

Native American Resources Committee Newsletter

*A joint newsletter of the Native American Resources Committee
and the Nuclear Law Committee*

Vol. 9, No. 1

July 2013

MESSAGE FROM THE EDITOR

Christine Jochim Boote

Welcome to this joint issue between the Nuclear Law and the Native American Resources Committees. This issue focuses on nuclear issues involving Native Americans and/or their land. In addition to addressing many of the legal issues that arise when Native Americans must address nuclear-related matters within their communities, our authors provide a look into some of the unique cultural aspects that influence or guide how these matters are resolved.

As always, we're looking for ideas and feedback from our members. Please don't hesitate to contact me or any member of the Nuclear Law Committee or Native American Resources Committee leadership at any time.

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THE TRUST DOCTRINE IN NRC PROCEEDINGS

Maxwell C. Smith

When the United States gave peace, did they not also receive it? Worcester v. Georgia, 31 U.S. 515, 551 (1832).

The U.S. Supreme Court has frequently recognized “the undisputed existence of a general trust relationship between the United States and the Indian people,” frequently called the Trust Doctrine. *E.g.*, *U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011) (internal quotations omitted). Under the Trust Doctrine, the United States has “charged itself with moral obligations of the highest responsibility and trust.” *Id.* (internal quotations omitted). In recent times, courts have been unwilling to find that the Trust Doctrine imposes obligations on federal agencies beyond those imposed by other statutes. Nonetheless, plaintiffs and commenters have argued that perhaps it should. Given the high level of protection from radiological hazards the Nuclear Regulatory Commission (NRC) already provides all citizens, NRC adjudications are unlikely to prove a hospitable forum for developing substantive rights under the Trust Doctrine. Nonetheless, the Trust Doctrine still functions as a critical policy consideration for the NRC, and all federal agencies, outside of the adjudicatory context.

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Jane W. Gardner and Ronnie Hawks, Editors

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History of the Trust Doctrine

Commenters frequently trace the Trust Doctrine back to a pair of cases authored by Chief Justice John Marshall: *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 250-51 (2003) (citing *Cherokee Nation*, 30 U.S. 1 (1831); *Worcester*, 31 U.S. 515 (1832)). In *Cherokee Nation*, Chief Justice Marshall determined that tribes were not foreign nations but “domestic dependent nations,” *Cherokee Nation*, 30 U.S. at 17, and in *Worcester* he invalidated Georgia’s attempt to impose state law on tribal land, *Worcester*, 31 U.S. at 561. While Chief Justice Marshall has been accused of crafting these opinions from his own conceptions of morality, Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 424-25 (1984), *Worcester* actually rests upon a careful analysis of applicable treaties, *Worcester*, 31 U.S. at 549-58; see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1500-01 (1994). *Worcester* soundly rejected the notion that European descendants acquired title to tribal land through discovery or conquest. *Worcester*, 31 U.S. at 544-45. Rather, Chief Justice Marshall illustrated that the fledgling United States and its predecessors, beset by enemies, gained as much through the peace established by treaties with tribal governments as the tribes gained. *Id.* at 546-50. Thus, to the extent those treaties contained a guarantee of protection from the United States to tribal governments, the United States found itself under a profound moral obligation to honor that promise. *Id.* at 551-52, 555, 562.

Subsequently, the Trust Doctrine evolved several times, typically mirroring federal policy toward Native Americans. Toward the end of the nineteenth century, the Supreme Court relied on the Trust Doctrine to justify a “nearly total Federal authority” over tribal lands. Wood, *supra* at 1502-03 (citing *United States v. Kagama*, 118 U.S. 375, 384 (1886)). The

government wielded this control to compel assimilation. *Id.* at 1504. Allotments, dividing reservations, and providing individual property tracts to tribe members were a hallmark of this era. Indian General Allotment Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 331.

The Trust Doctrine Today

In modern times, the Supreme Court has limited the reach of the Trust Doctrine to the specific terms of statutes authorizing the federal government to control property on Native Americans’ behalf. *Seminole Nation v. U.S.*, 316 U.S. 286, 296-300 (1941). The Court has only held government agents to a fiduciary duty in managing tribal property when a statute specifically provides such a duty. *Compare United States v. Mitchell*, 445 U.S. 535, 544 (1980) (finding no fiduciary duty when statute only authorized government to “hold land in trust”) with *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (finding that a statute clearly created a fiduciary obligation when it directed government to manage property in “the best interests of the Indian owner”). Thus, lower courts have found that “unless there is a specific duty that has been placed on the [agency] with respect to Indians, [the trust] responsibility is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.” *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). See also *Skokomish Tribe of Indians v. FERC*, 121 F.3d 1303, 1309 (9th Cir. 1997).

