Washington and Lee Law Review

Volume 76 | Issue 2 Article 8

6-19-2019

This Land Is Your Land, This Land Is Mined Land: Expanding Governmental Ownership Liability Under CERCLA

Kiersten E. Holms
Washington and Lee University School of Law, holms.k@law.wlu.edu

This Land Is Your Land, This Land Is Mined Land: Expanding Governmental Ownership Liability Under CERCLA

Kiersten E. Holms

Table of Contents

I. Introduction

On August 5, 2015, the Gold King Mine spill released millions of gallons of mining waste from an abandoned mine into the surrounding ecosystem.[1] This spill occurred during an Environmental Protection Agency (EPA) investigation of the abandoned Gold King Mine.[2] Accumulated mine drainage at the entrance of the mine unexpectedly gave way, causing a torrent of water and mining waste to flow into the nearby Cement Creek.[3] The waste moved swiftly from Cement Creek into the Animas River north of Silverton, Colorado, turning the water an opaque orange color.[4] In total, the accident resulted in the release of an

1. *See* KARLETTA CHIEF ET AL., UNIV. OF ARIZ. SUPERFUND RESEARCH PROGRAM, UNDERSTANDING THE GOLD KING MINE SPILL 1 (2016) (synthesizing the information about the Gold King Mine Spill as it emerged).

2.*See id.* (describing the events that lead to the Gold King Mine spill).

3. *See id.*

4. *See* Zoe Schlanger, *EPA Causes Massive Spill of Mining Site Water in Colorado, Turns Animas River Bright Orange*, NEWSWEEK (Aug. 7, 2015, 3:35

estimated three million gallons of acid drainage, which ultimately flowed into the Colorado River.[5] The water released from the mine contained a number of heavy metals, including lead, arsenic, mercury, and cadmium, that severely polluted the nearby ecosystems.[6]

While the Gold King Mine Spill provides an extreme example of environmental contamination caused by legacy hard rock mining, the environmental impact of mining is an issue that extends far beyond the Animas River.[7] Thousands of gallons of pollutants spill into United States waterways from abandoned mines every minute.[8] In fact, there are approximately 23,000 abandoned mines in the state of Colorado alone and approximately 500,000 abandoned mines across the United States.[9] While hard rock mining produces hundreds of billions of dollars' worth of minerals, the owners of mining sites often abandon the mines once the minerals are not economically retrievable.[10] In some cases,

---

PM), http://www.newsweek.com/epa-causes-massive-colorado-spill-1-million-gallons-mining-waste-turns-river-361019 (last visited Feb. 24, 2018) (providing an account of the Gold King Mine Spill) (on file with the Washington and Lee Law Review).

5. *See* Karletta Chief et al., *supra* note 1, at 2–3 ("The acid mine drainage released in the spill contained a number of metals and salts totaling about 190 tons of solids, including several forms of toxic metals such as lead, arsenic, mercury and cadmium. These solids were mixed in 3,043,067 gallons of water.").

6. *See id.* (discussing the repercussions of the Gold King Mine Spill).

7. *See* Emelie Frojen, *Two Years After the Gold King Spill*, MEDIUM (Aug. 15, 2015), https://medium.com/@ConservationCO/two-years-after-the-gold-king-spill-2c8a83837d2b (last visited Feb. 24, 2018) ("The amount of pollution that flowed through Durango during the Gold King Mine Spill still passes down Colorado waterways every other day; the only difference in the spill was that the water was orange. This is an issue that extends far beyond the Animas River.") (on file with the Washington and Lee Law Review).

8. *See* Ronald Cohen, *Weighing the Impact of the Gold King Mine Spill—and Hundreds of Inactive Mines Like It*, CONVERSATION (Aug. 27, 2015, 3:49 AM), http://theconversation.com/weighing-the-impact-of-the-gold-king-mine-spill-and-hundreds-of-inactive-mines-like-it-46662 (last visited Apr. 7, 2019) ("There are at least 230 inactive mines in Colorado spilling thousands of gallons per minute into local waterways, according to state officials.") (on file with the Washington and Lee Law Review).

9. *See* Frojen, *supra* note 7 (discussing the history of hard rock mining in Colorado and throughout the United States).

10. *See* STUART BUCK & DAVID GERARD, CLEANING UP MINING WASTE 1 (2001), https://www.perc.org/wp-content/uploads/old/rs01_1.pdf (introducing the contamination issues associated with hard rock mining).

such as with the Gold King Mine spill, these abandoned mining sites have caused environmental, health, and safety problems, polluting water supplies and affecting nearby residential areas, fish populations, and wildlife habitations.[11] In all, mining waste is responsible for considerable damage to human health and the environment.[12]

In response to the threats hazardous waste poses to public health and the environment, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[13] CERCLA provides the EPA with an avenue to compel responsible parties to clean up abandoned mining sites.[14] However, when looking to remediate sites, the EPA is faced with a number of challenges.[15] At the outset, the EPA must determine who should be held responsible for the cleanup costs associated with remediating a contaminated site—often, environmental damage is caused by companies that ceased operations decades ago or now lack the financial resources to clean up the waste.[16]

Many commentators argue that the federal government is an obvious party to fund the cleanup of contaminated mining sites, specifically contaminated federal lands. For more than a century, the federal government failed to regulate mining activity.[17] But

---

11. *See id.* at 2 (illustrating how severe the damage can be from former mining operations).

12. *See* U.S. ENVTL. PROT. AGENCY, HUMAN HEALTH & ENVIRONMENTAL DAMAGES FROM MINING AND MINERAL PROCESSING WASTES 1, 7 (1995), https://archive.epa.gov/epawaste/nonhaz/industrial/special/web/pdf/damage.pdf (discussing exempt and non-exempt mineral processing wastes).

13. *See* U.S. ENVTL. PROT. AGENCY, REVITALIZING CONTAMINATED SITES: ADDRESSING LIABILITY CONCERNS 5 (2008) (providing an overview of the EPA's capacity to remediate contaminated lands under CERCLA).

14. *See id.* at 6 (reviewing CERCLA's liability provisions).

15. *See* BUCK & GERARD, *supra* note 10, at 1–2 (describing the difficulties in allocating liability for mining operations).

16. *See* Matthew Brown, *U.S. Mining Sites Dump 50 Million Gallons of Fouled Wastewater Daily*, PBS (Feb. 20, 2019, 12:51 PM), https://www.pbs.org/newshour/nation/u-s-mining-sites-dump-50-million-gallons-of-fouled-wastewater-daily (last visited Apr. 9, 2019) (discussing pollution caused by a legacy of mining in the United States) (on file with the Washington and Lee Law Review).

17. *See id.*

even further, the federal government actively encouraged the development of economic resources on public lands.[18] The General Mining Law of 1872[19] authorizes and governs mining activities on federal lands.[20] Congress passed this law for the purpose of promoting "the development of mining resources in the United States."[21] The General Mining Law led to extensive mining and waste disposal activities on federal lands between the late 1800s and post-World War II.[22] During that time, federal agencies kept the federal government apprised of the extent of waste disposal occurring on federal lands through field inspections and detailed reports.[23] Despite this knowledge, the federal government took no steps to control or prevent the contamination.[24]

In addition, United States agencies have aided in the coal production process. During World War II, for example, the United States Production Board and the Departments of Interior and Agriculture deliberately increased mineral production pursuant to the General Mining Law.[25] The Department of Defense furloughed thousands of soldiers to work on mines, mills, and process facilities.[26] Additionally, the United States Forest Service funded the construction of roads for the express purpose of facilitating

---

18. *See* Cohen, *supra* note 8 ("Today, it's hard to imagine an industry largely free of responsibility for its actions. But, it happened when the U.S. government laid out a series of policies for miners to promote western growth and economic development.").

19. The General Mining Law of 1872, 30 U.S.C. § 22 et seq. (2012).

20. *See id.* § 22 ("All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase.").

21. *See, e.g.*, Bagg v. N.J. Loan Co., 354 P.2d 40, 45 (Ariz. 1960) ("No citation of authority is required to support the statement that the all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country.").

22. *See* Roger L. Freeman & Pamela S. Sbar, *Cleanup on the Federal Lands Meets the Private Sector*, 44 ROCKY MTN. INST. 1, 10–11 (1998), https://www.dgslaw.com/images/materials/273770.pdf (describing the theories advanced by the National Mining Association as to why the United States should be liable under CERCLA).

23. *See id.* at 11 (recounting the National Mining Association's arguments).

24. *See id.* (describing the United States' extensive involvement in mining activities on federal lands).

25. *See id.* (discussing the ways in which the federal government contributed to the mining contamination).

26. *See id.*

mining.[27] The United States Bureau of Mines carried out numerous explorations and drilling programs to expand ore mineral reserves and increase mineral production.[28]

Together with private individuals, the federal government exploited minerals on federal lands.[29] The centuries of mining on federal lands left abandoned mines containing hazardous wastes littered throughout the country.[30] Despite holding fee title to, and actively encouraging development on, federal lands, the federal government has attempted to evade CERCLA liability.[31] This Note addresses whether CERCLA extends ownership liability to the federal government for cleanup costs on contaminated public lands based on the federal government's role as the legal titleholder.

Part II begins by providing a brief overview of the background and goals of CERCLA. Part II also provides an examination of the issue of ownership liability under CERCLA and recounts the federal courts' difficulty in applying ownership liability. Part II then describes how the federal government's "bare legal title" argument arose out of the confusion surrounding ownership liability in CERCLA litigation. Part III moves on to examine the recent trend in CERCLA litigation rejecting the federal government's bare legal title argument, thus holding the federal government liable as an owner based on its possession of legal title to contaminated public lands.

Part IV analyzes whether the bare legal title defense is consistent with CERCLA, taking the position that the defense is not. Finally, Part V contends that federal government liability for its role as titleholder of public lands should extend beyond the context of contaminated mining lands. Ultimately, this Note argues that the recent court decisions rejecting the government's

---

27. *See id.*

28. *See id.*

29. *See id.*

30. *See* Brian Handwerk, *Why Tens of Thousands of Toxic Mines Litter the U.S. West*, SMITHSONIAN.COM (Aug. 13, 2015), https://www.smithsonianmag.com/science-nature/why-tens-thousands-toxic-mines-litter-us-west-180956265/ (last visited Feb. 26, 2018) (examining how the Gold King Mine spill highlighted the problems of waste building up in abandoned mines) (on file with the Washington and Lee Law Review).

31. *See infra* Part III (discussing the government's bare legal title defense).

bare legal title defense are consistent with CERCLA.[32] Courts should not treat the federal government any differently than a private entity and, therefore, courts should hold the federal government liable as an owner under CERCLA for its role as legal titleholder to public lands.[33]

II. The History and Legal Framework of CERCLA

In 1980, Congress adopted one of the most extensive environmental cleanup statutes to date: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[34] CERCLA was enacted in response to the alarming environmental and health risks posed by industrial pollution.[35] The Love Canal disaster, which has become one of the most infamous environmental catastrophes to date, illuminated the need for remedial legislation.[36] The discovery of the Love Canal and several other severely contaminated sites in the late 1970s sparked public outrage.[37] In response, Congress constructed CERCLA to enable the EPA to clean up thousands of hazardous wastes sites across the United States.[38] Unlike its statutory predecessors that regulated hazardous wastes,[39] Congress

32. *See infra* Part IV (discussing how rejecting the government's "bare legal title" defense will further the remedial and deterrent purposes of CERCLA).

33. *See infra* Part IV (arguing for a uniform test that holds the federal government liable based upon roles as a legal title holder of public lands).

34. *See* 42 U.S.C. §§ 9601–9675 (2012) (laying the liability framework for the statute's remedial goals).

35. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 55 (1998) ("In 1980, CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution.").

36. *See* Dennis Hevesi, *The Long History of a Toxic Waste Nightmare*, N.Y. TIMES, Sept. 28, 1998, at B4 (providing a chronological history of the Love Canal disaster).

37. *See id.* (rationalizing the policy reasons for enacting CERCLA).

38. *See* 42 U.S.C. § 9604 (allocating the authority to respond to the release or threatened release of hazardous substances to the Executive Branch).

39. *See, e.g.*, *id.* §§ 6901–92k. Before CERCLA, the Resources Conservation and Recovery Act (RCRA) was the primary statute that addressed hazardous waste disposal. However, RCRA "did not authorize the EPA to respond quickly to the release or threatened release of toxic wastes in an abandoned site. RCRA regulated only active hazardous waste sites; it did not contemplate abandoned sites which may jeopardize health." Elizabeth A. Glass, *Superfund and SARA:*

designed CERLCA to be retroactive, rectifying environmental contamination that had already occurred.[40]

The overarching goals of CERCLA are two-fold: (1) to promote the "timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts are borne by those responsible for the contamination"[41] and (2) to encourage the careful handling of hazardous wastes in order to prevent future environmental contamination.[42] Through its liability framework, CERCLA "provide[s] for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[43]

In order to fully understand the question of ownership liability presented in this Note, it is important to understand the history and goals of CERCLA, as well as the liability scheme the Act creates. This Part begins by providing an explanation of the authority CERCLA grants the EPA followed by a discussion of how the EPA or a third party may recover costs expended in the remediation of a contaminated site.

A. The EPA's Authority Under CERCLA

CERCLA enables the EPA to respond to the release or threatened release of a hazardous substance into the environment.[44] CERCLA delegates the EPA response authority in

---

Are There Any Defenses Left?, 23 HARV. ENVTL. L. REV. 385, 388 (1985).

40. *See, e.g.*, United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985) (stating that, "CERCLA is by its very nature backward looking. Many of the human acts that have caused the pollution already had taken place before its enactment").

41. Burlington Northern & Santa Fe Ry. v. United States, 556 U.S. 599, 602 (2009) (quoting Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90, 94 (2d Cir. 2005)).

42. *See* Daniel C. Chang, *CERCLA: The Problems of Limiting Contribution Claims for Potentially Responsible* Parties, 35 LOY. L.A. L. REV. 1107, 1008 (2002) (explaining that one of the main goals of CERCLA is "to encourage the careful handling of hazardous wastes by spreading liability over all responsible parties").

