCLA Owner.**

12 The Court’s previous order noted that the Ninth Circuit has looked to the relevant
13 common law to identify an owner under CERCLA, and directed the parties to brief the
14 federal law that applies to reservation lands. *El Paso*, 2017 WL 2405266 at *5-6.
15 Although the Court continues to find federal statutory and common law relevant, and will
16 consider it in this order, the Court also concludes that the remedial purposes of CERCLA
17 and the ordinary meaning of property ownership are important in this case. The Ninth
18 Circuit cases cited in the Court’s previous order considered whether a person other than
19 the fee title holder could be an owner under CERCLA, and looked to common law for the
20 answer. *See Long Beach Unified Sch. Dist. v. Dorothy B. Godwin California Living Tr.*,
21 32 F.3d 1364 (9th Cir. 1994); *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440
22 (9th Cir. 2011). The question in this case is the reverse – whether a fee title holder can be
23 deemed a non-owner for purposes of CERCLA. On this basic question, and after
24 reviewing the parties’ supplemental briefing, the Court finds the purposes of CERCLA
25 and the ordinary meaning of “owner” to be highly relevant, as did the Tenth Circuit in the
26 recent case of *Chevron Mining Inc. v. United States*, --- F.3d ---, 2017 WL 3045887, at *7
27 (10th Cir. July 19, 2017).

28

1 **A. The Purpose of CERCLA.**

2 The Court’s conclusion that the United States is an owner under CERCLA is
3 strongly influenced by the approach CERCLA takes to environmental cleanup. CERCLA
4 seeks “to promote the ‘timely cleanup of hazardous waste sites’ and to ensure that the
5 costs of such cleanup efforts [are] borne by those responsible for the contamination.”
6 *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602 (2009) (citation
7 omitted). To accomplish this goal, CERCLA casts the liability net broadly, capturing
8 virtually everyone connected with the property or the contamination, with specific levels
9 of responsibility to be assigned by the court in an equitable allocation process. As the
10 Supreme Court has explained, “[t]he remedy that Congress felt it needed in CERCLA is
11 sweeping: *everyone* who is potentially responsible for hazardous-waste contamination
12 may be forced to contribute to the costs of cleanup.” *United States v. Bestfoods*, 524 U.S.
13 51, 56 n.1 (1998) (emphasis in original; citation omitted). Liable parties include entities
14 and individuals who may have had little or nothing to do with the actual contamination.
15 “CERCLA is a strict liability statute in that it does not require a party to act culpably in
16 order to be liable for clean up.” *Vogenthaler v. Maryland Square LLC*, 724 F.3d 1050,
17 1061 (9th Cir. 2013). To achieve CERCLA’s broad remedial goals, courts interpret the
18 statute “liberally.” *Id.* at 1064.

19 There are four types of persons liable under CERCLA: owners, operators,
20 arrangers, and transporters. 42 U.S.C. § 9607(a). These are “broad categories” of liable
21 persons, *United States v. Atl. Research Corp.*, 551 U.S. 128, 134 (2007), and they can
22 include the United States. Under § 9620(a)(1) of CERCLA, “[e]ach department, agency,
23 and instrumentality of the United States . . . shall be subject to . . . this chapter in the
24 same manner and to the same extent, both procedurally and substantively, as any
25 nongovernmental entity, including liability under section 9607 of this title.”
26 42 U.S.C. § 9620(a)(1). This provision waives sovereign immunity to the extent the
27 United States is a liable party under CERCLA. *El Paso*, 2017 WL 2405266 at *2-4.

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1 **B. The Ordinary Meaning of “Owner.”**

2 CERCLA defines “owner” as “any person owning” a facility. 42 U.S.C.
3 § 9601(20)(A). This definition, of course, is circular. As the Ninth Circuit has noted, it
4 “is a bit like defining ‘green’ as ‘green.’” *Long Beach*, 32 F.3d at 1368. When a statute
5 provides such a circular definition of a term, courts normally look to the term’s plain and
6 ordinary meaning. *Id.*