The Trust Doctrine in NRC Adjudicatory Proceedings

Despite these holdings, commenters and tribal plaintiffs have sought to rely on the Trust Doctrine to establish substantive rights in adjudicatory proceedings. *E.g.*, Curtis G. Berkley, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources*, 83 DENV. U. L. REV. 1069, 1071 (2006); *North Slope Borough v. Andrus*, 642 F.2d 589, 614 (D.C. Cir. 1980). In light of Chief Justice Marshall’s clear articulation of the federal government’s obligations to tribal governments, these arguments carry considerable force. *Worcester*, 31 U.S. at 549-58.

But NRC licensing proceedings may not prove a suitable venue to establish this principle. NRC adjudications typically consider safety concerns under the Atomic Energy Act (AEA) and environmental issues under the National Environmental Policy Act (NEPA). *Florida Power & Light Company* (Turkey Point Nuclear Power Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 6-12, 13 (2001). Given the high stakes of nuclear safety, e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1979) (describing the risks of nuclear accidents as “substantial”), the NRC provides all citizens with a very high level of protection from radiological harm through its regulations and its policy to ensure that nuclear activities do not pose an appreciably greater hazard to the public health and safety than comparable industrial activities, Safety Goals for the Operation of Nuclear Power Plants; Policy Statement, 51 Fed. Reg. 28,044, 28,045-46 (Aug. 4, 1986). Moreover, courts generally acknowledge that NEPA only establishes procedural rights. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007). Consequently, because NRC hearings primarily consider issues under the AEA and NEPA, they may not provide fertile ground for cultivating substantive rights under the Trust Doctrine. Indeed, at least one NRC licensing board rejected attempts to invoke the Trust Doctrine in an NRC adjudication when the petitioner did not establish a nexus between the relief sought and federal control or management over tribal property. *Hydro Resources, Inc.*, LBP-98-5, 47 NRC 119, 135-37 (1998).

The Policy Impacts of the Trust Doctrine

Although the courts have bowdlerized the Trust Doctrine of any independent legal force, it still provides an important policy consideration for government agencies. *Jicarilla Apache Nation*, 131 S. Ct. at 2324. In this vein, President Clinton promulgated a memorandum directing federal agencies to consult with tribal governments to the “greatest extent practicable” and consider the impacts of federal projects on tribal interests. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,951 (Apr. 29, 1994).

Toward this end, the NRC is developing a tribal protocol manual that will guide NRC-tribal interactions in NRC proceedings. Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement, 77 Fed. Reg. 62,269, 62,269 (Oct. 12, 2012). Even if the Trust Doctrine does not currently serve as an independent basis for substantive legal rights, it can still provide a vehicle to ensure that tribal voices are heard and considered in agency decision making. In light of the moral obligations identified by Chief Justice Marshall, ignoring those voices would constitute a serious failure on the part of the federal government.

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APPEALS COURT UPHOLDS DECISION TO REOPEN “ZOMBIE MINE” NEAR GRAND CANYON, DESPITE MORATORIUM

Eric Michel

The recent Ninth Circuit decision of *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, has conservation groups fearing that “zombie mines”—formerly approved uranium mining operations that are reopening after being dormant for years—may now “live perpetually without ever being subject to new environmental reviews.” *Appeals Court Upholds Reopening of Uranium Mine near Grand Canyon*, ARIZONA CAPITOL TIMES (Feb. 5, 2013), available at <http://azcapitoltimes.com/news/2013/02/05/appeals-court-upholds-reopening-of-uranium-mine-near-grand-canyon> (quoting Taylor McKinnon, Wildlands Campaigns Director for the Center for Biological Diversity).

In January of 2012, Department of the Interior (DOI) Secretary Ken Salazar formally signed a 20-year moratorium on uranium mining covering over one million acres of federal land in northern Arizona. See *Public Land Order No. 7787; Withdrawal of Public and National Forest System Lands in the Grand Canyon Watershed*, 77 Fed. Reg. 2563 (Jan. 18, 2012). This moratorium, which followed a two-year environmental study, was issued pursuant to the Federal Land Policy Management Act of 1976 (FLPMA). While the Mining Law of 1872 authorizes uranium mining on federal public lands, FLPMA vests the Bureau of Land Management (BLM) (an agency within DOI) with the management of such mining. 43 U.S.C. § 1732. Secretary Salazar’s stated purpose for this withdrawal of lands was to “protect the iconic Grand Canyon and its vital watershed from the potential adverse effects of additional uranium and other hardrock mining[.]” See U.S. Dep’t of Interior, Press Release: Secretary Salazar Announces Decision to Withdraw Public Lands near Grand Canyon from New Mining Claims (Jan. 9, 2012). However, the moratorium was explicitly subject to valid existing rights, meaning that previously approved uranium mining operations in the region would not be affected.