43. Pub. L. No. 96-510, 94 Stat. 2767, 2767 (1980) (codified as amendment at 42 U.S.C. §§ 9601–9675 (2012)).

44. *See* 42 U.S.C. § 9604(a)

two ways: (1) CERCLA authorizes the cleanup of contaminated sites; and (2) CERCLA establishes a liability scheme to ensure that the parties responsible for the contamination pay for the cleanup at the site.[45]

In addition, CERCLA established a trust fund called the Superfund[46] meant to finance the remediation of hazardous sites, or Superfund sites, when the EPA cannot locate responsible parties or responsible parties are insolvent.[47] When the Superfund was first established, dedicated taxes placed on polluting industries and general taxes financed the Superfund.[48] However, CERCLA's taxing authority expired in 1995.[49] Since 2001, general appropriations constitute the largest source of revenue for the Superfund.[50]

In the past decade, the EPA allocated $243 million per year to Superfund cleanups, but it is estimated that $335 to $681 million

---

> [T]he President is authorized to act, . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . which the President deems necessary to protect the public health or welfare or the environment.

The President delegated his response power to the EPA by Executive Order. *See* Superfund Implementation, Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987).

45. *See* Memorandum from the Comm. on Energy and Commerce Democratic Staff to Members of the Subcomm. on Env't and on the Econ. (Sept. 9, 2015) [hereinafter "Hearing on Federal Facility Cleanups under Superfund"] (providing a background on contaminated sites and CERCLA cleanups).

46. *See* 26 U.S.C. § 9507(a) (2012) ("There is established in the Treasury of the United States a trust fund to be known as the 'Hazardous Substance Superfund,' consisting of such amounts as may be—(1) appropriated to the Superfund as provided in this section.").

47. *See id.* (establishing the parameters of the Superfund).

48. *See id.* § 9607(b) (detailing that the Superfund funding would be provided by taxes issues on behalf of the Treasury and any funds recovered in CERCLA actions).

49. *See* DAVID M. BEARDMAN, CONG. RESEARCH SERV., COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT 2 (2012) [hereinafter "CONGRESSIONAL CERCLA SUMMARY"] (stating that CERCLA's "authority to collect the industry taxes expired on December 31, 1995").

50. *See id.* ("General revenues now provide most of the funding for the trust fund, but other monies continue to contribute some revenues (i.e., cost-recoveries from [potentially responsible parties], fines and penalties for violations of cleanup requirements, and interest on the trust fund balance).").

per year are needed to clean up contaminated sites.[51] With such limited funding, it is important that those responsible for the contamination, and not the Superfund, bear the costs of the cleanup.[52] Congress passed CERCLA under the theory that those culpable for the contamination of lands should be responsible for remediating them.[53] As such, CERCLA identifies four categories of potentially responsible parties (PRPs) that could be held liable to finance the cleanup of the contaminated site: (1) the present owner or operator of the contaminated site; (2) any past owner or operator of the contaminated site at the time the hazardous substance was disposed of on the site; (3) any generator who arranged to have the waste taken to the site for treatment or disposal; and (4) any person who transported the waste for treatment or disposal.[54]

---

51. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-380, SUPERFUND: EPA's Estimated Costs to Remediate Existing Sites Exceeds Current Funding 2010) (discussing the costs of cleanup at NPL sites).

52. *See* James Morrow, *Owning Up: Determining the Proper Test for Ownership Liability Under CERCLA*, 42 WASH. U. J.L. & POL'Y 333, 335 (2014) (discussing the EPA's authority under CERLA).

53. *See A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, Senate Committee of Environment and Public Works, S. Doc. No. 97–14, 97th Cong., 2d Sess.1983, Vol. I, p. 320 (stating that one of the statute's principal goals is "assuring that those who caused chemical harm bear the costs of that harm . . . ."); United States v. Alcan Aluminum Corp., 964 F.2d 252, 257 (3rd Cir. 1992) ("In response to widespread concern over the improper disposal of hazardous wastes, Congress enacted CERCLA, a complex piece of legislation designed to force polluters to pay for costs associated with remedying their pollution.").

54. *See id.* § 9607(a) (imposing liability for the cleanup of facilities on four categories of persons:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who . . . arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities.

Once a PRP has been identified, the EPA may utilize one of three enforcement mechanisms to initiate a cleanup at the contaminated site: (1) under Section 104, the EPA may undertake emergency remediation measures in order to clean up a hazardous site and then sue responsible parties for reimbursement for the cleanup costs;[55] (2) under Section 106, the EPA may issue a judicial or administrative order compelling one or more potentially responsible parties to perform a cleanup of the contaminated site;[56] or (3) the EPA may enter into a voluntary settlement agreement with a responsible party to remediate the site.[57]

If the EPA remediates a contaminated site without first identifying a responsible party, the agency may bring a Section 107(a) recovery action against PRPs to reimburse their response costs.[58] If PRPs either cannot be located or are insolvent, Superfund monies will be allocated to fund the remediation of the site.[59] Despite Congressional appropriations, Superfund monies are limited, so it is crucial for the EPA to locate and establish that that a PRP is liable to avoid depleting the Superfund.[60] As one attorney stated, "[h]aving money immediately available from a responsible party would be a game changer."[61]

B. Establishing CERCLA Liability

---

55. 42 U.S.C. § 9604 (2012).

56. *See id.* § 9606 (providing the statutory authority for abatement actions).

57. *See id.* § 9606(a) (stating that the when the President determines that there may be "imminent and substantial endangerment to the public health or welfare or the environment," the President may secure relief "as may be necessary to abate such danger or threat").

58. *See* 42 U.S.C. § 9607(a)(4) (listing the financial responsibilities of a PRP).

59. *See* CONGRESSIONAL CERCLA SUMMARY, *supra* note 49, at 2 ("In the event that the potentially responsible parties cannot pay or cannot be found, appropriated Superfund monies may be used to pay the orphan shares of cleanup costs at a site, under a cost-sharing agreement with the state in which the site is located.").

60. *See id.* at 23–25 (describing the enforcement mechanisms available to the EPA under CERCLA).

61.*See* Brown, *supra* note 16 (discussing who should pay for the cleanup of contaminated sites).

CERCLA liability is triggered against a PRP if it is established that there was a "release" or "threatened release"[62] of a "hazardous substance"[63] from a "facility"[64] into the environment that will result in response costs in cleaning the contamination.[65] An identified PRP may be liable for government cleanup costs, damages to natural resources, the cost of certain health assessments, and injunctive relief (i.e. performing a cleanup).[66]

When Congress enacted CERCLA, they expected the liability for contamination to be sweeping, forcing any party potentially responsible for the hazardous waste contamination at a site "to contribute to the costs of the cleanup."[67] With this goal in mind, CERCLA imposes strict[68] joint and several[69] liability on any party found liable.[70] While a defendant may evade liability in a limited number of circumstances,[71] courts tend to construe PRP liability

---

62. *See* 42 U.S.C. § 9601(22) (2018) (defining "release" as broadly including "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment").

63. *See id.* § 9601(14) (defining "hazardous substance" widely to include "any hazardous waste listed under the Clean Air Act, Clean Water Act, or RCRA; any imminently dangerous substance under the Toxic Substance Control Act; and any element, compound, or mixture that may present a substantial danger to the public health or welfare of the environment").

64. *See id.* § 9601(9) (defining a facility to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located").

65. *See id.* § 9607 (laying the framework for the liability scheme under CERCLA).

66. *See id.* § 9607(a)(4) (providing that PRPs will be liable for all costs of removal or remedial action as well as any other necessary costs of a response).

67. *See* United States v. Bestfoods, 524 U.S. 51, 56 n.1 (1998).

68. CONGRESSIONAL CERCLA SUMMARY, *supra* note 49, at 14 ("Strict liability means that a party can be held liable regardless of whether the conduct of that party was negligent.").

69. *See id.* ("Joint and several liability means that one or more of the liable parties can be held responsible for the full cost of the cleanup at a site, regardless of the degree of involvement in the contamination.").

70. *See* U.S. ENVTL. PROT. AGENCY, CERCLA LIABILITY AND LOCAL GOVERNMENT ACQUISITIONS AND OTHER ACTIVITIES 2 (2011) *(*"CERCLA is a strict liability statute that holds potentially responsible parties (PRPs) jointly and severally liable, without regard to fault, for cleanup costs incurred in response to the release.").

71. *See* 42 U.S.C. §§ 9607(b)(1)–(3) (2012) (detailing the circumstances in

liberally in order to accomplish the statute's goal of environmental cleanup and protection.[72]

In light of this expansive liability, a PRP may be responsible for funding the entirety of a cleanup, regardless of its degree of participation in the contamination.[73] Typically, the EPA will focus on a limited number of PRPs to pay for the cleanup at a contaminated site, which can cause one PRP to incur an enormous amount of monetary liability.[74] A PRP identified and found liable under CERCLA may attempt to apportion their costs in an action against other PRPs.[75] Under § 113(f)(1) of CERCLA, a liable party may seek contribution from other PRPs for their costs incurred as a result of their cleanup.[76] Contribution actions permit a liable party to recover from a defendant an equitable share of that defendant's response costs.[77] The huge increase in the cost of environmental cleanups since the enactment of CERCLA has made the allocation of response costs for liable parties particularly important.[78]

---

which liability will not attach to a potentially responsible party).

72. *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) ("Because it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup.").

73. *See* Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821, 822–23 (2012) (analyzing the expansive scope of PRPs under CERCLA).

74. *See* Jason E. Panzer, *Apportioning CERCLA Liability: Cost Recovery or Contribution, Where Does a PRP Stand?*, 7 FORDHAM ENVTL. L. REV. 437, 451

> Due to financial constraints and other impracticalities, the EPA only focuses on a few financially viable PRPs to should the entire cost of the EPA's remediation or removal measures under § 107(a). The PRPs singled out by the EPA must then attempt to recover from the PRPs that the EPA failed to identify.

75. *See id.* at 442–43 (describing how after a party has been targeted by the government to clean up a contaminated site, the party "then faces the precarious task of attempting to apportion their costs among other liable parties").

76. *See* 42 U.S.C. § 9613(f)(1) (2012) ("Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 [42 USCS § 9606] or under section 107(a).").

77. *See id.* ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

78. *See* Thomas C. Roberts, *Allocation of Liability Under CERCLA: A Carrot*

C. Ownership Liability Under CERCLA

While Congress's goals in enacting CERCLA were clear, CERCLA's statutory language is less so—often lacking clarity or precision.[79] Because of the statute's ambiguous language, CERCLA has generated a number of controversies within the federal court system.[80] One such issue that has arisen is whether courts should extend liability to past and present owners of contaminated real property—both of whom are PRPs under CERLCA.[81]

Applying strict liability to an owner may seem a relatively straightforward task, but in practice courts have struggled to determine ownership liability. CERCLA provides little guidance on the interpretation of the word "owner," defining an "owner" circularly as "any person owning" a facility.[82] As the Ninth Circuit noted, this definition "is a bit like defining 'green' as 'green.'"[83] This lack of clarity has led courts to adopt a variety of legal tests to determine the legal meaning of the term.[84]

---

and Stick Formula, 14 ECOLOGY L.Q. 601, 604 (1987) (estimating that "the total bill for cleaning up all the hazardous waste disposal sites that eventually may require cleanup [has] ranged from $8 billion to $100 billion").

79. *See* Richard J. Angell & Jeffrey C. Corey, *Possession is (Only) Nine-Tenths of the Law Under CERCLA: Taking Your Claim and Asserting it Too After* Chevron Mining Inc. v. United States, 64 ROCKY MTN. MIN. L. INST. 26-1, 26-6 (2018) (describing the ambiguity in CERCLA ownership liability before the decision in *Chevron Mining*).

80. *See* Chang, *supra* note 42, at 1007 ("From the time Congress passed [CERCLA] in 1980, it has been plagued by many problems and controversies.").

81. *See* Angell, *supra* note 79, at 26-6 (discussing the ambiguity of the statutory language in CERLCA).

82. *See* 42 U.S.C. § 9601(20)(A) (2012) ("The term 'owner or operator' means . . . in the case of an onshore facility or an offshore facility, any person owning or operating such facility.").

83. Long Beach Unified Sch. Dist. v. Goodwin, 32 F.3d 1364, 1368 (9th Cir. 1994).

84. *See* Catherine Nampewo, *CERCLA: Determining Ownership Liability for Possessory Interests in Real Property*, 39 B.C. ENVTL. AFFAIRS L.R. 82, 85 (2012) (detailing three approaches the used to determine whether an owner is subject to CERCLA liability).

1. Tests Addressing Ownership Liability Under CERCLA

In particular, courts have struggled with the question of ownership liability when a party holds a possessory interest in a piece of contaminated property that is less than holding title.[85] In this scenario, one PRP holds legal title to contaminated property[86] while another PRP, such as a leaseholder, holds an indicia of ownership to the piece of property.[87]

Courts have developed various methods for determining whether a party is an owner for purpose of CERCLA liability. The first approach, applied in *United States v. South Carolina Recycling and Disposal, Inc.*,[88] is the "site control" test.[89] This method examines the extent of control and responsibility the defendant maintained over the contaminated property to determine CERCLA ownership liability.[90] In *South Carolina Recycling*, the district court held the lessee liable as an owner and operator based on the "control over and responsibility" it maintained over the property during the period of time in which the contamination occurred.[91]

The second approach, adopted by the Second Circuit, is referred to as the "de facto ownership" test.[92] In applying this

---

85. *See* Morrow, *supra* note 52, at 339–50 (detailing the three main tests court have applied when less than full title).

86. *See* KELLY TROY, LEGAL TITLE VS. EQUITABLE TITLE 2 (2011), https://www.proeducate.com/courses/Finance/EquitableTitle.pdf

> Indicia of ownership means evidence of a secured interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title or deed to real or personal property acquired through or incident to foreclosure.

87. *See* 40 C.F.R. § 280.200 (2017) ("Indicia of ownership means . . . evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title or deed to real or personal property acquired through or incident to foreclosure.").

88. 653 F. Supp. 984 (D.S.C. 1986), *aff'd in part, vacated in part sub. nom.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988).

89. *See id.* at 1003 (reasoning that attaching ownership liability to parties who controlled the site would further Congress' intent when enacting CERCLA).

90. *See id.* (noting that "site control is an important consideration in determining who qualifies as an 'owner' under Section 107(a)").

91. *Id.* at 1006.