7 The ordinary meaning of the word “owner” is the person or entity which holds title
8 to property. As the Tenth Circuit recently noted in *Chevron Mining*, “[t]he ordinary or
9 natural meaning of ‘owner’ includes, at a minimum, a legal title holder.” 2017 WL
10 3045887 at *7; *see also Own*, Black’s Law Dictionary (10th ed. 2014) (“To rightfully
11 have or possess as property; to have legal title to.”); *Owner*, Black’s Law Dictionary
12 (10th ed. 2014) (“Someone who has the right to possess, use, and convey something; a
13 person in whom one or more interests are vested. An owner may have complete property
14 in the thing or may have parted with some interests in it (as by granting an easement or
15 making a lease).”). “Dictionaries published around the time of CERCLA’s enactment in
16 1980 affirm this natural meaning.” *Chevron Mining*, 2017 WL 3045887 at 7; *see Own*,
17 Black’s Law Dictionary (5th ed. 1979) (“To have good legal title; to hold as property; to
18 have a legal or rightful title to; to have; to possess.”); *Owner*, Black’s Law Dictionary
19 (5th ed. 1979) (“The person in whom is vested the ownership, dominion, or title of
20 property; proprietor.”). “For purposes of CERCLA, then, an owner includes the legal
21 title holder of contaminated land.” *Chevron Mining*, 2017 WL 3045887 at *7. Because
22 the United States holds legal title to the Mine Sites, it is the owner of the Mine Sites
23 under the ordinary meaning of “owner.”

24 **C. The Nature of Reservation Land.**

25 The Court’s review of federal law does not alter this conclusion.

26 **1. United States Fee Title.**

27 The longstanding law in this country holds that the United States owns fee title to
28 reservation land. *Oneida Indian Nation of N. Y. State v. Oneida Cty., New York*,

1 414 U.S. 661, 667 (1974) (“fee title to the lands occupied by Indians when the colonists
2 arrived became vested in the sovereign – first the discovering European nation and later
3 the original States and the United States”). The tribes retained a limited right of
4 occupancy, often referred to as “Indian title,” that could be extinguished only by the
5 United States and continued only at the pleasure of the United States. *Id.*; *United States*
6 *v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050, 1062 (E.D. Wash. 2007). Over the years,
7 the federal government entered treaties, issued executive orders, and passed legislation
8 affecting, clarifying, and guaranteeing rights to reservation land. Additionally, the
9 position of the United States began to be construed as a trust relationship, with the United
10 States holding land in trust for the benefit of the tribes. Cohen’s Handbook of Federal
11 Indian Law §§ 15.03, 15.09[1][b] at 997, 1053 (Nell Jessup Newton et al. eds., 2012).
12 The precise nature of tribal land rights depends on the language of the instrument used to
13 convey or consolidate them. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103-04
14 (1949); *Healing v. Jones*, 174 F. Supp. 211, 216 (D. Ariz. 1959).

15 2. The Nation’s Interest in Reservation Land.

16 In 1868, the United States entered into a treaty granting the Navajos a reservation
17 in the northeast corner of Arizona. *Sekaquaptewa v. MacDonald*, 619 F.2d 801, 803 (9th
18 Cir. 1980). The reservation was expanded through various executive orders between
19 1880 and 1918. *Id.* The Mine Sites are all located on portions of the reservation set aside
20 through executive order. Doc. 133 at 10.

21 An unconfirmed executive order granting reservation land does not convey any
22 compensable right to native Americans. *See Tee-Hit-Ton Indians v. United States*, 348
23 U.S. 272, 285 (1955); *Healing*, 174 F. Supp. at 216 (“An unconfirmed executive order
24 creating an Indian reservation conveys no right of use or occupancy to the beneficiaries
25 beyond the pleasure of Congress or the President.”). Rights to reservation land granted
26 by treaty or statute, however, do grant compensable rights under the Fifth Amendment.
27 *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 687 (9th Cir. 1976).