Located within this withdrawn territory is the Arizona 1 Mine, situated a little over six miles north of Grand Canyon National Park. Arizona 1 is a uranium exploration mine that began operation in the 1980s. In 1984, Energy Fuels Nuclear submitted a plan for uranium exploration activities to BLM, which approved the plan in May of 1988 after preparing a detailed environmental assessment. Notably, the plan of operations submitted by Energy Nuclear Fuels included plans that would govern in the event of an extended period of non-operation, as required by BLM’s regulations. See 43 C.F.R. § 3809.401(b).

BLM approved the plan and Energy Fuels Nuclear developed and operated the mine until 1992, when economic conditions forced the company to cease mining activities indefinitely. The owners of the mine changed hands several times after a series of mergers and acquisitions in the 1990s and 2000s, and the mine was eventually obtained by Denison Mines Corp. in 2007. During this period of non-operation, however, the mine at all times was still managed under the provisions of the approved 1988 plan that contemplated the shutdown. This included physical maintenance, such as upkeep of buildings, shafts, fences, etc., as well as financial maintenance such as paying taxes and posting the required surety bond.

In 2007, Denison informed BLM that it intended to restart uranium mining at the Arizona 1 Mine. Denison was required to obtain an updated Clean Air Act permit, post a larger surety bond, and obtain a right-of-way permit to make improvements on the public access road that leads to the mine. However, no new operational plan was submitted or approved. Under the BLM regulations, a previously approved plan of operations is effective so long as the mine is “conducting operations.” See 43 C.F.R. § 3809.423.

Several conservation groups and Indian tribes filed suit attempting to prevent the reopening of the mine, including the Kaibab Band of Paiute Indian Tribe and Havasupai Tribe, both of which have reservations near Grand Canyon National Park. These parties argued that the 17-year hiatus of mining activity rendered the plan of operations and its accompanying environmental assessment outdated. Thus, they alleged BLM violated

its own regulations and the National Environmental Policy Act (NEPA) by failing to require either a new plan of operations from Denison or conduct a supplemental environmental assessment before reopening the mine.

An Arizona district court granted summary judgment in favor of Denison and BLM, 791 F. Supp. 2d 687 (D. Ariz. 2011), which the Ninth Circuit affirmed. 706 F.3d 1085 (9th Cir. 2013). The Ninth Circuit found that under the BLM regulations, the plan of operations did not become ineffective during the mine's shutdown, and thus no new plan was required. *Id.* at 1094. Furthermore, the posting of a new surety bond or obtaining of new permits was not viewed as "major federal actions" that prompted an updated environmental NEPA analysis. *Id.* at 1094–95 (citing 42 U.S.C. § 4332). Thus, the Ninth Circuit affirmed the grant of summary judgment and allowed the reopening of the mine to go forth.

On its surface, the situation no doubt seems peculiar: the Department of the Interior has formally withdrawn over a million acres of land from being mined, citing protection and preservation of the iconic Grand Canyon watershed, yet it has now allowed a uranium mine dormant since the early 1990s to resurrect operations under a plan approved nearly 25 years ago. But closer examination reveals that the appellants in this case were seeking a procedural redress that simply was not available. The regulations at issue clearly contemplate the possibility of a mine temporarily shutting down without an ensuing revocation of its plan of operations. *See* 43 C.F.R. § 3809. Additionally then, because the 1988 plan of operations was still in effect under the BLM regulations, the reopening of the mine is a *continuation* of an already approved major federal action, and thus does not trigger NEPA review as a *new* federal action.

Notwithstanding this procedural judicial victory, Denison and the Arizona 1 Mine do not enjoy immune status from federal regulation: the BLM still maintains a legal obligation to "take any action necessary" toward the mining operations if they are found to cause "unnecessary or undue degradation" of public land,

consistent with its statutory mandate. *See* 43 U.S.C. § 1732(b).

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THE PRAIRIE ISLAND INDIAN COMMUNITY AND THE NUCLEAR REGULATORY COMMISSION: THE USE OF NEPA TO FURTHER THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY

Francis X. Cameron

The federal government's "trust" responsibility to Native Americans is a long-standing principle of federal Indian law. *Seminole Nation v. United States*, 316 U.S. 286 (1942). This fiduciary duty (the Trust Doctrine) applies to all executive departments and federal agencies and includes duties to protect tribal lands and cultural and natural resources. The federal government takes the position that this fiduciary duty does not add any substantive duties to those of agency-enabling statutes and other governing statutes. President Clinton's Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000), endorsed by President Obama on November 5, 2009, available at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>, added a gloss on the trust responsibility by requiring each agency to have a process for ensuring meaningful and timely participation by tribal officials in developing regulatory policies and actions that have tribal implications. The Nuclear Regulatory Commission's (NRC) use of "cooperative agreements" under the National Environmental Policy Act (NEPA) has been a productive approach for implementing the trust responsibility in the context of licensing nuclear facilities that are under the NRC's jurisdiction. NEPA provides the NRC and other federal agencies with the tools to more fully give life to the Trust Doctrine for purposes of environmental protection in Indian Country by identifying and mitigating adverse environmental impacts and addressing environmental justice. The NRC's experience can provide a useful example to other federal agencies in their relationship with tribal governments.