92. *See* Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321, 330 (2d Cir. 2000) ("Certain lessees may have the requisite indicia of ownership

method, the Second Circuit rejected the site control approach, observing the differences between owner and operator liability.[93] Instead, the court articulated a five-factor analysis to determine ownership liability, evaluating whether the PRP had the necessary indicia of ownership to amount to ownership liability.[94] Ultimately the Second Circuit concluded that the lessee was not an owner because they "did not possess sufficient attributes of ownership."[95]

Finally, the Ninth Circuit applied a third approach to determine ownership liability, looking to the common law definition of owner in state where the property is located.[96] By applying California's common law, the court distinguished between fee title holders and those holding lesser rights, ultimately finding the lessor to not be an owner under CERCLA.[97]

The site control, de facto owner, and common law approaches demonstrate federal courts' difficulty in defining and determining ownership liability.[98] While these tests arose to alleviate

---

vis-a-vis the record owner to be *de facto* owners and therefore strictly liable.").

93. *See id.* at 328 ("Even a cursory examination of the basis for operator liability reveals that it would be almost entirely subsumed by owner liability that relied on site control analysis.").

94. *See id.* at 330–31 (adopting a non-exclusive five factor test that denotes whether the defendant had ownership liability. The five factors include:

> [(1)] whether the lease is for an extensive term and admits of no rights in the owner/ lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs.

95. *Id.* at 331.

96. *See* City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 449 (9th Cir. 2011) (applying the California common law definition of an owner to determine liability).

97. *See id.* at 449 ("[T]he holder of a permit for specific use of real property is not the 'owner' of that real property, where, as here, the fee title owner retained power to control the permittee's use of the real property.").

98. *See* Morrow, *supra* note 52, at 337 ("Federal courts have struggled to apply a consistent test to determine if a PRP is an 'owner' under CERCLA, particularly when a PRP possesses an interest in the contaminated property that

ownership issues when a party owns less than fee title, they have translated into confusion and overgeneralizations on the path to determining CERCLA ownership liability.[99] This confusion and ambiguity in the statutory framework has created an avenue for PRPs to persuasively argue their way out of ownership liability. A prime example of this is the federal government, which has attempted to, often successfully, evade CERCLA liability despite holding legal title to contaminated property.[100]

2. Federal Government Liability as the Owner of Public Lands

It is not uncommon that courts, when seeking to determine and apportion CERCLA liability in a contribution action, must resolve the issue of federal government liability as a PRP.[101] The federal government holds fee title to the nation's public lands but has throughout our nation's history allowed third parties to utilize or develop the land, resulting in contamination.[102] When the developing parties are identified and found liable as a PRP based on the contamination on public lands, they are often strapped with massive liability and, in turn, bring a contribution action against the federal government as the owner of the contaminated public lands.[103]

At the outset, it is important to note that generally the United States, due to sovereign immunity, cannot be the subject of a

---

is less than full title.").

99. *See* United States v. P.R. Indus. Dev. Co., No. 15-2328, 2017 WL 6061011, at *6 (D.P.R. Dec. 7, 2017)

> PRIDCO admits that it is the "titular owner" of the property, but denies that it is an "owner" within the meaning of CERCLA. According to PRIDCO, the United States failed to establish that PRDICO participated in the management of the property. This failure, PRIDCO asserts, negates its status as an owner.

100. *Id.*

101. *See* Steven G. Davidson, *Government Liability Under CERCLA*, 23 B.C. ENVTL. AFF. L. REV. 47, 47 (1997) (examining governmental liability under CERCLA).

102. *See* Chevron Mining v. United States, 139 F. Supp. 3d 1261, 1265–67 (D.N.M. 2015) (detailing the history of ownership of relevant contaminated lands subject to the unpatented mining claims).

103. *See id.* at 1267–68 (providing the procedural history of the contribution action).

lawsuit.[104] However, in 1986 Congress enacted the Superfund Amendments and Reauthorization Act (SARA),[105] which expressly waived the United States' general sovereign immunity under CERCLA.[106] The Third Circuit further clarified that the federal government could be held liable under CERCLA in both its capacity as a federal agent and its role as the owner and operator of federal facilities.[107]

After the SARA amendments to CERCLA came a first wave of CERCLA litigation against the federal government premised on the government's ownership of federal facilities, many of which had released hazardous waste into the surrounding environment.[108] Today, it is well settled that the federal government is likely to be held liable as an owner and operator of federal facilities.[109] CERCLA lawsuits against the federal

---

104. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 569–70 (2003) ("[S]overeign immunity functions in a wide range of areas as a 'clear statement' rule for interpretation of statutes claimed to subject the United states to monetary liabilities, such that, . . . [they] will not apply in the absence of unusually clear statement.").

105. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 100 Stat. 1613.

106. *See* 42 U.S.C. § 9620(a)(1) (2012) (detailing the application of CERCLA liability to the federal government); *See also id.* § 9620

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity.

107. *See* FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 840 (3d Cir. 1994) (en banc) ("Section 120(a)(1) of CERCLA does not state that regulatory activities cannot form the basis of liability. Rather it states that the [federal] government is liable in the same manner and to the same extent as any non-governmental entity.").

108. *See id.* at 42 (Sloviter, C.J., dissenting) ("Studies suggest that there are numerous [federal] government facilities dangerous enough to fall within the ambit of CERCLA.")

109. *See* Van S. Katzman, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191, 1218–19 (1993) (detailing how "the federal government itself has willingly acknowledged [ownership liability] in both *FMC Corp.* and other cases" because "the United States actually purchased and held title to a number of production facilities throughout the country during World War II").

government involving contaminated federal facilities tend to be straightforward, sometimes even with the government accepting liability, because the federal government not only owns fee title to the facility but also directly controls it.[110] The federal agency with administrative jurisdiction over the federal facility is responsible for performing and paying for remediation of the site out of its own budget."[111]

Beyond the government's CERCLA liability at federal facilities, governmental liability under CERCLA presents issues with less apparent resolutions.[112] Courts evaluating contribution actions against the United States must grapple with the question of whether the federal government should incur CERCLA liability based upon its status as a titleholder when, often times, the United States was not the entity that actually polluted the contaminated land. In other words, should CERCLA liability extend to the federal government for cleanup costs on public lands that, the government argues, were not involved in pollution?[113]

To date, this question arises most frequently in the context of abandoned mining sites containing hazardous wastes[114] The

---

110. *See FMC Corp.*, 29 F.3d at 845 ("[W]hen we consider 'the totality of the circumstances presented' we cannot reject the district court's 'inherently fact-intensive' conclusion that the government was an operator of the facility.") (quoting Landsford-Coaldale Joint Water Auth. v. Tonolli Corp. 4 F.3d 1209, 1222 (3d Cir. 1993)).

111. *See* 42 U.S.C. § 9611(e) (prohibiting the use of Superfund money to clean up federal facilities because the Superfund Trust monies must be dedicated to sites where PRPs cannot be identified).

112. *See* United States v. Friedland, 152 F. Supp. 2d 1234, 1243 (D. Colo. 2001) ("[N]o court has specifically addressed whether the United States, as bare legal title holder of unpatented mining claims, can be held liable as an 'owner' under CERCLA where the 'possessor' of the land contaminates it.").

113. *See* Theodore Garrett, *The Governments "Bare Legal Title" Defense Wears Thin*, AM. C. OF ENVTL. LAW. (Aug. 29, 2017), http://www.acoel.org/post/2017/08/29/The-Government%E2%80%99s-%E2%80%9CBare-Legal-Title%E2%80%9D-CERCLA-Defense-Wears-Thin.aspx (last visited Jan. 7, 2018) (discussing recent case law decisions that support government contribution to remediation of CERCLA sites on federal lands) (on file with Washington and Lee Law Review).

114. *See* John F. Seymour, *Hard Rock Mining and the Environment: Issues of Federal Enforcement and Liability*, 31 ECOLOGY L.Q. 795, 865 (2004) (describing private entity's arguments when attempting to win a contribution action against the United States).

General Mining Law of 1872[115] allows parties to discover, explore, and reclaim mineral deposits on federally owned lands through patented and unpatented mining claims.[116] In a patented mining claim, the owner holds title to the land and the mineral rights underneath it.[117] In contrast, in an unpatented mining claim, the owner holds exclusive subsurface and surface possessory rights to extract and sell minerals while title to the underlying fee simple estate in the land remains with the United States.[118] Pursuant to the General Mining Law, the federal government now holds fee title to contaminated federal lands subject to unpatented mining claims developed by private individuals and companies.

Courts traditionally hold that unpatented mining claims are "fully recognized possessory interests" that allow a claimant to sell and transfer their rights as they so choose.[119] The holder of an unpatented mining claim has superior rights as against third parties but not as against the United States.[120]

---

115. *See generally* 30 U.S.C. § 22 (2018).

116. *See id.* ("[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States.").

117. *See* JAMES J. BUCHWALTER ET. AL, 58 CORPUS JURIS SECUNDUM MINES & MINERALS § 142 (2019) (explaining the rights conferred by mineral patents).

118. *See* United States v. Friedland, 152 F. Supp. 2d 1234, 1244 (D. Colo. 2001) (describing the history of the development of mineral deposits and unpatented mining claims).

119. *See* Ohio Shale Corp. v. Morton, 370 F. Supp. 108, 124 (D. Colo. 1973)

> A mining claim is an interest in land which cannot be unreasonably or unfairly dissolved at the whim of the Interior Department. Once there is a valid discovery and proper location, a mining claim, in the language of the Supreme Court, is 'real property in the highest sense.' Legal title to the land remains in the United States, but the claimant enjoys a valid, equitable, possessory title.

Unpatented mining claims can be distinguished from patented mining claims, which allow private owners to obtain a "patent" from the federal government that grants fee simple title to the claimant. *See Friedland*, 152 F. Supp. 3d at 1244 (comparing patented and unpatented mining claims under the General Mining Law).

120. *See id.* (detailing the rights of the federal government and the holder of an unpatented mining claim).

Decades of hardrock mining have left hazardous wastes on thousands of abandoned mining sites on federal lands, posing potential threats to human health and the environment.[121] When the EPA seeks to remediate contaminated mining lands subject to unpatented mining lands, they will often identify a private mining company as the PRP.[122] In turn, the mining company will bring a contribution action against the United States as a PRP based on its holding title to the lands subject to unpatented mining claims.[123] The United States argues that the federal government does not possess sufficient ownership interests to rise to the level of "owner" within the meaning of CERCLA.[124] This argument has been coined the "bare legal title" defense.

III. The Rise and Fall of the Bare Legal Title Defense

The term bare legal title refers to the idea that an entity does not have an equitable ownership in the piece of property, but only holds legal title to the piece of property.[125] The federal government

---

121. *See* U.S. ENVTL. PROT. AGENCY, ABANDONED MINE SITE CHARACTERIZATION AND CLEANUP HANDBOOK 30–40 (2000), https://www.epa.gov/sites/production/files/2015-09/documents/2000_08_pdfs_amscch.pdf (introducing the types of impact mining and mineral operations have had on federal, state, tribal, and private lands).

122. *See Friedland*, 152 F. Supp. 3d at 1237 (describing the defendant's contribution action against the United States).

123. *Id.*

124. For example, in *United States v. Atlantic Richfield Co.*, the EPA brought an action against mining companies to recover costs incurred to clean up sites contaminated by more than a century of mining. *See* United States v. Atl. Richfield Co., No. CV-89-39-BU-PG, 1994 U.S. Dist. LEXIS 21708, at *6 (D. Mont. Nov. 1, 1994). The defendant counterclaimed against the United States as an "owner" at the time of disposal because the BLM held title to the lands that were subject to the unpatented mining claims. *Id.* at *5–6. The United States magistrate found that "[g]iven the historical context within which the government operated and the nature and extent of the title held by the government, . . . the United States was not an 'owner' for purposes of CERCLA liability." *Id.* at *17.

125. *See* Julie E. Hough, *"Bare Legal Title"—Or Property of the Bankruptcy Estate?*, AM. BANKR. INST. J. 18, 18 (2012) (describing the origins of the bare legal title defense). The term "bare legal title" is used in bankruptcy law to describe a situation in which a debtor holds title to a piece of land, but a court finds that the property is not actually the property of the debtor and should not be considered part of the debtor's bankruptcy estate. *Id.* Normally, the court will find that the debtor only held bare legal title to the land based upon factors such as lack of property taxes paid by the debtor or lack of maintenance and upkeep provided by

argues that while it holds legal title to the unpatented mining claims, it should not be held liable under CERCLA because it does not hold any equitable interest in the piece of property—the claimant to the unpatented mining claim holds the ability to use and control the land.[126]

The bare legal title defense has provided a means for the federal government to evade CERCLA liability despite its ownership interest in contaminated public lands. Some courts have accepted the rationale underlying the federal government's argument, while others have rejected it and equated legal title ownership to CERCLA ownership liability. The lack of clear definition of "owner" under CERCLA coupled with federal courts' inability to consistently apply a test for ownership less than fee title has persuaded some courts to accept the federal government's reasons. Thus, the issue remains whether the courts should accept the government's attempt at evading CERCLA ownership liability through the bare legal title defense.

A. The Federal Government Successfully Evades Liability

The term "bare legal title" comes from tax and bankruptcy law, where it helped determine whether a debtor holds an equitable ownership interest in a piece of property.[127] The federal government took "bare legal title" out of its bankruptcy context to argue that while it holds legal title to the unpatented mining claims, it should not be held liable under CERCLA because it does not hold any equitable interest in the piece of property—the claimant to the unpatented mining claim has the ability to use and control the land.[128]

---

the debtor. In these situations, the court will hold that the "property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another." 11 U.S.C. § 541(a)(1) (2012).

126. *See Friedland*, 152 F. Supp. 2d at 1241 (laying out the government's argument that bare legal title is insufficient for purposes of CERCLA "owner" liability).

127. *See* Hough, *supra* note 125, and accompanying text.

128. *See Friedland*, 152 F. Supp. 2d at 1241 (laying out the government's argument that bare legal title is insufficient for purposes of CERCLA "owner"

In *United States v. Friedland*,[129] the federal government for the first time used the "bare legal title" beyond its traditional use.[130] In *Friedland*, the court addressed the federal government's CERCLA ownership liability in a contribution action based solely on its ownership of unpatented mining claims.[131] The plaintiff, Industrial Constructors Corporation (ICC), alleged that the United States' ownership interest at the Summitville Mine site qualified it as an "owner" and thus a PRP liable for contribution under CERCLA.[132] Neither ICC nor the United States contested the fact that the United States was the record owner at the Summitville Mine site.[133] However, it was the plaintiff's, and not the federal government's, conduct that resulted in the contamination at the site.[134] Thus, the question the court addressed was whether legal title, here to unpatented mining claims, could be enough to create ownership liability under CERCLA.[135] The federal government argued that bare legal title to unpatented mining claims was insufficient for purposes of CERCLA ownership liability.[136]

The district court recognized that the statutory language of CERCLA offered no guidance to interpret ownership liability.[137] The court attempted to discern a natural meaning of the term "owner," concluding that no natural meaning of the word would resolve the conflict at issue.[138] In light of this, the court pointed to

---

liability).

