

Dated: January 6, 2012



*George B. Nielsen*

George B. Nielsen, Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

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

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

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

1 jurisdiction over this adversary proceeding.

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

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

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

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

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

27   **FINDINGS OF FACT**

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

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

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

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

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

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

28 4. Carl Padilla has been an oil equipment manufacturer

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

1 Nation.

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

1 finder.

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

5 **CONCLUSIONS OF LAW**

6 1. To the extent that any of the above findings of fact  
7 should be considered conclusions of law, they are hereby incorpo-  
8 rated by reference.

9 2. Jurisdiction of the Chapter 11 bankruptcy case to  
10 which this adversary proceeding is related is vested in the United  
11 States District Court for the District of Arizona. 28 U.S.C.  
12 §1334(a). That court has referred all cases under Title 11 of the  
13 United States Code, all adversary proceedings and all contested  
14 matters arising under Title 11 or related to a bankruptcy case to  
15 the United States Bankruptcy Court for the District of Arizona.  
16 28 U.S.C. §157(a), District General Order 01-15(1). The Nation  
17 has denied this court has core bankruptcy jurisdiction to resolve  
18 this proceeding by entering a final order or judgment. Answer to  
19 second amended complaint at ¶ 4, dkt. 64. The Nation was  
20 scheduled as a disputed unsecured creditor, but did not file a  
21 bankruptcy claim against the estate. Schedule F at p. 2.

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

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<sup>2</sup>Second amended complaint at p. 2,

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

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

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



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

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

25           7. Defendant's expert appraisal is of lesser utility,  
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27           <sup>3</sup>Apparently, family member Brian L. Nicholson received contact regarding  
28 the record's return but either never followed up or did not retain them.  
Nicholson test., Ex. 35.

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

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

21 **ORDER**

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

28

1 Copies emailed this 6th day  
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