The Prairie Island Indian Community (Community) is a federally recognized Indian tribe whose reservation is located on the ancestral homeland of the

Mdewakanton Dakota (Sioux) approximately 35 miles southeast of the Twin Cities of Minneapolis/Saint Paul, Minnesota. The Prairie Island Indian Reservation is located on Prairie Island, which is formed at the confluence of the Vermillion and Mississippi Rivers. The geographic size of the reservation has grown through several federal reorganization acts and direct purchases by the tribal council, and now totals over 3000 acres. There are currently 882 enrolled members of the tribe. Immediately adjacent to the reservation is the privately owned Prairie Island Nuclear Generating Plant (PINGP), and its associated facility for the storage of spent nuclear fuel from the reactor, an Independent Spent Fuel Storage Facility (ISFSI). Both the reactor and the ISFSI are licensed by the NRC and are subject to periodic relicensing under the Atomic Energy Act and the NRC regulations—10 C.F.R. part 54 and 10 C.F.R. part 72, respectively. It was in the context of the relicensing proceedings, both for the reactor and the ISFSI, that the Community and the NRC entered into memoranda of understanding (MOU), which established the Community as a cooperating agency in the NRC environmental review of the license renewal applications.

Direct participation by the Community in the NRC's environmental review is particularly appropriate given the Community's unique relationship to natural and cultural resources at Prairie Island. *Unci Maka*, which translates as "Grandmother Earth," is the Dakota term for earth that also expresses the kinship relationship between the Dakota and the earth. Likewise, the expression often used to end Dakota prayers and ceremonies, *Mitakuye Oyasin*, translates as "we are all related." *Mitakuye Oyasin* encapsulates a way of life and a cultural identity based on the interconnection and unity of all forms of life. This philosophy and way of life help explain how the identity of the Mdewakanton is inextricably linked to Prairie Island. The air, soil, rainwater, groundwater, rivers, lakes, sloughs, trees, prairies, plants and all forms of wildlife on Prairie Island are the natural resources of the Mdewakanton—resources that have been used for countless generations for subsistence, medicine, religious ceremonies, recreation, and all aspects of daily living. Consequently, the Community has grave concerns over the potential adverse environmental

impacts from the operation of the PINGP and its ISFSI. Community members have expressed fears over nuclear reactor safety, radioactive emissions to air and water, indefinite on-site spent nuclear fuel storage, and high-voltage power lines.

In 2008, the Community entered into an MOU with the NRC to become a cooperating agency for the purpose of preparing the environmental impact statement (EIS) for the proposed license renewal of the PINGP. A similar MOU was entered into in 2012 for the purpose of preparing an environmental assessment (EA) of the proposed license renewal for the ISFSI. *See* Council on Environmental Quality regulations in 40 C.F.R. § 1501.6 and NRC regulations at 10 C.F.R. § 51.14(a). Although, the NRC regulations provide for cooperating agencies, these designations are fairly unusual in NRC practice. The use of this mechanism in the PINGP context is part of the NRC's continued development of its policy and practice in relationship to Native American governments. *See* Tribal Protocol Manual, U.S. Nuclear Regulatory Commission (Sept. 2012) (*available at* <http://www.nrc.gov/about-nrc/state-tribal/tpm.html>).

Pursuant to the MOU on the renewal of the license for the nuclear reactor (the environmental review for the ISFSI is still ongoing), the Community provided expertise and assistance to the NRC staff in four areas—archeological and historical resources, socioeconomics, land use, and environmental justice.

The significance of the Community's participation was that it occurred in the preparation of the draft EIS, rather than in the later opportunity for public comments traditionally provided by an agency after the draft EIS is issued. This early opportunity for participation was beneficial to both the NRC and the Community. Similarly, the Community is also working closely with the NRC to develop portions of the EA on the proposed relicensing of the ISFSI. The relationship of the Community's environmental staff and the NRC staff has matured since the initial MOU on the reactor relicensing. In the case of the preparation of the draft EA on the ISFSI, the Community fully participates in the analysis and drafting of the language for those portions of the EA designated for tribal participation under the MOU. NEPA has provided the catalyst for this productive working relationship between the Community and the NRC staff. This will be especially fruitful in the environmental justice analysis of potential direct, indirect, and cumulative impacts. Of particular importance in this dialogue between the Community and the NRC will be the willingness of the NRC to require the license applicant to mitigate adverse environmental impacts. On environmental justice in the NRC context, *see* Policy Statement on the Treatment of Environmental Justice Matters in Regulatory and Licensing Actions, U.S. Nuclear Regulatory Commission, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

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TRIBAL REGULATION OF NUCLEAR ENERGY IN INDIAN COUNTRY

Brandy K. M. Toelupe

Numerous Indian tribes have needed to address important nuclear energy issues on or near their tribal lands. These issues are typically brought into Indian communities by outside governmental agencies or private entities. Indian tribes and communities are increasingly utilizing their inherent sovereign and legally recognized rights to govern their lands and to protect their communities and natural resources. As nuclear power continues to be used and considered for future energy development, Indian tribes will continue to develop laws that are grounded in their own cultural and historical identities to address these issues.