129. 152 F. Supp. 2d 1234 (D. Colo. 2001).

130. *Id.*

131. *See id.* at 1237 (discussing the plaintiff's claim against the United States based upon its record title ownership at the contaminated site).

132. *Id.*

133. *See id.* at 1241 ("There is no dispute that the United States, as holder of bare legal title to a number of unpatented mining claims randomly located within the boundaries of the Summitville Mine site, is a 'record owner' of certain real property or mineral interest at the Summitville Mine.").

134. *Id.* at 1242.

135. *See id.* at 1241 (detailing the United States' concessions).

136. *See id.* (providing the United States' arguments against liability).

137. *See id.* at 1242 ("The phrase 'owner'—tautologically defined by Congress as 'any person . . . owning' a facility—is a paradigm of neither clarity nor precision, much less a model of legislative draftsmanship.").

138. *See id.*

> According to Webster's dictionary, an owner is "one that has the legal or rightful title whether the possessor or not." Black's Law Dictionary, however, equivocates between titular and possessory ownership,

other decisions that addressed the scope of ownership liability under CERCLA in alternate contexts.[139] The court found the "site control" test persuasive,[140] noting that site control provides sufficient indicia of ownership to impose CERCLA liability on a party.[141] Applying this test, the court examined the unique nature of the United States' interest in an unpatented mining claim to determine if there were sufficient indicia of ownership to merit the application of ownership liability.[142]

The United States argued that its property interest in the unpatented mining claims at issue stood "in stark contrast to most 'owners' of property."[143] Specifically, the United States "(1) [had]

> defining an owner variously as "one who has the right to possess, use, and convey something," and as "one who has the primary or residuary title to property."

139. *See id.* ("In various third-party contexts, however—such as where the alleged 'owner' acted in the capacity of either trustee or conservator/executor of the property in question—several courts have addressed the scope of 'owner' liability under CERCLA and whether bare legal title alone is sufficient to trigger such liability."). The court looked to several cases when coming to their conclusion. In *Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 366–67 (N.D. Cal. 1994), the court held that ownership liability under CERCLA could extend to both conservators and executors of land if it was found they hold an "indicia of ownership" beyond bare legal title during the period of hazardous waste disposal. In *City of Phoenix v. Garbage Services Co.*, 827 F. Supp. 600, 607 (D. Ariz. 1993), the court held a bank liable in its capacity as a trustee for responses costs incurred in the cleaning up of the contaminated property even though it only held bare legal title. In *Friedland*, both *Castlerock Estates* and *City of Phoenix* were dispositive in determining that more than "bare legal title" was necessary to find liability. *United States v. Friedland*, 152 F. Supp. 2d 1234, 1243 (D. Colo. 2001).

140. *See supra* notes 85–90 and accompanying text (detailing the site control test).

141. *See Friedland*, 152 F. Supp. 2d at 1243 (finding the site control test to be dispositive in a determination of ownership liability).

142. *See id.* at 1245–45 (looking to Supreme Court cases that describe the interests held by the United States and the owner of an unpatented mining claim). In *Wilbur v. United States ex rel. Krushnic*, 260 U.S. 306, 316–17 (1930), the court described the interest held by the owner off an unpatented mining claim:

> When the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the rights of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States.

143. *Friedland*, 152 F. Supp. 2d at 1245.

no notice of initiation of the possession of its property, (2) [had] no ability to exclude persons from entering upon its lands that are open to mining claims, . . . (3) [had] no contractual relationship with the possessor of the property," (4) received no financial benefit from the lands subject to unpatented mining claims and (5) lacked the power to retain title to the land if the claimant chose to seek title.[144] Based on these differences, the United States argued they should not be an owner for purposes of CERCLA liability.

The court compared the roles of the federal government and the unpatented mining holder in the development of the lands subject to unpatented mining claims, finding that "the United States [was] not an 'owner' in the fullest sense of the term."[145] While the United States retained title in the land and broad powers over the terms upon which the land could be used, leased, and acquired, the United States received no financial benefit from its lands subject to unpatented mining claims and lacked the power to retain title to its land if the claimant seeks title.[146] In addition, the United States had no ability to set the boundaries of the conveyance or establish the terms of the sale based upon the land's value.[147] Finally, the United States is not allowed to exclude individuals from the land and may only regulate mining activities in the national forests in order to protect surface resources.[148]

Friedland distinguished between two potential owners for CERCLA purposes: the "owner" that holds fee title to the contaminated property and the "owner" that holds a claim to the land but does not have the ability to possess and control the land.[149] Ultimately, the court held that the United States could not be deemed an "owner" for purposes of CERCLA liability based upon the limited nature of the ownership rights it holds in unpatented

144. *Id.*

145. *Id.* at 1246.

146. *See id.* (providing the United States' arguments against liability).

147. *See id.* (discussing the United States' interest in the mining lands).

148. *See id.* at 1246 ("[T]he United States argues that, throughout the history of mining at Summitville, the United States' property interest at the site was encumbered by privately owned mining claims covering the land subject to mining activity.").

149. *See id.* at 1246 (finding that the United States is not an owner under CERCLA because of its limited role compared to the holder of the unpatented mining claim).

mining claims.[150] The court described the United States' interest in the land as "bare legal title"[151]—establishing what has now become known as the federal government's "bare legal title" defense.[152]

B. Two Courts Reject the Bare Legal Title Defense

Following the federal government's successful argument in *Friedland*, they have attempted to use the "bare legal title" defense to avoid CERCLA ownership liability in other contribution actions involving unpatented mining claims. However, in recent decisions, courts have rejected the bare legal title defense and instead held the federal government liable for the cleanup costs associated with historic mining operations.[153] These cases, discussed in depth below, may represent a growing trend of expanding liability to the federal government for its role as an owner of contaminated public lands.[154]

---

150. *Id.* at 1246.

151. *Id.* at 1242.

152. *See* Garrett, *supra* note 113 ("Two recent decision reject the government's argument that its 'bare legal title' should not give rise to CERCLA owner liability.").

153. *See* Chevron Mining v. United States, 863 F.3d 1261, 1266 (10th Cir. 2017) (holding the United States liable under CERCLA as an owner of portions of mining sites during the time hazardous substances came to located there); El Paso Natural Gas v. United States, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at *2 (Dist. Ariz. Aug. 15, 2017) (same).

154. *See CERCLA Liability of U.S. Government as Owner, Operator, or Arranger for Clean-Up Cost and NRD on Public Lands*, STAFFORD (Nov. 21, 2017), https://www.straffordpub.com/products/cercla-liability-of-u-s-government-as-owner-operator-or-arranger-for-clean-up-cost-and-nrd-on-public-lands-2017-11-21 (last visited on Nov. 27, 2017) (showing that one commentator has affirmatively stated that, "[t]hese decisions represent a growing trend of courts holding the federal government liable in its various roles as landlord") (on file with the Washington and Lee Law Review).

1. Chevron Mining v. United States *Rejects the Bare Legal Title Argument*

In the first case, *Chevron Mining v. United States*,[155] the Tenth Circuit Court of Appeals held that the holder of fee title—in this case, the United States—is liable as an owner regardless of the role it played in the creation or disposal of hazardous waste.[156] In *Chevron Mining*, Chevron Mining Incorporated (CMI) and its corporate predecessors filed suit against the United States seeking to hold the federal government strictly liable for its equitable share of cleanup costs as an "owner" and "arranger" at the contaminated site in question.[157] The United States held fee title to national forest land subject to unpatented mining claims on a portion of the mining site near Questa, New Mexico, referred to by the parties as the "Questa Site."[158] From 1919 to 2014, CMI and its corporate predecessors mined molybdenum at the Questa Site, generating significant amounts of hazardous substances.[159] In 1957, the Defense Minerals Exploration Administration (DMEA) entered into an exploration project contract with CMI, driven by the United States' domestic molybdenum production goal.[160] Under the contract, CMI was responsible for the exploration, drilling, and sampling of minerals at the site.[161] In return, the United States loaned CMI funds for half of the expenditures of its work.[162] All of the exploration work under the contract required government approval.[163] CMI also conducted exploration outside of the DMEA contract, ultimately spending over $4,000,000 of their own funds to mine the lands by 1964.[164] The DMEA Exploration Contract ended in 1960, and CMI made its final royalty payment to the United States in 1966.[165]

---

155. 139 F. Supp. 3d 1261, 1263 (D.N.M. 2015).
156. *See id.* at 1277 (holding the United States liable as a PRP).
157. *See id.* at 1266 (discussing the procedural background of the lawsuit).
158. *See id.* at 1267 (discussing the background of the contaminated site).
159. *See id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

The mining at the Questa Site generated an extensive amount of hazardous waste, resulting in a costly cleanup.[166] The hazardous waste generated from the mining was not a surprise to either party.[167] CMI acknowledged its status as a PRP and began remediation measures pursuant to EPA orders. CMI filed suit for financial contribution against the United States as an "owner" and "arranger" for its equitable share of past, present, and future remediation costs.[168]

The District Court of New Mexico, in reviewing CMI's contribution action, held that the federal government's ownership interest at the Questa site was insufficient to establish ownership liability.[169] The district court agreed with the *Friedland* court's focus on the indicia of ownership analysis.[170] The court was not persuaded by CMI's argument that legal title should conclusively establish ownership liability under CERCLA.[171] Instead, the court applied an indicia of ownership test, finding it dispositive that CMI maintained the right to use and control the property.[172]

---

166. *See id.* at 1268 ("Approximately 150 thousand tons of waste rock were generated from the early underground mining operations, 328 million tons of waste rock and 75 million tons of 'tailings' from the open-pit mining, and 25 million tons of tailings from the renewed underground mining.").

167. *See id.*

> The substantial amount of waste generated by these mining activities was not unexpected. When Molycorp first discovered the molybdenum ore deposit in 1960, for example, government engineers produced a "Final Geological and Engineering Report" estimating over 99% of the material extracted from the 260-million-ton ore deposit would need to be discarded as waste. Nonetheless, the federal government actively encouraged—and, indeed, funded—Molycorp's mining activities at this site.

168. *Id.* at 1263.

169. *See id.* ("Having considered the parties' arguments and submissions, the relevant case law, and otherwise being fully advised in the premises, the Court grants the United States' Motion for Summary Judgment and denies Plaintiff's Motions for Summary Judgment.").

170. *Id.* at 1271 (agreeing with "*Friedland's* focus on who owns which strands of the bundle of property rights in determining whether the United States is an owner").

171. *Id.*

172. *See id.* at 1274 ("Given that the United States' ownership interests in land on which another holds unpatented mining claims are unique, there is no comparable ownership interests of private parties in other contexts.").

On appeal, the Tenth Circuit reversed the district court's decision, holding the United States liable as an "owner" but not as an "arranger" under CERCLA.[173] The federal government argued that it did not have the required "indicia of ownership" to be considered an owner under Section 107(a) because it did not control the mining activity.[174] The federal government referenced the General Mining Act of 1872 to argue that the limited nature of its rights as fee title holders enabled CMI, as holder of the unpatented mining claims, to have the exclusive right of possession of the surface land.[175] The Court of Appeals rejected this argument, holding the federal government liable as an owner regardless of whether CMI maintained the exclusive use and possession of the lands without any control by the United States.

In rejecting the government's argument, the Tenth Circuit stated that "owner" covers fee title holders, regardless of any additional indicia of ownership.[176] The court rejected *Friedland*'s requirement that ownership liability required a threshold level of ownership beyond their rights as titleholder.[177] The court considered the ordinary meaning of the word "owner" as well as the statutory construction of CERCLA to find a distinction between federally owned and federally controlled properties.[178] The court then remanded the case to the district court for further proceedings to determine the United States' equitable share of past, present, and future cleanup costs at the Questa Site.[179]

---

173. *See* Chevron Mining v. United States, 863 F.3d 1261, 1262 (10th Cir. 2017) (concluding that the United States is an "owner" and, therefore, a PRP under CERCLA).

174. *Id.* at 1273.

175. *See id.* at 1270 (outlining the major provisions of the General Mining Act).

176. *See id.* at 1272 ("Owner liability attaches to 'any person owning' the contaminated facility.") The court also explained that "the potentially responsible person inquiry 'rests on the relationship between' the defendant and the 'facility itself.'" (quoting United States v. Bestfoods, 524 U.S. 51, 68 (1998)).

177. *See id.* at 1275 ("The government urges us to adopt *Friedland's* indicia of ownership test. But we find it neither persuasive in principle nor in application.").

178. *See id.* at 1272 ("The ordinary or natural meaning of 'owner' includes, at a minimum, a legal title owner.").

179. *Id.* at 1266.

2. El Paso Natural Gas v. United States *Applies Chevron Mining's Reasoning*

Since *Chevron Mining*, several other courts have opined on the bare legal title defense.[180] In *El Paso Natural Gas v. United States*,[181] the District Court for the District of Arizona addressed the extent of the federal government's CERCLA liability as an owner, citing *Chevron Mining* in support of its finding of liability.[182] The plaintiff, El Paso Natural Gas Company, brought a contribution action against the United States to recover costs incurred in remediating a contaminated site on the Navajo Reservation.[183] The federal government argued that it was not an owner within the meaning of CERCLA because "its ownership interest [was] limited—it holds reservation land in trust for the benefit of the Navajo Nation."[184] Both parties stipulated that the United States owned fee title to the uncontaminated lands that were held in trust for the Najavos.[185] In determining the outcome of the case, the district court looked at the broad remedial goals of CERCLA, the ordinary meaning of word "ownership," the nature of the United States' interest in the contaminated property, and

---

180. *See* United States v. Puerto Rico Indus. Dev. Co., 287 F. Supp. 3d 133, 143 (D.P.R. 2017) ("Just as the United States argued in Chevron Mining Inc., PRIDCO asserts that it is immune from liability pursuant to CERCLA because it 'merely holds bare title' to the property. PRIDCO's argument is unconvincing because it cites no authority to support the proposition that bare legal title, without more, is insufficient to trigger liability pursuant to section 107.").