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1 In 1934, Congress passed legislation to “consolidate land ownership within the
2 boundaries of the [Navajo] Reservation.” *Sekaquaptewa*, 619 F.2d at 804. In addition to
3 delineating reservation borders, the 1934 Act made clear that the land was “permanently
4 withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other
5 Indians as may already be located thereon.” 48 Stat. 960. The statute permanently set
6 aside reservation land for use and enjoyment of the Navajo Nation. The legislation
7 therefore granted the Nation a compensable interest in all reservations lands, including
8 those where the Mine Sites are located.¹

9 The Supreme Court has made clear that “[a]lthough the United States retained the
10 fee, and the tribe’s right of occupancy was incapable of alienation or of being held
11 otherwise than in common, that right is as sacred and as securely safeguarded as is fee
12 simple absolute title.” *United States v. Shoshone Tribe of Indians of Wind River
13 Reservation in Wyoming*, 304 U.S. 111, 117 (1938). But while this could support an
14 argument that the Navajo Nation should be considered an owner of reservation land
15 under CERCLA, that is not an issue before the Court. Tribes are exempt from CERCLA
16 liability. *Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029, 1035 (E.D.
17 Wash. 2009). The question in this case is whether the United States is an owner of the
18 tribal land for purposes of CERCLA.

19 The fact that the Navajo Nation has significant rights in reservation land does not
20 answer the question in this case. Even if we assume the Nation could be considered an
21 owner under CERCLA (a question the Court need not decide), the Court is aware of no
22 authority suggesting that the United States could not also be an owner. To the contrary,
23 CERCLA itself recognizes that there may be more than one owner of a covered facility.
24 *See* 42 U.S.C. § 9608(b)(4) (“Where a facility is owned or operated by more than one

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26 ¹ Portions of the land covered by the 1934 Act are reserved for other tribes,
27 including the Hopi. *See Sekaquaptewa*, 619 F.2d at 803. The history and relationship of
28 the tribes’ rights to the land is long and complicated. Because the land rights of the tribes
in relation to one another – rather than in relation to the United States – are not relevant
to this case, the Court will refer only to the Navajo Reservation and Navajo land rights.

1 person, evidence of financial responsibility covering the facility may be established and
2 maintained by one of the owners or operators, or, in consolidated form, by or on behalf of
3 two or more owners or operators.”). And if there could be only one owner of a facility
4 under CERCLA, the Ninth Circuit would not have considered whether holders of
5 easements and revocable permits could, in addition to the fee title holders, be considered
6 owners of property under CERCLA. *See Long Beach*, 32 F.3d 1364; *San Pedro*, 635
7 F.3d 440.²

8 It should also be noted that although the United States is said to hold the land in
9 trust for the Nation, the trustee-beneficiary relationship “is not comparable to a private
10 trust relationship.” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011).
11 “Congress may style its relations with the Indians a ‘trust’ without assuming all the
12 fiduciary duties of a private trustee, creating a trust relationship that is ‘limited’ or ‘bare’
13 compared to a trust relationship between private parties at common law.” *Id.* at 174.

14 **3. The United States Retains Power Over Reservation Land.**

15 “Throughout the history of the Indian trust relationship, we have recognized that
16 the organization and management of the trust is a sovereign function subject to the
17 plenary authority of Congress.” *Id.* at 175. “Congress possesses a paramount power over
18 the property of the Indians, by reason of its exercise of guardianship over their
19 interests[.]” *United States v. Sioux Nation of Indians*, 448 U.S. 371, 408 (1980) (citation
20 and quotation marks omitted, alterations incorporated); *see also Winton v. Amos*, 255
21 U.S. 373, 391 (1921) (“It is thoroughly established that Congress has plenary authority
22 over the Indians . . . and full power to legislate concerning their tribal property”); *S. Pac.*
23 *Transp. Co.*, 543 F.2d at 687 (“the Indians have the exclusive right to possession but title
24 to the lands remains with the United States. Congress has plenary authority to control
25 use, grant adverse interests or extinguish the Indian title.”). Thus, while the Navajo
26 Nation was granted exclusive use and occupancy of the reservation, this use and

27 ² The United States agrees that “[m]ultiple people and/or entities can hold absolute
28 rights – the entire bundle of sticks – in a property and multiple people and/or entities can
hold absolute rights in distinct parts of a property.” Doc. 133 at 15 (parentheticals
omitted).

1 occupancy is enjoyed “under general federal supervision.” *McClanahan v. State Tax*
2 *Comm’n of Arizona*, 411 U.S. 164, 174-75 (1973).

3 And beyond its supervisory and plenary power, the United States has reserved
4 other specific powers with regard to reservation land.