Generally, when a nuclear issue arises for a tribe, the issue is related to one of the following occurring on or near tribal lands: (1) transportation or impending transportation of nuclear materials; (2) storage and disposal of nuclear waste; (3) mining of nuclear materials; or (4) placement of a nuclear energy production facility or the effects from an already sited facility. For years, tribes have been struggling with issues under the first three categories. The United States currently has 65 commercial operating nuclear energy plants with 104 nuclear reactors in operation, and also ships about three million packages of radioactive materials each year via roadways, railways, air, and water. U.S. Energy Information Administration, *How Many Nuclear Power Plants Are in the U.S. and Where Are They Located?*, available at <http://www.eia.gov/tools/faqs/faq.cfm?id=207&t=3>; U.S. Nuclear Regulatory Commission (NRC), Materials Transportation, available at <http://www.nrc.gov/materials/transportation.html> (last modified Dec. 21, 2012). Consequently, transportation, storage and disposal, and mining of nuclear materials are prevalent throughout certain areas of Indian Country.

As to the fourth category, according to the U.S. Department of Energy, the United States has not developed a nuclear energy production facility for more than 20 years. U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy,

Tribal Energy Program, Environmental Benefits and Impacts, available at http://www1.eere.energy.gov/tribalenergy/guide/benefits_impacts.html#nuclear. As a result, for the past two decades the actual placement of nuclear energy production facilities on or near tribal lands has been less of an issue than the other three categories of nuclear issues listed. This situation is likely to change in the near future as policies have recently been adopted that are likely to lead to further development of nuclear energy facilities. For instance, in fiscal year 2012, the U.S. Department of Energy Office of Nuclear Energy's Small Modular Reactor Licensing Technical Support program put forward initiatives to "accelerate the timelines for the commercialization and deployment of small modular reactor (SMR) technologies." U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Small Modular Nuclear Reactors, available at <http://energy.gov/ne/nuclear-reactor-technologies/small-modular-nuclear-reactors>. SMRs are defined as "nuclear power plants that [are] smaller in size (300 MWe or less) than current generation base load plants (1,000 MWe or higher). These smaller, compact designs are factory-fabricated reactors that can be transported by truck or rail to a nuclear power site." *Id.* Thus, tribes may be dealing with placement issues in the near future, either trying to prohibit placement of such facilities on or near their tribal lands or considering the use of nuclear energy as a means to economic development on a long-term basis.

Federal laws governing nuclear energy generally apply to Indian lands, unless those laws interfere with treaty or statutorily confirmed rights. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116-117 (1960). But the regulation of this potentially dangerous activity is not left entirely to the United States. Federal and international law recognizes that Indian tribes are also vested with inherent sovereign authority over their tribal lands. Domestically, the federal government has a long-standing position that the 566 federally recognized Indian tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544 (1975) (citing *Worcester v. Georgia*, 6 Pet. 515, 557 (1832)). Furthermore, tribes have authority to regulate matters on their reservations

that threaten their public health or safety and authority to regulate on-reservation civil activity involving non-Indians. See *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) (Indian tribes have “the power of regulating their internal and social relations . . .”).

Internationally, the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) recognizes the rights of indigenous communities to enact their own laws and to be involved in decisions by others that affect them. United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (adopted Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. It specifically points out that indigenous peoples have the right to protect their lands from hazardous materials. Specific articles of the UN Declaration recognizing such sovereign authority include the following:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. *Id.* at art. 3.

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. *Id.* at art. 4.

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such

programmes through their own institutions. *Id.* at art. 23.

These provisions clearly encompass the rights of indigenous peoples to control the use of hazardous materials within their territory. Articles 18 and 19 extend the ability of indigenous peoples to influence matters outside their territories that may affect them:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. *Id.* at art. 18.

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. *Id.* at art. 19.

Article 29 then provides the rights of indigenous peoples in regard to sustainable development and the role a state has in protecting indigenous peoples from unwanted hazardous materials within their communities. This article provides as follows:

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. *Id.* at art. 29, 1.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. *Id.* at art. 29, 2.