181. No. CV-14-08165-PCT-DGC, 2017 WL 3492993 (Dist. Ariz. Aug. 15, 2017).

182. *Id.* at *15–16 ("Finding that CERCLA envisions liability even for those who did not contribute to contamination, the Tenth Circuit concluded that CERCLA imposed liability on the United States as the fee title owner of unpatented mining claims, even if it could be argued that the United States held only 'bare legal title.'").

183. *See id.* at *1–2 ("Plaintiff . . . brings claims against Defendants United States of America, the Department of the Interior, the Bureau of Indian Affairs, the U.S. Geological Survey, the Department of Energy, and the Nuclear Regulatory Commission (collectively, the 'United States.'").

184. *Id.* at *2.

185. *See id.* at *9 (discussing the United States' interest in the Reservation Land).

the relevant case law on the issue.[186] Specifically, the court found that,

> While the United States has granted a significant property interest to the Navajo Nation—exclusive use and possession of reservation land, amounting to a compensable interest—the fact remains that the United States holds fee title and substantial power over the land, including the power to enter, control alienation, and take.[187]

The court held the United States liable based upon CERCLA's "simple declaration that facility owners are liable and the court's obligation to construe 'owner' liberally."[188] The court further found that the extent of the federal government's liability should be determined at the allocation phase of the trial and would be based on equitable allocation.[189] Ultimately, this court also rejected the federal government's bare legal title argument.[190]

IV. The Bare Legal Title Defense is Inconsistent with CERCLA

Whether liability should extend to the federal government as the fee title holder of federal lands has yet be resolved. Both *Chevron Mining* and *El Paso Natural Gas* denied the government's "bare legal title" defense,[191] suggesting that CERCLA liability should extend to the federal government in its capacity as fee titleholder of unpatented mining claims.[192] Because the federal government holds fee title to contaminated mining claims across the United States, this issue will again make its way into the court system as parties seek to clean up hazardous wastes at former mining cites. Courts will continue to grapple with the question of

---

186. *See id.* at *4–13 (providing a framework for its analysis).

187. *Id.* at *12–13.

188. *Id.* at *5.

189. *See id.* at *17 ("The Court's holding that the United States is an owner, therefore, does not decide the extent of its liability for contamination at the Mine Sites.").

190. *Id.*

191. *See supra* Part III.B (discussing the holdings of *Chevron Mining* and *El Paso Natural Gas*).

192. *See id.* (discussing the holdings of *Chevron Mining* and *El Paso Natural Gas*).

whether the federal government's involvement as an owner should amount to a showing of strict liability.

By extending liability to the federal government for its role as title holder to public lands, *Chevron Mining*, and cases applying its reasoning, came to the correct result. The following Part analyzes the rationale for extending CERCLA liability to the holder of unpatented mining claims. For the reasons stated in *Chevron Mining*, and for reasons discussed in-depth below, courts should reject the federal government's application of the bare legal title defense.

A. Bare Legal Title Is an Improper Expansion of the Site Control Test

First, the court should reject the federal government's bare legal title argument. By relying on the government's "indicia of ownership" to the contaminated land instead of its role as title holder, the federal government is trying to reduce a category of PRP, contrary to CERCLA's expansive goals.

The *Friedland* court found the site control test persuasive in determining the federal government's ownership liability.[193] However, the *Friedland* court, in accepting the government's bare legal title argument, overlooked the fact that the site control test was constructed to resolve the question of ownership liability when a party does not hold title to contaminated property but has many of the rights that make it equivalent to an owner—[194]not in situations when the party *does* hold title.

The court in *South Carolina Recycling* first articulated the site control test.[195] In this case, the court created the site control test to determine whether Columbia Organic Chemical Company (COCC) was an owner under CERCLA. The court held that COCC,

193. *See supra notes* 85–96 and accompanying text (discussing the *Friedland* court's rationale in coming to a conclusion).

194. *See supra* notes 85–96 and accompanying text (outlining three tests used by courts to determine liability for interests less than fee title).

195. *See supra notes* 88–91 and accompanying text (describing the *Friedland* site control test).

a lessee which had subleased a property to those that contaminated the property, should be held liable as an owner because it "maintained control over and responsibility for the use of the property and, essentially, stood in the shoes of the property owners."[196] COCC did not hold fee title to the piece of property, so the court created the site control test to expand the category of ownership liability beyond how it was traditionally construed to encompass a party that acted as an owner would.[197] However, CCCC was found to be a PRP *in addition to* and not *in lieu of* the title holder owners of the contaminated site.[198]

The federal government is essentially in the opposite position as COCC—the government holds fee title to a piece of contaminated property but claims to not have control over the land and, thus, claims they should not be considered an owner. The distinction between the two positions is critical—courts routinely allocate ownership liability to a party holding legal title to a piece of contaminated property but not necessarily to a party that uses the land without holding title.[199] In fact, courts routinely impose liability on the fee title holder of a site for purposes of CERCLA litigation despite arguments that the owner had no responsibility over the disposal activity.[200] As one court clearly articulated, an

196. *Id.* at 3003.

197. *See id.* ("As a general rule, a lessor or sublessor who allows property under his control to be used by another in a manner which endangers third parties or which creates a nuisance, is, along with the lessee or sublessee, liable for the harm.").

198. *See id.* at 1003 ("Accordingly, site lessees like COCC should, along with the property owners themselves, be considered "owners" for purposes of imposing liability under Section 107(a). To conclude otherwise would frustrate Congress' intent that persons with responsibility for hazardous conditions bear the cost of remedying those conditions.").

199. *See* William B. Johnson, Annotation, *Private Entity's Status as Owner or Operator Under § 107(a)(1,2) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §9607(a)(a)(1,2)) (CERCLA)*, 140 A.L.R. Fed. 181, 183 (1997 & 2017 Supp.) ("Where entities have held title to a contaminated facility, there has been relatively little litigation on the issue whether they qualified as 'owners' for purposes of CERCLA liability. Clearly, the owner of a manufacturing facility or waste disposal facility is an 'owner' for purposes of CERCLA liability.").

200. *See id.* (describing how in the entire course of CERCLA litigation, "when an entity has held title to a contaminated facility there has been relatively little litigation on the issue of whether [holders of fee title] qualify as 'owners' for purposes of CERCLA litigation"); United States v. Monsanto Co., 858 F.2d 160,

"owner" is someone "who holds title to the facility."[201] Owning title to a piece of property by itself, regardless of any control or lack of control, is sufficient for ownership liability.[202] Thus, at a minimum, one could safely assume that if "owner" means nothing else, it means a person who holds legal title to a piece of land.[203]

Rather, the majority of the litigation surrounding "ownership" liability has arisen in messier ownership scenarios.[204] Courts have struggled to determine whether a party should be considered an owner when they control the site but do not hold fee title to it.[205] CERCLA's legislative history makes clear that "owner" is meant to encompass not only "those persons who hold title to a . . . facility, but those who in the absence of holding title, possess some equivalent evidence of ownership."[206] This situation occurs, for example, when a lessee or a manager of a site exercises so much control

---

168 (4th Cir. 1988) ("The plain language of section 107(a)(2) extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste.").

201. Coppola v. Smith, 19 F. Supp. 3d 960, 969 (E.D. Cal. 2014) (citing *Redevelopment Agency of City of Stockton v. BNSF,* 643 F.3d 668, 679–81 (9th Cir. 2011)).

202. United States v. Honeywell Int'l, 542 F. Supp. 2d 1188, 1198 (E.D. Cal. 2008) (quoting Lincoln Prop., Ltd. v. Higgins, 823 F. Supp. 1528, 1533 (E.D. Cal. 1992)) ("[O]wnership of the property on which the release took place is sufficient to impose liability under § 107(a), regardless of any control or lack of control over the disposal activities.").

203. *See* Johnson, *supra* note 200, at 183

> Clearly, the owner of a manufacturing facility or waste disposal facility is an 'owner' for purposes of CERCLA liability. . . . Courts have held that titleholders qualified as 'owners' for purposes of liability under § 107(a) of CERCLA, even though they did not participate in the waste disposal activities that took place on their property. It has been held that mere ownership of the property from which the release took place is sufficient to qualify an entity as an owner.

204. *See id.* ("Thus, as to title-holders, the litigation has arisen with respect to peripheral issues.").

205. *See, e.g.*, United States v. A & N Cleaners & Launderers, Inc., 788 F. Supp. 1317 (S.D.N.Y. 1992) (finding the lessee bank that subleased property to dry cleaner operator to be an "owner" subject to CERCLA liability because the bank ultimately had responsibility over the site).

206. *Committee on Merchant Marine and Fisheries*, H.R. REP. NO. 172, at 37 (1979).

over a piece of property that the lessee or manager can be said to be in a same position as the legal title holder of the property.[207] Based upon this idea, courts have extended ownership liability to parties beyond mere title owners.[208]

The circuit split tests discussed in Part III[209] arose as a means to supplement the meaning of term "owner" in the *absence* of legal title to the land.[210] It is not logical to apply these tests, which were meant to explain circumstances in which a party has all of the rights of an owner except for legal title, to a situation in which an entity actually holds legal title to a piece of property.[211] These tests evolved as a way to implement a functional definition of the term owner in order to expand the scope of ownership liability under CERCLA.[212] The tests were not meant to enable titleholders to evade CERCLA ownership liability nor should courts allow the

---

207. *See, e.g.*, Grand Truck W.R.R. v. Acme Belt Recoating, 859 F. Supp. 1125, 1130 (W.D. Mich. 1994) (demonstrating a situation in which a court has had to determine whether an entity that did not hold title to land is still liable as an "owner" under CERCLA). In *Grand Truck Western Railroad Co. v. Acme Belt Recoating*, the court held that the owner of an easement providing the holder with access to the street was not an owner under CERCLA for contamination of the easement property. *Id.* The court concluded that while the easement holder held an interest in the property, the only entity that owned the easement property was the holder of the fee simple interest in the land. *Id.* In another situation, the court had to determine whether a property manager qualified as an "owner" for purpose of CERCLA liability. Combined Properties/Reseda Assocs. v. Kechichian, 23 E.L.R. 20810, No. CV 91-0272-DWW(JRx) (C.D. Cal. Feb. 19, 1992). The court found the property manager was an owner when he acquired the rights and responsibilities consistent with ownership. *Id.*

208. *See* Johnson, *supra* note 200, at 184 (detailing CERCLA ownership liability when an entity did not hold legal title).

209. *See supra* notes 85–90 and accompanying text (describing different tests circuits have applied in order to determine ownership liability when a party held less than full title to a piece of property).

210. *Id.*

211. *See* El Paso Natural Gas v. United States, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at *3 (D. Ariz. Aug. 15, 2017) ("The Ninth Circuit cases cited in the Court's previous order considered whether a person other than the fee title holder could be an owner under CERCLA, and looked to common law for the answer. The question in this case is the reverse—whether a fee title holder can be deemed a non-owner for purposes of CERCLA.").

212. *See* Johnson, *supra* note 200, at 186 (detailing expansive approaches to CERCLA ownership liability to easement holders and lessees).

federal government to do so.[213]

B. Bare Legal Title is Inconsistent with the Goals of CERCLA

Next, allowing the federal government to prevail in their application of the bare legal title defense is inconsistent with the goals Congress envisioned when writing CERCLA. In their enactment, Congress pursued dual goals: (1) to prevent environmental contamination; and (2) to clean up hazardous waste sites.[214] Enabling the federal government to circumvent CERCLA liability for its role as titleholder to public lands frustrates both goals of the Act. CERCLA "should not be read in any way that frustrates the statute's goals,"[215] so courts should not allow the federal government to evade CERCLA liability.

1. Contrary to CERCLA's Goal of Timely Cleanup

First, through CERCLA's enactment Congress sought to ensure the timely cleanup of hazardous substances on contaminated lands.[216] In order to timely cleanup hazardous sites, the EPA must have adequate funds to remediate sites on the NPL.[217] While site cleanups have been funded through the Superfund Trust, Congressional funding of the

---

213. *Id.*

214. S. REP. NO. 96-848, at 3 (1980) (discussing Congress' ambitions when enacting CERCLA).

215. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (finding that there is no causation requirement within CERCLA statutory framework).

216. S. REP. NO. 96-848, at 3 (1980) (discussing Congress' ambitions when enacting CERCLA) (detailing Congress' goals when enacting CERCLA).

217. *See* Bryan Anderson, *Taxpayers Dollars Fund the Most Oversight and Cleanup Costs at Superfund Sites*, WASH. POST (Sept. 20, 2017), https://www.washingtonpost.com/national/taxpayer-dollars-fund-most-oversight-and-cleanup-costs-at-superfund-sites/2017/09/20/aedcd426-8209-11e7-902a-2a9f2d808496_story.html?utm_term=.33c71293dbe1 (last visited Mar. 1, 2018) (detailing funding issues at Superfund sites) (on file with the Washington and Lee Law Review).

Superfund has gradually decreased.[218] The lack of money in the Superfund has caused the cleanup process, which is often costly, to slow, both in the number of sites cleaned and the time the cleanups take.[219] As President Barack Obama noted, Superfund appropriations are "competing with a multitude of other activities and obligations of the federal government."[220] PRPs should pay for the remediation of contaminated sites so that Superfund monies can be applied in circumstances in which no PRP can be identified.

While it may seem counter-intuitive to hold the federal government, the entity that funds the Superfund, liable, it is not. Funding for the Superfund and financing to cleanup sites when the United States is found to be a PRP come from separate sources—specifically, when the United States is found to be a PRP the money comes from the responsible agency's budget, not from the Superfund trust.[221] While it would be beneficial to be able to locate and identify a private corporation as a PRP as well, often PRPs either cannot be identified or, if they are, they have become insolvent. Establishing the precedent of holding the federal government, a party that can always be located and will never be insolvent, liable as an owner will allow the Superfund trust monies to be allocated to the remediation of other hazardous sites.[222] In doing so, courts will in turn promote the timely cleanup of contaminated sites throughout the United States.

2. Contrary to CERCLA's Deterrent Goals

Additionally, in enacting CERLCA Congress aspired for

218. *See id.* (discussing the gradual decline of Superfund appropriations).

219. *See id.* (articulating the consequences on decreased Superfund appropriations).