5 First, although the Navajo Nation has the authority to exclude others from the
6 reservation, this authority does not apply against the United States. Tribes “may exclude
7 private individuals from the territory within [their respective] jurisdiction[s], or prescribe
8 the conditions upon which such entry will be permitted,” but this power of exclusion “has
9 been superseded by many statutes authorizing and directing officers and agents of the
10 United States to enter upon Indian lands for various purposes.” *Powers of Indian Tribes*,
11 55 I.D. 14, 1934 WL 2186, at * 49 (1934). The 1868 Treaty provided that ““officers,
12 soldiers, agents, and employees of the government . . . shall ever be permitted to pass
13 over, settle upon, or reside in, the territory described in this article.”” *McClanahan v.*
14 *State Tax Comm’n of Arizona*, 411 U.S. 164, 174 (1973) (quoting Treaty with the Navajo
15 Nation, 15 Stat. 668.). This language does not appear in the 1934 Act, but Congress, as
16 shown by the law quoted above, retains plenary power over reservation lands, including
17 the power of access by the federal government.

18 Second, Congress has restricted the alienability of tribal lands, providing that
19 “[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto,
20 from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless
21 the same be made by treaty or convention entered into pursuant to the Constitution.”
22 25 U.S.C. § 177. Thus, no interest in land possessed by a tribe may be conveyed without
23 approval of the federal government. The United States emphasizes that this limitation on
24 alienation was enacted “to promote and protect tribal sovereignty and self-determination”
25 (Doc. 133 at 12 n.6), but whatever the rationale, the fact remains that the United States
26 exercise control over the power to alienate tribal land, an important property right.³

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28 ³ The United States cites a 1934 opinion from the Solicitor of the Department of
the Interior for the proposition that tribes retain substantial sovereign powers. But that
same opinion recognizes that tribal powers may be limited by Congress or by treaties

1 **4. The Nation’s Compensable Interest.**

2 The United States also emphasizes that a tribe’s interest in land conferred through
3 statute or treaty is protected from uncompensated taking by the Fifth Amendment. *See*
4 *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935).⁴ But the Court cannot
5 conclude that the Nation’s right to compensation for taking of tribal lands means that the
6 United States is not an owner of those lands. The fact that a party has a compensable
7 interest in land does not mean there is no other owner. For example, an easement holder
8 has a compensable property interest under the Fifth Amendment, *United States v.*
9 *Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961), and yet it cannot reasonably be
10 argued that the existence of that interest negates the fee title holder’s position as owner of
11 the property.

12 **5. Conclusion.**

13 While the United States has granted a significant property interest to the Navajo
14 Nation – exclusive use and possession of reservation land, amounting to a compensable
15 interest – the fact remains that the United States holds fee title and substantial powers
16 over the land, including the power to enter, control alienation, and take. Given
17 CERCLA’s broad remedial purposes, its simple declaration that facility owners are liable,
18 and the Court’s obligation to construe “owner” liberally, *Voggenthaler*, 724 F.3d at 1064,
19 the Court concludes that a fee title holder with such plenary and supervisory powers is an
20 owner for purposes of CERCLA.

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23 with the federal government: “The powers of sovereignty have been limited from time to
24 time by special treaties and laws designed to take from the Indian tribes control of
25 matters which, in the judgment of Congress, these tribes could no longer be safely
permitted to handle. The statutes of Congress, then, must be examined to determine the
limitations of tribal sovereignty[.]” *Powers of Indian Tribes*, 1934 WL 2186, at *4
(1934).

26 ⁴ This Constitutional protection apparently applies only to actions taken by the
27 United States for its own purposes, rather than for the benefit of the tribe at issue.
28 “Because the government operates as both a trustee and a sovereign with regard to Indian
tribes, an action depriving a tribe of property that would be a per se taking under the
Court’s takings clause jurisprudence may be held to be the action of a trustee and
therefore not a taking.” Cohen’s Handbook of Federal Indian Law § 5.04[2][c] at 410
(Nell Jessup Newton et al. eds., 2012).

1 **D. Supporting Case Law.**

2 The Tenth Circuit’s recent decision in *Chevron Mining* strongly supports this
3 conclusion. *Chevron Mining* considered whether the United States is a CERCLA owner
4 of land subject to unpatented mining claims. 2017 WL 3045887, at *7.