President Barack Obama announced his support for the UN Declaration on December 16, 2010 on behalf

of the United States, which was a reversal of the previous position of the United States on the matter. Robert T. Coulter, *Two Years Later: Native Nations Pushing for Implementation of the UN Declaration*, Indian Country Today Media Network.com (Dec. 15, 2012), available at <http://indiancountrytodaymedianetwork.com/opinion/two-years-later-native-nations-pushing-implementation-un-declaration-146333>. On March 1, 2013, the Advisory Council on Historic Preservation (ACHP), an independent federal agency established by the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 et seq., formally endorsed a plan to support and implement some provisions of the *UN Declaration*. Advisory Council on Historic Preservation (ACHP), *ACHP Endorses United Nations Declaration on the Rights of Indigenous Peoples* (Mar. 10, 2013), available at http://www.achp.gov/news_20130310.html. *The NHPA is a particularly helpful federal law in the protection of tribal cultural and historical lands and resources, and such endorsement by the ACHP may lead to additional resources for tribes to regulate nuclear energy issues on tribal lands.*

Many tribes have asserted their inherent sovereign powers to react to or prepare for nuclear energy matters. Thus, some tribes have enacted tribal laws or entered into agreements with other interested parties to regulate the presence of nuclear materials on or near tribal lands. Such regulation ranges from enacting “nuclear free zones” to comprehensive regulations of nuclear energy issues on or near tribal lands.

At one end, there is an increasing effort in Indian Country to declare Indian lands as “nuclear free zones” through the passage of tribal laws by individual Indian tribes. See National Environmental Coalition of Native Americans, available at <http://necona.indigenousnative.org/>. For instance, the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin has enacted a comprehensive pollution and environmental protection code that incorporates Red Cliff’s nuclear position by providing the following across-the-board bans:

“[N]o person shall import, store, incinerate, treat, process, or dispose of radioactive materials, for any purpose, within the Red Cliff Reservation, or within landfills or incinerators owned or licensed by the Red Cliff Band of Lake Superior Chippewa Indians.” Red Cliff Band of Lake Superior Chippewa Indians, Code of Laws, chapter 12—Pollution and Environmental Protection, section 8: Nuclear Free Zone; § 8.1.

“[N]o person shall knowingly, within the Red Cliff Reservation, design, test, produce, deploy, launch, maintain, or store nuclear weapons or components of nuclear weapons.” *Id.* at § 8.2.

What’s more, Red Cliff has established a penalty of \$1000 for each day a violation of the code occurs. Red Cliff Band law thus addresses the nuclear energy issues most relevant to the tribe. The issue of mining is likely not contemplated in the code because Red Cliff is situated far from all current uranium facilities. U.S. Nuclear Regulatory Commission (NRC), Locations of Uranium Facilities, available at <http://www.nrc.gov/info-finder/materials/uranium/>.

The Oglala Sioux Tribe (OST) of the Pine Ridge Reservation in South Dakota has enacted a nuclear free zone code similar to the Red Cliff Band’s code. However, the OST has a wealth of experience with the issue of uranium mining near its tribal lands. The Crow Butte uranium mine, established in the 1980s, is situated near lands recognized by the 1851 and 1868 Treaties of Fort Laramie as the aboriginal territory of the OST. The OST also have historical and modern sacred and cultural sites within the Crow Butte area. There are ongoing attempts to expand the Crow Butte uranium mine into these territories. *Native Sun News: NRC Weighing Uranium Mine near Pine Ridge* (Dec. 7, 2012), available at <http://www.indianz.com/News/2013/009491.asp>. The OST’s nuclear free zone code was enacted in 2008 in response to one such attempt. Those in violation of the OST code may be subject to criminal prosecution. Rob Capriccioso, *A Nuclear Problem: Oglala Sioux Fight Expansion of Uranium Mine* (May 9, 2008), available at <http://www.indianyouth.org/a-nuclear-problem.html>.

Aside from the nuclear free zone codes, many tribes have passed tribal laws to regulate the management of nuclear materials on their tribal lands. For example:

- The Poarch Band of Creek Indians of Alabama has enacted a comprehensive environmental protection code that prohibits “radioactive wastes” from being “disposed of or accepted anywhere on the Reservation” and violators of the code are subject to civil penalties and damages. Poarch Band of Creek Indians Tribal Code, chapter 26—Environmental Protection, §§ 26-2-12(a), 26-1-22 to -23.
- The Pit River Tribe of California has enacted a natural resources and water code that mandates that “[n]o person shall generate, store, transfer, transport, treat, discharge, release or dispose of a hazardous waste” on the Pit River lands. Statutes of the Pit River Tribe of California, title 15. Natural Resources and Water Code, chapter 1. Solid Waste Disposal Ordinance, § 909(A). A violator of the Pit River code is subject to both civil and criminal proceedings and can also be subject to penalties, including the possibility of a fine and payment of “the cost to clean up, abate, remove and mitigate the environmental impacts.” *Id.* at §§ 1504, 1505, 1509.
- The Confederated Tribes of the Umatilla Indian Reservation in Oregon have enacted a tribal fire department code that initiates a permitting system for vehicles that park on the Umatilla Indian Reservation carrying radioactive materials. Statutes of the Confederated Tribes of the Umatilla Indian Reservation, as amended through Resolution 09-089 (July 6, 2009), Fire Prevention and Emergency Services Code, § 2.04.
- In the criminal code of the Eastern Band of Cherokee of North Carolina, it is a crime to store, bury, or dispose of “of any nuclear refuse, by-product, waste or radioactive material or any chemicals or other toxic refuse, by-products or waste material within the trust lands or any other lands of the Eastern Band of Cherokee Indians.” Cherokee Code, article