220. *Id.*

221. *See id.* at 30 ("However, the [Superfunds] are not explicitly authorized to pay cleanup cost-recovery or contribution claims . . . where a federal agency may be held liable as a generator or transporter of wastes sent to a site for disposal.").

222. *See* Congressional CERCLA Summary, *supra* note 49, at 2 ("In the event that the potentially responsible parties cannot pay or cannot be found, appropriated Superfund monies may be used to pay the orphan shares of cleanup costs at a site.").

CERCLA to serve preventive ends.[223] As Phillip Cummings, the chief counsel of the Senate Environment Committee at the time CERCLA was drafted wrote, "[T]he main purpose of CERCLA is to make spilling or dumping of hazardous wastes less likely through liability."[224] By imposing strict liability on a broad class, Congress intended to create powerful incentives "for waste reduction and care waste management."[225] Strict liability is meant to "maximize deterrence and ease enforcement difficulties" by establishing easy rules for a court to follow.[226] It follows then that any attempt by a court to interpret CERCLA in a way that empowers a party to elude strict liability is inconsistent with the preventative goals of the Act.[227]

Congress intended PRP liability be interpreted expansively as possible because the more inclusive a group of PRPs is found to be, the more likely it is parties require proper hazardous waste protocol. If a broad definition of owner applies to the federal government, the federal government will likely insist on a set of rules parties must abide by when authorizing the use of public lands as a way to avoid future liability in contribution actions.[228]

---

223. *See* ROBERT K. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW SCIENCE AND POLICY 395 (6th ed. 2009).

224. Phillip Cummings, *Completing the Circle*, 7 ENVTL. FORUM 6, 11–12 (1990).

225. PERCIVAL ET AL., *supra* note 223, at 396.

226. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991)) (discussing the strict liability scheme within the Anti-Drug Abuse Act).

227. New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (finding that CERCLA should not be interpreted to frustrate its statutory goals).

228. *See* Thomas Perry & Sarah Wightman, *Owner of a Lonely Heart: Federal Government Labile for CERCLA Damages on Public Lands*, MARTEN LAW (Sept. 21, 2017) http://www.martenlaw.com/newsletter/20170921-federal-government-cercla-damages-public-lands#_edn34 (last visited on Mar. 1, 2018)

> [G]iven the federal government's growing liability profile, it may insist on more conditions or compensatory mitigation in authorizing the use of public land to mining companies, as a hedge against future liability of any cleanup costs. In any event, these decisions have the potential to shape the relationship between the United States and mining

In *Chevron Mining*, the federal government and the plaintiff argued for two opposing views of ownership liability. The plaintiff argued that an "owner" should be a "record owner" while the federal government argued that an "owner" is someone who holds sufficient "indicia of ownership" to the land.[229] The federal government argued for a narrow definition of the term "owner" while the defendant argued that ownership liability should be construed broadly. Thus, rejecting the federal government's bare legal title argument, a narrow interpretation of the Act, would enable CERCLA to reduce or eliminate future pollution on public lands.[230] Thus, the plaintiff's expansive interpretation is in line with the legislative intent of the Act.

3. Contrary to the Congress' Rejection of a Causation Requirement

Further, in promoting Congress's deterrent goals, courts have interpreted CERCLA to cover owners and operators without regard to causation.[231] When Congress enacted the statute, it specifically rejected including a causation requirement in section 9607(a) of CERCLA.[232] The lack of causation requirement in the Act means that an ownership liability does not depend on activity furthering or contributing to the waste contamination at a contaminated site.[233] Despite this lack of causation requirement in CERCLA, the federal government's bare legal title argument

---

companies in the West.

(on file with the Washington and Lee Law Review).

229. *See Chevron Mining*, 863 F.3d at 1276 (questioning the federal government's argument that there should be an adoption of the indicia of ownership test).

230. *Id.*

231. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (holding that an owner is liable regardless of any contribution to the contamination at a site).

232. *See id.* at 1044 ("The early House version imposed liability only upon 'any person who caused or contributed to the release or threatened release.' . . . The compromise version, to which the House later agreed, . . . imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release.").

233. *See id.* (relating how ownership liability does not require any knowledge or participation in the contamination).

essentially asks the court to read into CERCLA a causation requirement.[234] By suggesting that there need to be an indicia of ownership to be considered an owner, the federal government is suggesting a test that requires control over the property or hazardous substances.[235] However, as the legislative history and courts' interpretation have made clear, there is no causation requirement and, as such, actual control is not required for a determination of ownership liability.[236] On the contrary, "the trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination."[237]

4. Congress's Intention to Hold the Federal Government Liable

In addition to Congress's ambitions when enacting CERCLA, Congress specifically intended the federal government to be held liable under CERCLA in the exact same way as any other private party by waiving the government's sovereign immunity.[238] The federal government has sovereign immunity by default, but Congress went out of its way to amend CERCLA to clarify its application to the federal government.[239] Enabling the federal government to dodge liability through the bare legal title defense is contrary to the specific provisions of CERCLA that allocate liability to the federal government.[240]

---

234. *See* Chevron Mining v. United States, 863 F.3d 1261, 1275 (10th Cir. 2017) (analyzing the government's bare legal title argument).

235. *See id.* (discussing how the indicia of ownership test requires rights beyond a party's rights as title holder).

236. *See id.* at 845 (finding that active participating is not a requirement for liability).

237. *See* Nurad, Inc. v. Wiliam E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992).

238. *See supra* notes 105–107 and accompanying text (discussing Congress's waiver of sovereign immunity).

239. *See id.* (explaining the SARA amendments to CERCLA).

240. *See id.* (discussing Congress's waiver of sovereign immunity).

C. The Government Cannot Argue a Defense Outside of the Statutory Language

Third, the federal government should not be able to create a defense not statutorily prescribed by CERCLA. Since its enactment, courts have construed CERCLA's strict liability framework to attach liability to any party against whom a prima facie case of liability is found, subject only to defenses enumerated in the statute.[241] Upon its initial enactment, CERCLA provided only three defenses a party could assert to avoid strict liability.[242] These defenses allowed a liable party to evade liability if the release or threatened release of the hazardous substance was caused by an act of god, an act of war, or the act or omission of a third party with which a PRP had no contractual relationship.[243] Since its enactment, Congress has further amended CERCLA to limit or eliminate liability for certain categories of PRPs to reflect its concerns that the strict liability framework might lead to inequitable results in certain situations.[244]

In 1996, Congress enacted The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996,[245] which protected trustees and other fiduciaries from

---

241. *See, e.g.*, Emhart Indus., Inc. v. Century Indem. Co., 559 F.3d 57, 60 (1st Cir. 2009) ("Liability under CERCLA is strict as well as joint and several."); United States v. Kramer, 757 F. Supp. 397, 413 (D. N.J. 1991) ("[U]nder section 107. . . PRPs have joint and several strict liability for all response costs . . . subject only to the defenses' in section 107(b).").

242. *See* 42 U.S.C. § 9607(b) (2012) (listing the act of god, act of war, and act or omission of a third party defenses).

243. *Id.*

244. *See* Sudhir L. Burgaard, *Landowner Defenses to CERCLA Liability*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/landowner_defenses_to_cercla_liability.html (last visited Jan. 9, 2018) (addressing concerns that CERCLA's strict liability scheme could cause inequitable results with respect to hazardous substance disposal activities, Congress further established defenses and exclusions from liability for innocent landowners, bona fide prospective purchasers, and contiguous property owners (collectively, "the landowner liability defenses")) (on file with the Washington and Lee Law Review).

245. Asset Conservation, Lender Liability and Deposit Insurance Protection, Pub. L. No. 104-208, §§ 2501–2505, 110 Stat. at 3009-462-469 (1996), codified at

personal liability beyond their personal assets.[246] Next, in 1999, the Superfund Recycling Equity Act[247] created an exemption from liability for generators and transporters of recyclable scrap.[248] Additionally, Congress specifically amended CERCLA to express its discomfort with what has been viewed as the harsh effects of strict, retroactive, and joint and several liability as applied to "innocent" landowners.[249] Again in 2002, Congress established an exclusion from liability for innocent landowners,[250] bona fide prospective purchasers,[251] and contiguous property owners[252] (together known as the "landowner liability defenses") to specifically alleviate concerns that CERCLA's legislative scheme would lead to "inequitable results" for certain landowners.[253]

Parties subject to CERCLA liability have only the defenses enumerated in the statute.[254] Because the bare legal title defense is not a defense specifically listed in CERCLA, courts should reject it. One of the most important rules of statutory construction is the rule that the expression of one idea is the exclusion of another, or *expresssio unius est*

---

42 U.S.C. §§ 9601(2), 9607(n), 6991(b) (h) (9)).

246. *See* 42 U.S.C. § 9706(n) (discussing the extent of liability for a fiduciary).

247. *Id.* § 9627.

248. *Id.* § 9627.

249. *See* Burgaard, *supra* note 244 (addressing concerns that CERCLA's strict liability scheme could cause inequitable results with respect to hazardous substance disposal activities, Congress further established defenses and exclusions from liability for innocent landowners, bona fide prospective purchasers, and contiguous property owners (collectively, "the landowner liability defenses.")).

250. 42 U.S.C. §§ 9607 (b)(3), 9601(65) (providing an exception for a party that purchased a piece of contaminated knowledge without of the existing contamination and had no involvement in the contamination).

251. *See id.* § 9601(40) (defining bona fide purchaser).

252. *See id.* § 9607(q) (providing an exception for contiguous property owners).

253. *See* Burgaard, *supra* note 244 (describing the rationale for the landowner exceptions).

254. *See* 42 U.S.C. § 9607(a) (2012) (providing that PRPs are subject to CERCLA liability "notwithstanding any other provisions or rule of law, and subject only to the defenses set forth in subsection (b) of this section").

excuseo alterius. This canon of statutory construction has been applied in the strict liability framework.[255] For example, in *Laird v. Railroad*,[256] the court held that a statute providing one defense is meant to exclude the application of all other.[257] Applying this rule of construction to CERCLA, courts should exclude any defense not specifically enumerated in the statute. To allow parties to argue a defense outside of the Act would run contrary to one of the canons of statutory construction and render the exceptions to liability in the statute essentially meaningless.

In addition, Congress has been very responsive in amending CERCLA to be "equitable" by adding defenses to CERCLA's liability provisions; yet, Congress has not at any point suggested that the federal government should be sheltered from CERCLA liability.[258] If Congress wants to add a governmental liability defense to CERCLA, they have the power to amend the statute. If courts were to allow the bare legal title argument, they would essentially be creating a judicially created defense, but it is Congress's job, and not the judicial branch, to amend CERCLA as they see fit. As one court pointed out when interpreting CERCLA:

> While it may be true that application of the principles in this case by other courts could lead to the imposition of broad liability on the government, that circumstance cannot influence our result as we cannot amend CERCLA by judicial fiat. Rather, our approach must be the as that of the Supreme Court when responding to an argument that the Racketeer Influenced and Corrupt Organizations Act (RICO) was being applied too broadly: this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.[259]

---

255. *See* Laird v. Railroad, 62 N.H. 254, 267 (1883) (demonstrating the application of the rule to a strict liability framework).

256. *Id.*

257. *See id.* (holding that the defense of contributory negligence was not available under the statute in question).

258. *See* Burgaard, *supra* note 244 (discussing Congress' implementation of the CERCLA "landowner defenses").

259. FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 846 (3d Cir. 1994) (en banc).

D. Bare Legal Title Blurs the Owner-Operator Distinction in CERCLA

Next, the bare legal title defense should be rejected because to do otherwise would make superfluous the "owner" and "operator" distinction within the statutory language of the Act. Since CERCLA's enactment, courts have struggled to interpret ownership liability because many courts fail to distinguish between the two distinct categories of owner and operator, focusing instead on an owner's ability to control the contamination on the property.[260] However, owner and operator provide separate bases for liability: operator liability is a direct liability premised on a party's activities at a contaminated site[261] while ownership liability is an indirect liability based on what can often be a party's passive role at a contaminated site.[262] Accepting the federal government's bare legal title argument blurs the distinction between two distinct categories of liable parties.[263] Both *Chevron Mining* and *El Paso Natural Gas* support clearer lines between the owner and operator categories of PRPs,[264] and courts should follow

---

260. *See* Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASH. U. L. REV. 223, 235 (1994) (explaining the confusion between owner and operator liability in CERCLA); Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 300 (1992) ("[C]ourts typically connect the terms as a single phrase—'owner or operator'—and fail to distinguish between the grounds supporting the imposition of liability upon the two categories of potentially responsible parties.").

261. Questions surrounding operator liability most often arises in situations involving corporate liability. *See Indirect Owner / Operator Liability Under CERCLA*, FINDLAW, https://corporate.findlaw.com/law-library/indirect-owner-operator-liability-under-cercla.html (last visited May 7, 2019) (on file with the Washington and Lee Law Review) ("The majority of courts which have addressed the issue of operator liability have analyzed whether a parent or sister corporation or other person exercised sufficient control over the related corporation or its facility to be considered an operator of the facility with the attendant liability under §9607(a)(1) or (a)(2).").

262. *See id.* (discussing owner and operator liability for corporations).

263. *See* Perry & Wightman, *supra* note 228 ("[T]he *Friedland* test runs the risk of collapsing the "owner" and "operator" categories clearly delineated in CERCLA.").

264. *See Chevron Mining*, 864 F.3d at 274 (distinguishing between the term owner and operator within CERCLA).

these cases' rationale in rejecting the bare legal title argument to draw the distinction between federally-owned and federally-controlled properties.

The courts should distinguish between owners and operators of a facility because the language of CERCLA itself indicates a distinction between the two categories. In *Burlington Northern & Santa Fe v. Shell Oil Corp.*,[265] the Supreme Court, in determining CERCLA liability, began by looking at the language of the statute.[266] CERCLA defines "owner and operator" as any party "who at the time of disposal of any hazardous substance owned *or* operated" the site in question.[267] By using the word "or" to separate the words "owner" and "operator," the statute suggests a distinction between the two words.[268] CERCLA's statutory framework as a whole also indicates a distinction between the two categories.[269] The "National Contingency Plan" section of CERCLA[270] enables the President to defer listing an eligible site on the NPL if the President determines that "deferral would not be appropriate because the State, as an owner *or* operator *or* a significant contributor of hazardous substances to the facility, is a potentially responsible party."[271] Again, the word "or" is placed between the words "owner" and "operator," supporting the proposition courts should treat owner and operator as two distinguishable categories of liable parties.