5 The General Mining Act of 1872 allows citizens to exploit mineral deposits under
6 the public lands of the United States. If citizens discover valuable mineral deposits, they
7 may take certain steps to obtain an unpatented claim to the relevant public land. *Id.* The
8 holder of such a claim does not obtain title, but does obtain the exclusive right to use and
9 possess the land. *Id.* As with tribal lands, “the holder of an unpatented claim has
10 superior rights as against third parties,” but not against the United States, which retains
11 fee title and plenary power over the land. *Id.* at *7, 9. If the holder of an unpatented
12 claim exercises his statutory right and follows required procedures, he can acquire a
13 patented mining claim which includes fee title. *Id.*

14 In *Chevron*, the contamination was located on land subject to unpatented mining
15 claims. The mining company admitted its liability under CERCLA, and sued the United
16 States as an owner of the land. The situation was very similar to this case – the holder of
17 the unpatented claims, like the Nation, possessed the exclusive right to possession and
18 control of the land under federal law, and the United States held fee title and retained
19 some powers over the land. The Tenth Circuit held that the United States was an owner
20 under CERCLA. In reaching this conclusion, the court noted that “[t]he ordinary or natural
21 meaning of ‘owner’ includes, at a minimum, a legal title holder.” *Id.* at *7. It
22 emphasized that CERCLA provides broad liability with only a few limited exceptions, *id.*
23 (citing exceptions at 42 U.S.C. § 9601(20)), and that it specifically provides for United
24 States liability as both an owner and an operator, *id.*, at *8 (citing 42 U.S.C. § 9605(a)).
25 Finding that CERCLA envisions liability even for those who did not contribute to
26 contamination, the Tenth Circuit concluded that CERCLA imposed liability on the

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1 United States as the fee title owner of unpatented mining claims, even if it could be
2 argued that the United States held only “bare legal title.” *Id.* at 8, 10.⁵

3 The United States’ status as an owner is also supported by dicta from the Ninth
4 Circuit stating that the “CERCLA framework holds liable . . . the passive *title* owner of
5 real property[.]” *San Pedro*, 635 F.3d at 451-52 (emphasis in original). It also comports
6 with the *Newmont* case cited above, where the district court held that the United States
7 was a CERCLA owner of the Spokane Indian Reservation. 504 F. Supp. 2d at 1065.
8 *Newmont* is somewhat distinguishable from this case because the Spokane Reservation
9 was created by executive orders that did not convey a compensable interest in the land.
10 *Id.* at 1062-64, 1065. But *Newmont* appears to be the only other published case to
11 consider whether the United States is a CERCLA owner of reservation lands, and held
12 that it is. *Newmont* aptly observed that “the drafters of CERCLA [appeared] to intend
13 that land held by the United States in trust for Indians be treated the same as land owned
14 in fee simple by the United States.” *Id.* at 1075.

15 **E. Allocation Remains Ahead**

16 As noted above, Congress designed CERCLA to cast the liability net broadly,
17 capturing virtually everyone connected with the property or the contamination and then
18 sorting out levels of responsibility in an equitable allocation phase. *See* 42 U.S.C.
19 § 9613(f)(1). The Court’s holding that the United States is an owner, therefore, does not
20 decide the extent of its liability for contamination at the Mine Sites. As the Tenth Circuit
21 explained in *Chevron Mining*: “a ‘bare legal title’ holder may in fact be liable for only a
22 small, or perhaps no, share of remediation costs as a matter of equity. But a liberal
23 construction of CERCLA’s liability scheme requires any consideration of the extent and
24 kind of an owner’s involvement in hazardous substance production and disposal be made

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26 ⁵ The United States’ response to El Paso’s motion for summary judgment relied
27 heavily on the site control test for determining CERCLA ownership, as adopted in *United*
28 *States v. Friedland*, 152 F. Supp. 2d 1234 (D. Colo. 2001), and other cases.
Doc. 119 at 16-20. *Chevron Mining* rejected *Friedland* and the site control test. 2017
WL 3045887, at *9-10. This Court’s previous order also found that the site control test
has been rejected by the Ninth Circuit. *See El Paso*, 2017 WL 2405266, at *5-7.

1 at the second stage of the CERCLA liability inquiry (*i.e.*, allocation under 42 U.S.C.
2 § 9613(f)(1)), rather than the first (*i.e.*, precluding ‘owner’ liability entirely).” 2017 WL
3 3045887, at *10.