VI. Crimes Against Public Safety, § 14-25.1(a). Violators are subject to a mandatory one-year prison term and a fine of \$5000. *Id.* at § 14-25.1(b).

Other tribes have announced policies to provide guidance as to their position regarding nuclear energy. For example, the Prairie Island Indian Community has announced that “[w]hile not opposed to nuclear power as an energy source, the Prairie Island Indian Community opposes any expansion of the nuclear power industry—including the lifting of Minnesota’s moratorium on nuclear power—until the federal government keeps its promise and creates a permanent national solution for dealing with nuclear waste.” Prairie Island Indian Community, Nuclear Power, *available at* <http://www.prairieisland.org/community/nuclear-power/>.

Tribes have also exercised their inherent sovereign powers to further their involvement in the field of nuclear energy by entering into agreements with governmental or private entities to regulate and monitor nuclear activities on or near tribal lands. For example, the Seneca Nation of Indians of New York and the U.S. Department of Energy have been entering into cooperative agreements since 1996 regarding the Western New York Nuclear Service Center, which includes provisions for consultation and document sharing between the two parties. U.S. Department of Energy, Key Legal Drivers, *available at* http://www.wv.doe.gov/Key_Legal_Drivers.html. Similarly, “[t]he Los Alamos Pueblos Project (LAPP), comprised of four New Mexico pueblo governments (Santa Clara Pueblo, Pueblo of Cochiti, Pueblo of Jemez, and Pueblo de San Ildefonso), has individual cooperative agreements to develop and maintain environmental monitoring programs.” U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Site Programs & Cooperative Agreements: Los Alamos and National Laboratory, Los Alamos and National Laboratory (LANL), *available at* <http://energy.gov/em/site-programs-cooperative-agreements-los-alamos-and-national-laboratory>. Throughout Indian Country, therefore, tribes are exercising their inherent sovereignty to handle nuclear energy issues in a manner that is consistent with their

unique tribal cultures, histories, resources, and needs. These efforts are likely to increase considerably in the coming years and tribes will have the opportunity to participate in or reject the extraction, transportation, management, and storage of nuclear material on or near their tribal lands.

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A TALE OF TWO CITIES AND TWO URANIUM TAILINGS PILES: A QUESTION OF ENVIRONMENTAL JUSTICE

David A. Taylor

With apologies to Charles Dickens, and those who love him, this is a tale of two cities and two highly radioactive uranium tailings piles. For Moab, Utah, in many ways, it is the best of times. The economy is vibrant, if not booming, with a growing tourist trade. City of Moab, Utah, *Visitor Information*, available at <http://www.moabcity.org/visitors/index.cfm>. And a 16-million ton uranium tailings pile located nearby on the banks of the Colorado River is in the process of being relocated to the relative obscurity and safety of a place known as Crescent Junction.

For Shiprock, Navajo Nation, New Mexico, in many ways it is the worst of times. It has a poverty rate of close to 40 percent. U.S. Dep't of Commerce, U.S. Census Bureau, *American Fact Finder*, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_5YR_DP03. The 2010 census shows a population of over eight thousand residents, but it still lacks a single motel. *Id.*, http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml. Shiprock, like Moab, is also home to a uranium tailings pile sitting beside the San Juan River and going nowhere. Despite the fact that the Navajo Nation has pressed for relocating the pile since 2007, not one federal dollar has been spent considering that possibility. This even though Republicans and Democrats alike have acknowledged that the legacy of uranium contamination spread throughout southwestern Indian Country represents one of the greatest environmental tragedies facing our nation. *The Health and Environmental Impacts of Uranium Contamination in the Navajo Nation: Hearing Before the Comm. on Oversight and Gov't Reform*, 110th Cong. 1, 12 (2007) (statement of Representative Waxman, Chairman, Committee on Oversight and Government Reform and Representative Davis, Representative of Virginia), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hrg45611/pdf/CHRG-110hrg45611.pdf>. This unequal treatment is troubling.