Since it seems clear that "owners" and "operators" should be treated as separate categories of liable parties under CERCLA, it is important to understand the meaning of each category within the statute. Turning first to the "operator" category of liability,

> [A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. . . . [A]n operator must manage, direct, or conduct operations specifically related

265. 556 U.S. 1870 (2009).

266. *See id.* 1877–78 (determining whether the defendant should qualify as an arranger and, if so, liable for the cleanup as a PRP).

267. 42 U.S.C. § 9607(a)(2) (2012).

268. *See Chevron Mining*, 863 F.3d at 1274 (differentiating between owners and operators in CERCLA).

269. *See, e.g.*, 42. U.S.C. § 9605(h)(1) (2012) (distinguishing between liable parties that are owners versus those that are operators).

270. *See id.* § 9605 (providing for a presidential national contingency plan).

271. *Id.* § 9605(h)(1).

> to pollution, that is, operations having do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.[272]

In order to determine operator liability, courts apply an "indicia of control" test premised on the operator's control of a site.[273] This makes it so that operator liability extends only to a party that exerts some control over the contaminated site or who has the authority to control the handling and disposal of the hazardous substances.[274]

Equating an operator of a site to someone who has the ability to control a site makes logical sense based upon the common sense and legal understanding of an operator.[275] On the other hand, determining ownership liability by examining the amount of control a party, as the federal government argues should be the case, would make it so there is no difference between the two categories. In addition, construing ownership liability based on control seems illogical based on the ordinary meaning of the word.[276] The "owner" of a piece of land is commonly understood as the entity holding title to the land.[277] Moreover, the dictionary,

---

272. United States v. Bestfoods, 524 U.S. 51, 66 (1998).

273. *See id.* (showing that a finding of CERCLA operator liability is premised on control).

274. *See* K.C.1986 Ltd. Partnership v. Reade Mfg., 472 F.3d 1009 (8th Cir. 2007).

275. *See* Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821, 832 (2012) ("Under CERCLA, operator status is accorded to anyone exercising control over activities at a site where hazardous materials have been released.").

276. The Supreme Court indicated that if the statutory definition of a provision within CERCLA are unclear, courts should give the "the phrase its ordinary meaning." *Burlington Northern*, 556 U.S. at 611 (looking to the "common parlance," or the words as found in the dictionary, to determine the meaning or arranger liability). *See also* United States v. Atlantic Research Corp., 551 U.S. 128, 136 (2007) (applying the plain meaning to interpret the word "may" within CERCLA).

277. *See* Dustin M. Gazier, *A Game of Old Maid: The Ninth Circuit Establishes When the Owner-Operator is Determined for CERCLA Liability in* California v. Hearthside Residential Corp., 2011 B.Y.U. L. REV. 117, 126 (2011) (discussing the plain meaning of the term "owner" within CERCLA); *see also* J.B. Ruhl, *The Plight of the Passive Past Owner: Defining the Limits of Superfund Liability*, 45 S.W. L.J. 1129, 1133 (1991) (detailing the liability of a passive owner, stating that "past owners are liable under CERCLA if they owned property when

which courts turn to when the statutory language is ambiguous, defines "legal owner" as "one who has legal title to property"[278] and "own" to be to "have or hold as property."[279] Thus, both the plain meaning and dictionary meaning of the word supports the interpretation that an owner is merely someone who owns title to property.

Other sections of CERCLA support this proposition. For one, the expedited settlement provision of CERCLA states that an expedited settlement may be appropriate when a potentially responsible party "(i) is the owner of the real property on or in which the facility is located; (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and (iii) did not contribute to the release or threat of release of a hazardous substance at a facility through any action or omission."[280] This Part provides three distinct requirements to obtain an expedited settlement, one of which is the owner of the land while another is conducting or contributing to contamination, indicating that a person who owns property and a person who actually controls or contributes to the contamination are separate bases of liability.[281]

Interpreting CERCLA in a way that premises liability for owner and operators on control makes the statute superfluous.[282] Because operator liability is established based on ability to control, courts should not also construe ownership liability to be based on control. The federal government, by asserting the bare legal title

---

hazardous substances leaked . . . into the environment *regardless* of whether they committed affirmative acts to cause the leak or spill" (emphasis added)).

278. *Legal Owner*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/owner (last updated Feb. 28, 2019) (last visited May 7, 2019) (on file with the Washington and Lee Law Review).

279. *Own*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/own (last updated Feb. 28, 2019) (last visited Apr. 16, 2019) (on file with the Washington and Lee Law Review).

280. 42 U.S.C. § 9622(g)(1) (2012).

281. *See* Chevron Mining v. United States, 863 F.3d 1261, 1265 n.12 (10th Cir. 2017) (discussing the need for a distinction between owner and operator liability).

282. *See id.* ("Differentiating among owners, operators, and significant contributors demonstrates that a person may be considered an owner for purposes of Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) liability without having contributed in any way to hazardous substances.").

defense, argues that something more, or control over the property, is required for ownership liability to attach and that holding title without an ability to control is not enough.[283] However, both owner and operator liability cannot be predicated on the ability of a party to control the contaminated site.[284] Allowing both owner and operator liability on control renders the difference between the "owner" and "operator" groups meaningless.[285]

E. Bare Legal Title is Inconsistent with Other CERCLA Case Law

Accepting the bare legal title argument is also inconsistent with prior interpretations of CERCLA's liability framework. While few cases specifically address liability of the federal government as a legal title holder to unpatented mining claims, the issue of when ownership liability attaches to the title holder generally frequently arises. A common scenario in which courts encounter this issue is in the context of a landlord who has leased a piece of property to a tenant who, in turn, contaminates the site. A landlord who leases a piece of property to a tenant can be analogized to the federal government granting a third party the right to use public lands through an unpatented mining claim.[286] In both situations, a third party tenant has a rights of possession and control over the land in questions.[287]

---

283. *See Chevron Mining*, 863 F.3d at 1274 (discussing the distinction between federal owner and operated properties).

284. *See id.* ("The distinction between *federally owned* and *federally controlled* properties indicates that ownership and control are independent inquiries—the United States may own a facility without controlling that facility.").

285. *See* Castlerock Estates, Inc. v. Estate of Markham, 71 F. Supp. 360, 367 (N.D. Cal. 1994) ("The test for 'ownership' liability under CERCLA . . . has become similar to [the] test for 'operator' liability under CERCLA.").

286. *See Mining Claims: What They Are and the Different Types*, 1881 LEASING INVESTMENTS, http://www.1881.com/minedef.htm (last visited March 1, 2018) (describing an unpatented mining claim as a lease from the government with no ownership rights conveyed) (on file with the Washington and Lee Law Review).

287. *See id.* (detailing the rights of a third party and the United States on a mining claim).

In landlord-lessee cases, courts routinely hold that any entity with legal title to a property is liable as an owner under CERCLA, regardless of control of the property.[288] Courts have interpreted "owner" to include lessors, lessees, and sublessors.[289] Lessors, as title owners of the land, are liable as owners, despite often having no control over the lessee's actions.[290] For example, in *United States v. Argent Corp.*,[291] the defendant, a property owner who leased a warehouse to the contaminating party, attempted to evade the CERCLA liability scheme because he had no control over lessee's operations or the contamination.[292] However, the court held the lessor liable, finding that the Act's legislative history "shows a deliberate omission [from CERCLA] which would have required participation in management or in operation as a prerequisite to owner liability."[293]

There are, admittedly, several differences between the relationship of the federal government to an unpatented mining claimant and a landlord and tenant. Namely, the federal

---

288. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988) ("[T]he site-owners contended that they were innocent absentee landlords unaware of and unconnected to the waste disposal activities that took place on their land . . ."); United States v. Manzo, 182 F. Supp. 2d 385, 397 (D.N.J. 2000) ("Section 107(a)(1) of CERLCA imposes liability on current owners of a site even if the disposal of the substances occurred before the commencement of ownership and the owner has not been shown to have caused a release."); United States v. Union Corp., 259 F. Supp. 2d 356, 395 (E.D. Pa. 2003) (holding the past owners and operators of a hazardous waste site liable where the hazardous substances were disposed of during their "tenure as owners and operators"); Western Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 688 (9th Cir. 2004) (holding a current landowner who did not contribute to the contamination of the land and did not fall under the innocent purchaser defense liable for cleanup costs), *abrogated by* Kotrous v. Goss-Jewett Co., 523 F.3d 924 (9th Cir. 2008).

289. *See, e.g.*, United States v. S.C. Recycling & Disposal, Inc., 653 F. Supp. 984, 1003 (D.S.C. 1986) (explaining how a lessee essentially stands in the shoes of the property owner and is liable as such), *aff'd in part and vacated in part by* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988).

290. *See, e.g.*, United States v. Argent Corp., No. CIV 83-0523-BB, 1984 WL 2567, at *2 (D.N.M. May 4, 1984) (finding precedent to hold a landlord lessor liable as an owner under CERCLA).

291. No. CIV 83-0523-BB, 1984 WL 2567 (D.N.M. May 4, 1984).

292. *See id.* at *1 ("Bishop argues that his mere ownership of the Rio Rancho land and building, without any attendant connection to the Argent Corp. business operated thereon, does not make him an 'owner' within the contemplation of CERCLA.").

293. *Id.* at *2.

government and unpatented mining claimant do not enter into an explicit agreement (such as a lease), nor does the claimant pay for use of the mining lands (so there is no rent paid on the lands).[294] However, the provisions of the General Mining Law define a miner's rights to locate and mine on lands much like a lease[295] because the General Mining Law governs the parameters of the holder of an unpatented mining claim's rights land much like a lease.[296] Specifically, the statute states that lands subject to unpatented mining claims are "free and open to exploration and purchase, and the land in which such deposits are found, to occupation and purchase by citizens of the United States, under regulation prescribed by law, and according to local customs and rules of miners."[297]

Beyond the lessor-lessee scope, property owners are routinely found liable for contamination on property that they hold fee title to, regardless of whether they played a role in the contamination or if they had knowledge that the contamination was occurring.[298] As such, finding the federal government liable as a PRP despite its control over the hazardous substance disposal is in line with case law allocating CERCLA liability to a landowner that was unaware of or was not involved in the contamination of a hazardous site.[299] Holding title to the contaminated site in question is enough to make a party liable as an owner under CERCLA.[300]

---

294. *See* 30 U.S.C. § 26 (2012) (outlining the locators' rights of possession and enjoyment).

295. *See id.* § 28 (listing regulations that govern mining on public lands).

296. *Id.*

297. *Id.* § 22.

298. *See* Laurence S. Kirsch & Geraldine E. Edens, *Federal Environmental Liability*, *in* Environmental Aspects of Real Estate and Commercial Transactions 7 (James B. Wilkin ed., 2004) ("A property owner or tenant may be held liable for contamination even if that person did not deposit hazardous substances on the site or knowingly or negligently allow unsafe conditions to persist there.").

299. *See id.* at 7–8 (discussing the allocation of CERCLA responsibility to landowners).

300. *See, e.g.*, Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 838 (4th Cir. 1992) (holding even a short-term title holder as an owner for CERCLA

F. CERCLA's Apportionment Phase Covers Equitable Concerns

Lastly, holding the federal government liable as a PRP is in line with the goals of the liability phase of a CERCLA action. The liability phase of CERCLA is meant to include as many PRPs as possible, in part because of the deterrent goals of the Act discussed above.

A contribution action allows a court hearing the suit to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[301] While CERCLA allocates a broad joint and several liability over PRPs, after cleanup costs have incurred, contribution actions among the jointly liable allow PRPs opportunity to allocate responsibility among themselves.[302] Precluding the federal government from liability at CERCLA's front-end liability phase does not make sense in light of the purposes of the statute's apportionment phase. The Act's first stage of attaching liability is meant to provide sweeping liability to all involved parties, even those tangentially involved, in order to encourage the careful handling of hazardous wastes while the allocation phase is meant to take into account equitable factors to distribute cleanup costs among PRPs.[303] Courts should not preclude the federal government from CERCLA liability based on the federal government's bare legal title argument; instead, courts should continue to enforce sweeping ownership liability and concern themselves with equitable issues at the allocation phase of litigation.

In *Burlington Northern and Santa Fe Railway Co. v. United States*,[304] the Supreme Court for the first time addressed the issue of apportionment of harm under CERCLA.[305] While each PRP

---

liability purposes).

301. 42 U.S.C. § 9613(f)(1) (2012).

302. *See* Percival et al., *supra* note 223, at 444 (introducing the allocation of liability between PRPs under CERCLA).

303. *See* JACOB S. WOODARD, FINDING A SAFE HARBOR FROM ENVIRONMENTAL LIABILITY FOR COMMERCIAL REAL ESTATE PURCHASERS 1 (2014), https://www.morrisonsund.com/news/wp-content/uploads/2014/01/Finding-a-Safe-Harbor-from-Environmental-Liability-for-Commercial-Real-Estate-Purchasers.pdf (describing the liability phase as imposing liability upon four broad classes of responsible persons).

304. 556 U.S. 599 (2009).

305. *See id.* at 613 (addressing whether there should be joint and several

could potentially bear liability for the entire cleanup at a contaminated site, *Burlington Northern* allowed for the apportionment between parties based on each party's contribution to the contamination.[306] In practice, courts rarely allocated liability equally between all of the potentially responsible parties.[307] When multiple owners or operators are PRPs for a contaminated site, courts have used a variety of methods to determine how to apportion liability. Factors considered when determining the allocation of costs include the knowledge of the party, the relative fault of each party, and contractually allocated responsibilities.[308]

CERCLA's statutory scheme is meant to provide sweeping liability to anyone involved, however remotely, in the disposal of hazardous substances.[309] A holder of bare legal title may only be liable for a small portion of remediation costs as a matter of equity at the apportionment phase. However, this should not preclude liability of any party, including the federal government, at the liability phase of a case because CERCLA's liability scheme "requires any consideration of the extent and kind of an owner's involvement in hazardous substance production and disposal be made at the second stage of the CERCLA liability inquiry, rather than the first."[310] Thus, the amount of liability is meant to be determined at the allocation phase of the CERCLA liability scheme.[311] An owner should not be entirely precluded from liability

---

liability for all of the government's response costs or whether the court should apportion the damages).

306. *See id.* at 599 (holding the defendants liable for only a percentage of the government's response costs).

307. *See* Kirsch & Geraldine, *supra* note 298, at 7–8 (discussing the allocation process between landowners).