4 **II. Limits of Fiduciary Liability.**

5 CERCLA provides that “[t]he liability of a fiduciary under any provision of this
6 chapter for the release or threatened release of a hazardous substance at, from, or in
7 connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets
8 held in the fiduciary capacity.” 42 U.S.C. § 9607(n)(1). Because the United States holds
9 Navajo land in trust and the land is inalienable, the United States argues, there are no
10 trust assets with which the liability of the United States can be satisfied. Doc. 119 at 22.
11 But the content of the trust is not clear to the Court. El Paso asserts that the trust includes
12 “all Navajo land and revenues.” Doc. 123 at 14. The United States has not shown that
13 the trust is limited to the land itself or that any costs allocated to the United States could
14 not be covered by trust assets.

15 Further, the limitation of liability to trust assets “does not apply to the extent that a
16 person is liable under this chapter independently of the person’s ownership of a vessel or
17 facility as a fiduciary or actions taken in a fiduciary capacity.” 42 U.S.C. 9607(n)(2). El
18 Paso claims that the United States is also liable in this case as an operator and arranger,
19 claims that must be resolved at trial. *See* Doc. 55 at 27-29. The fiduciary limit of
20 § 107(n) will not apply to any liability of the United States on these grounds.

21 Given this state of the case, the Court concludes that the effect of § 107(n) is better
22 left to trial. The Court will not hold at this time that the United States, as a liable owner
23 of the Mine Sites, has no equitable share of the response costs. *See* Doc. 119 at 22-23.

24 El Paso argues that CERCLA’s limitations on the liability of fiduciaries does not
25 apply because the statute explicitly excludes a person who “acts in a capacity other than
26 that of a fiduciary or in a beneficiary capacity; and in that capacity, directly or indirectly
27 benefits from a trust or fiduciary relationship[.]” 42 U.S.C. § 9607(n)(7)(A). El Paso
28 contends that the United States Atomic Energy Commission “acted in a capacity other

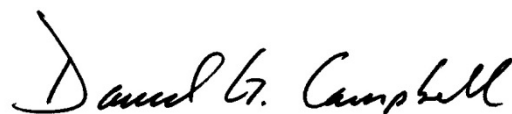
1 than a fiduciary during its mining activities at the Mine Sites, and “benefited by receiving
2 uranium ore needed to win the Cold War.” Doc. 114 at 19. As a result, any limitations
3 on liability established by § 107(n) are “abrogated,” according to El Paso. *Id.*

4 If El Paso is asking the Court to decide this issue on summary judgment, it has not
5 met its burden of showing that the United States acted in a role other than as a fiduciary.
6 If the United States is to be liable beyond the assets held in the trust based on its status as
7 an owner of the Mining Sites, it would appear that El Paso must show that the United
8 States’ actions *as an owner* exceeded its fiduciary role. El Paso has not established what
9 actions of the United States as an owner were taken outside its fiduciary role. Thus, the
10 Court cannot conclude at this time that § 107(n) does not apply to the United States’
11 liability as an owner of the Mine Sites.

12 El Paso additionally relies on the Restatement (Second) of Trusts to argue that the
13 United States’ liability is not limited to trust assets. But the trust relationship between the
14 United States and the tribes “is defined and governed by statutes rather than common
15 law.” *Jicarilla Apache Nation*, 564 U.S. at 174. Because § 107(n) explicitly lays out the
16 limitations on CERCLA liability of fiduciaries, the Court is not inclined to look to
17 contrary common law rules. El Paso also cites *City of Phoenix, Ariz. v. Garbage Servs.*
18 *Co.*, 816 F. Supp. 564, 567 (D. Ariz. 1993), to argue for extending the United States’
19 liability beyond the assets of the trust, but that case was decided before Congress enacted
20 § 107(n). *See* Pub. L. No. 104-208, § 2502, 110 Stat. 3009 (1996).

21 **IT IS ORDERED** that El Paso’s motion for partial summary judgment (Doc. 114)
22 is **granted** in part as set forth above. The Court finds that the United States is an owner
23 of the Mine Sites for purposes of CERCLA. The Court will schedule a telephone
24 conference to set a trial date and discuss pretrial procedures.

25 Dated this 15th day of August, 2017.

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David G. Campbell
United States District Judge