308. *Burlington Northern*, 556 U.S. at 617 (discussing relevant factors to apportioning liability).

309. *See id.* ("[T]he wide net cast by CERCLA can snare a large number of PRPs at a given site. There are usually past and present owners and, in some cases, large numbers of 'generator' PRPs.").

310. *See* Chevron Mining v. United States, 863 F.3d 1261, 1277 (10th Cir. 2017).

311. *See* 42 U.S.C. § 9613(f)(1) (2012) (laying out CERCLA's contribution framework).

but instead should have the *extent* of their fault determined when assessing the allocation of costs between the parties.

V. The Federal Government Should Be Held Liable as an Owner

Allocating CERCLA liability to the federal government is not a new concept. Congress made it clear that strict liability should apply to the United States through Congress' express waiver of sovereign immunity.[312] As one court expressed, "[If] the government engaged in the type of activity that normally would cause a private party to be liable as an 'owner,' 'operator,' or 'arranger for disposal,'"[313] then the federal government will be held liable to the same extent as a private party.[314]

Despite this understanding, the United States has made numerous attempts to elude CERCLA liability.[315] The federal government's "bare legal title" argument is simply another attempt by the federal government to escape responsibility for its role in the contamination of public lands. It is the federal government requesting that the court give it special treatment despite holding title to a contaminated site, which would lead to liability for any other third party.[316]

---

312. *See id.* § 9620 (stating that the United States shall be subject to CERCLA liability).

313. *See* United States v. Atl. Richfield Co., No. CV-89-39-BU-PG, 1994 U.S. Dist. LEXIS 21708, at *15 (D. Mt. Nov. 1, 1994).

314. *See id.* (rejecting government immunity under CERCLA).

315. *See, e.g.*, *id.* at *8 (rejecting the government's claim of sovereign immunity under CERCLA); Coeur D'Alene Tribe v. ASARCO Inc., 280 F. Supp. 2d 1094, 1125 (D. Idaho 2003) (same). In *United States v. Atlantic Richfield Co.*, the United States argued that the defendant's claims fell outside of CERCLA's waiver of sovereign immunity because the title held by the government to unpatented mining claims has "no private counterpart." *Atl. Richfield*, 1994 U.S. Dist. LEXIS 21708, at *9. However, the court found that "[if] the government engaged in the type of activity that normally would cause a private party to be liable as an 'owner,' 'operator,' or 'arranger for disposal,' then sovereign immunity does not apply." *Id.* at *15. The question "is not whether the United States is immune from liability when it acts in a sovereign capacity under section 120(a), but whether its activities—however characterized—cause it to fall within CERCLA's definition of an owner, operator, or party that has arranged for disposal of hazardous substances." *Id.* at *13–14.

316. If a private party held title to a piece of contaminated mining property as the government holds title to an unpatented mining claim, the third party

But, in fact, extending liability to the federal government for its title ownership of an unpatented mining claim is in accord with a long line of cases holding that the federal government can, and should, be held liable as an owner under CERCLA.[317] In some cases, the United States has been liable for its role as an owner of equipment at facilities that were used for hazardous waste disposal[318] and in other the United States has been held liable as an owner based upon its ownership of federal facilities.[319] Courts have repeatedly made clear that the federal government can only escape CERCLA liability when it engages in a cleanup in its regulatory capacity or falls into one of the Act's enumerated defenses.[320] Finding the federal government liable under CERCLA is by no means a new phenomenon.

It is true that the term "owner" has never been clearly defined under the Act, and in turn, courts have had to interpret what parties should fall under the ownership category.[321] But this lack of definite interpretation of "owner"

---

would undoubtedly be found liable as an owner under CERCLA.

317. *See* 42 U.S.C. § 9620 (2012) (stating that the United States shall be subject to CERCLA liability in the same manner as a private counterpart).

318. *See, e.g.*, Elf Atochem N. Am., Inc. v. United States, 868 F. Supp. 707, 708 (E.D. Pa. 1994) (holding the United States liable as the owner of equipment that discharge hazardous materials in the surrounding environment). In this case, the plaintiff's predecessor in interest leased equipment from the United States to produce the pesticide DDT. The land and ground surrounding the facility became contaminated with chemicals used in the manufacturing process of DDT. In a contribution action, the court held the United States liable as an owner under CERCLA. *Id.*

319. *See, e.g.*, FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 846 (3d Cir. 1994) (en banc) (holding the federal government liable as an owner, operator, and arranger under CERCLA). In this case, a rayon manufacturer sued the U.S. Department of Commerce for costs incurred in the removal of hazardous materials from a rayon manufacturing plant. The Department of Commerce owned certain facilities and equipment within the plant. Based on this, the government was held jointly and severally liable for the costs of the required clean up. *Id.*

320. *See* United States v. Skipper, 781 F. Supp. 1106, 1110–11 (E.D.N.C. 1991).

321. *See* Susan Peticolas & Paul M. Hauge, *Liability—Potentially Responsible Parties*, *in* 50A NEW JERSEY PRACTICE SERIES BUSINESS LAW DESKBOOK (2018–2019 ed.) (providing an overview of liability for potentially responsible

is not limited to cases involving the United States, and instead arises in any lawsuit in which a parties PRP status comes about from the party holding title to the contaminated piece of land. The breadth of CERCLA ownership liability has been interpreted broadly to include parties beyond legal title owners subject only to one of the enumerated defenses in the statute.[322] Yet, there are no exceptions in CERCLA in regards to title holders of a contaminated site; on the contrary, former landowners are routinely held to be a PRP liable for the cleanup costs at a contaminated site despite the fact that they did not in any way participate in the disposal of the hazardous substances.[323] As such, for purposes of CERCLA liability the federal government should be liable as an owner, a term that includes title holders, regardless of any additional "indicia of ownership." Holding a record fee titleholder liable under CERCLA despite any control or participation in the contamination is a well-established principle. Courts should rely on prior case law interpreting ownership liability to logically extend liability to the United States for its role in the contamination of public lands. Hence, courts should uniformly reject the federal government's bare legal title defense.

---

parties under CERCLA).

322. *See, e.g.*, Organic Chemical Site PRP Grp. v. Total Petroleum Inc., 58 F. Supp. 2d 755, 766 (W.D. Mich. 1999) (granting summary judgment in part finding that the defendant, Total Petroleum, Inc., was not liable under CERCLA). In this case, a group of PRPs brought a lawsuit against Total Petroleum, Inc., a company that once owned an interest in a superfund site. Total held title to the contaminated site as a land contract vendor. Total filed for summary judgment and the court held that Total fell under the security interest exception of CERCLA because its title in the land was only held as a security interest. In some cases, courts have gone so far as to hold landowners liable when they took no action to prevent the further contamination of property.

323. Southfund Partners III v. Sears, Roebuck & Co., 57 F. Supp. 2d 1369, 1377 (N.D. Ga. 1999) (rejecting the defendant's argument that a disposal requires an affirmative act by an owner of land). The opinion states that "such a narrow interpretation of the term 'disposal' would permit a landowner to contaminate the environment by ignoring open drums of hazardous materials on his property while rainwater displaced the materials and caused them to spill onto the ground." *Id.*

A. Policy Implications of Expanding Governmental Liability

While the federal government has only raised the "bare legal title" defense in the context of mining activity on public lands, CERCLA liability for the federal government as an owner should extend beyond the context of unpatented mining claims. Courts should reject the federal government's bare legal title defense and apply strict liability whenever the federal government holds fee title to contamination on public lands. Designating broad liability to the federal government is a powerful weapon in incentivizing the United States to prioritize environmental protection when authorizing the development on federal lands.[324]

In the United States, there has long been a history of the tension between preserving public lands and allowing for the commercial exploration of commodity resources.[325] With over 610 million acres, or 30% of the total land area in the United States, owned by the federal government, it is only natural that there are competing interests on federal lands.[326] Within the Bureau of Land Management (BLM), just one of the many federal agencies that administer public lands, lands are

---

324. *See, e.g.*, MOVING TO MARKETS IN ENVIRONMENTAL REGULATIONS: LESSONS FROM TWENTY YEARS OF EXPERIENCE 421 (Jody Freeman & Charles D. Kolstad eds., 2007) (discussing the deterrent effects of CERCLA).

325. *See* THE WILDERNESS SOC'Y, AMERICAN PUBLIC LANDS–THESE LANDS ARE YOUR LAND 1 https://wilderness.org/sites/default/files/Fact%20Sheet%20America%27s%20Public%20Lands%20.pdf (discussing public land management in the United States); The Editorial Bd., *The Looting of America's Public Lands*, N.Y. TIMES, Dec. 9, 2017, at SRB ("The last few weeks have been particularly brutal for conservationists and, indeed, anyone who believes that big chunks of America's public lands, however rich they may be in commercial resources, are best left in their natural state.").

326. *See* CASSANDRA J. HARTNETT, ANDREA L. SEVESTON & ERIC J. FORTE, FUNDAMENTALS OF GOVERNMENT INFORMATION: MINING, FINDING, EVALUATING, AND USING GOVERNMENT RESOURCES (2nd ed. 2016) (discussing management of lands controlled by the federal government). The federal estate also extends to energy and mineral resources located below the ground, including about 700 million acres of federal subsurface mineral estates. *See* KATIE HOOVER, CONG. RESEARCH SERV., R42329, FEDERAL LANDS AND NATURAL RESOURCES: OVERVIEW AND SELECTED ISSUES FOR THE 113TH CONGRESS 2 (2014) (summarizing the complex and issues surround "how much and which land the government should own, and how lands and resources should be used and managed").

designated for a myriad of uses, including renewable and conventional energy development, livestock grazing, timber production, hunting and fishing, recreational actives, and conservation.[327]

The history of mining on federally owned lands in the United States exemplifies the tension between preservation and development and the ultimate consequences of developing lands without factoring in environmental protection.[328] For the last twenty years, fossil fuels—petroleum, natural gas, and coal—have provided more than eighty percent of the United States' total energy consumption.[329] And while coal consumption may be decreasing in the United States,[330] the energy demands in the country are only increasing. The United States Department of Energy predicts that this energy demand will be met by the increased production of renewable energy, namely wind and solar energy.[331]

While the use of renewable energy sources provides a cleaner alternative than the use of fossil fuels, many of the same land use concerns that arise in conventional energy

---

327. Neil Kornze, Director, U.S. Dep't of Interior House Comm. on Oversight and Gov't Reform, Statement on the Recent Management of Oil and Gas Lease Sales by the Bureau of Land Management (Mar. 23, 2016).

328. *See* R. Timothy McCrum, *The Emerging Judicial Recognition of Government Liability and under Superfund*, CROWELL MORNING (Nov. 1998), https://www.crowell.com/NewsEvents/Publications/Articles/The-Emerging-Judicial-Recognition-Of-Government-Liability-Under-Superfund (last visited Mar. 1, 2018) (stating that the potential for financial liability is "present at a wide variety of sites ranging from historic abandoned mines on federal lands to Department of Defense and Department of Energy manufacturing and research facilities").

329. *See Fossil Fuels Still Dominate U.S. Energy Consumption Despite Recent Market Share Decline*, U.S. ENERGY INFRASTRUCTURE ADMIN. (July 1, 2016), https://www.eia.gov/todayinenergy/detail.php?id=26912 (last visited Mar. 1, 2018) (detailing trends in U.S. energy production).

330. *See Century-long Decline for U.S. Coal Mining Jobs*, ENERGY TREND TRACKER (Jan. 2017), http://www.energytrendtracker.org/2017/01/century-long-decline-for-u-s-coal-jobs/ (last visited Mar. 1, 2018) (compiling data on the decline in the U.S. Coal industry).

331. U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2012 WITH PROJECTIONS TO 2035, at 2 (2012), http://www.eia.gov/forecasts/aeo/pdf/0383(2012).pdf.

sources also arise in renewable energy projects.[332] The federal government has already encouraged development of renewable energy on public lands, but this development poses the threat of destroying natural landscapes and resources and contaminating public lands.[333] In allowing third parties to again develop the public lands with the potential to have devastating consequences, it is imperative that the federal government takes an active role in supervising the third parties. If federal courts would uniformly acknowledge the federal government as strictly liable as an owner of unpatented mining claims, the federal government will be put on notice that it will be responsible for the contamination of public lands when they allow third parties to develop public lands. By heightening the threat of CERCLA liability to the federal government, the government will more likely carefully weigh the costs and benefits of allowing third party development at federal lands. At the very least, the federal government will likely insist on conditions to the development and ensure that proper hazardous waste disposal practice are met to prevent CERCLA response costs in the future.[334]

Heightening the federal government's liability profile should not be viewed as a way to make the federal government carry the burden of remediation costs. Rather, expanding the federal government's CERCLA liability should be perceived as a route to effectively prevent the contamination of public lands in the future.

---

332. *See* Carolyn Miller, *The Transformation of Blight: Fixing the CERCLA Lessee Problem to Develop Renewable Energy*, 82 GEO. WASH. L. REV. 1267, 1287 (2014) (providing insight on the contaminated sites will accommodate the increased demand for renewable energy).

333. *See id.* (raising concerns that the development of energy resources will lead to increased contamination of public lands).

334. *See* Perry & Wightman, *supra* note 228 ("[G]iven the federal government's heightened liability profile, it may insist on more conditions in authorizing the use of public land to conduct mining operations, as a hedge against future liability of any cleanup costs.").

VI. Conclusion

CERCLA is an expansive remedial statute that holds responsible parties liable for their actions at contaminated waste sites. Yet, despite the broad remedial and deterrent goals of the statute, the federal government has attempted to evade CERCLA liability for its ownership role as the "bare legal titleholder" at contaminated mining sites subject to unpatented mining claims. The problem with the government's "bare legal title" argument is that it contravenes the goals and strict liability framework of the Act. Additionally, if federal agencies do not take responsibility for their role in environmental contamination, the limited funds in the Superfund Trust will be further stretched, impeding the remediation of contaminated waste sites in the United States.

Given the implications of the bare legal title defense, courts should recognize that *Chevron Mining* and *El Paso Natural Gas* were correctly decided and hold the federal government liable as an owner at mining sites. As the Tenth Circuit acknowledged in *Chevron Mining,* owner under CERCLA "at the very least mean the person who holds legal title to a piece of land." By expanding the federal government's liability profile, courts are establishing a precedent that will deter the United States from allowing contamination on public lands in the future.