For Moab, it is the age of wisdom. Daily activities at the tailings pile make U.S. Department of Energy (DOE) officials so justifiably proud that they invite interested parties for site tours. Site visitors witness an almost *Martian Chronicles*-like futuristic operation of radioactive tailings being loaded for a 30-mile rail trip to a safer destination. Author's personal observation, site visit to Moab Uranium Mill Tailing Remedial Action (UMTRA) project site (Mar. 11, 2011).

For Shiprock, Navajo Nation, New Mexico, some consider it the age of foolishness. Daily activities include the pumping and treating of a seemingly endless groundwater remediation system, occasional environmental tests, and repairs of torn fences conducted by DOE contractors. The contractors try to limit the access of wandering Navajos who are determined, as always, to use all of their land for grazing and watering livestock, even when it means drinking from radioactive, contaminated waters such as those flowing in Many Devils Wash located a few hundred yards from the Shiprock tailings pile. Author's personal observation, site visit to Shiprock UMTRA site (Oct. 2010).

Is this a classic example of environmental injustice in Indian Country? The Navajo Nation believes it is and so advised the U.S. Department of Justice (DOJ) on July 9, 2012, in a written communication indicating that the "former Shiprock Uranium Mill Site represents a case study in environmental injustice when compared with the nearby Moab Uranium Mill Site." Navajo Nation, *Position Paper on Environmental Justice Issues in Navajo Indian Country* (hand delivered to DOJ representatives on July 9, 2012). The response to date? Silence.

The facts on the ground reveal a number of similarities between the two sites and a few notable differences. For instance, both sites sit close to the banks of important rivers. The San Juan is a major tributary of the Colorado, flowing into it a few miles before Rainbow Bridge National Monument. The Colorado's importance to the Southwest cannot be overstated. Both sites contain tailings from past uranium processing operations. Both sites pose potential threats to human health and the environment in the nature of possible

radon and groundwater contamination exposures. Both sites draw large numbers of visitors for nearby recreational attractions. Arches National Park, parts of which are adjacent to certain parts of the Moab tailings site, attracts many visitors each year. Shiprock, on the other hand, hosts the highly popular annual Shiprock Fair, the oldest such fair on the Navajo Nation with the fairgrounds located about 1200 feet from the tailings pile, separated only by a chain-link fence. E-mail to author from Steve Austin, Navajo Environmental Protection Agency Senior Hydrologist, Shiprock (Mar. 20, 2013).

Differences between the sites include the fact that the Moab site is much larger with the latest size estimate being 16 million tons, compared with 1.5 million tons for the Shiprock pile. DOE, *Fact Sheet: Overview of Moab UMTRA Project* (June 2012), available at <http://www.gjem.energy.gov/moab/documents/factsheets/20120611OVERVIEW2.pdf>; B.M. Thomson, E.J. Henry, & M.S. Thombre, *Applications of Permeable Barrier Technology to Groundwater Contamination at the Shiprock, NM UMTRA Site* (1996), available at <https://www.engg.ksu.edu/HSRC/96Proceed/thomson.pdf>.

The size differential represents a double-edged sword, with one side suggesting that the environmental risks associated with the Moab pile must be ten and a half times as great as the risks associated with the Shiprock pile. The other side of that sword suggests that the environmental risks associated with *moving* the Moab pile, conversely, must be ten and a half times as great as those associated with moving the Shiprock pile. Moreover, the cost of moving the Shiprock pile presumably would be far less than the cost of moving the Moab pile. In other words, one could use the size differential as a justification for arguing that it makes more sense to move the Shiprock pile than the Moab pile.

Obviously, this does not represent the type of scientific comparison and analysis necessary to answer the question of whether or not it makes environmental and economic sense to move the Shiprock pile. It does, however, at least raise the question of whether the size differential makes any difference in determining, from

an environmental perspective, whether the Shiprock pile should be relocated.

A similar observation can be made regarding the Moab pile's location in a floodplain vis-à-vis the Shiprock pile's location on a terrace overlooking the floodplain. The Moab site sits in the floodplain, while the Shiprock site sits on a terrace between 50 and 60 feet above the floodplain. Whether these represent distinctions without a difference for environmental purposes is an important question. Is one location that much worse than another from an environmental perspective? Not necessarily. Even though the Shiprock pile overlooks the floodplain, the Shiprock floodplain itself overlays uranium-contaminated groundwater. DOE, *Fact Sheet, Shiprock, New Mexico, Disposal Site* (Dec. 9, 2011), available at www.lm.doe.gov/Shiprock/ship_factsheet.pdf. Moreover, every time it rains in Shiprock there is an increased risk of additional contamination flowing into the already contaminated floodplain that sits adjacent to the San Juan River.

Furthermore, according to a February 8, 2005, letter from the U.S. Environmental Protection Agency (EPA) to DOE, it appears that EPA was not nearly as worried about the Moab pile remaining in the floodplain as it was about the pile being unlined:

The basis for our Environmental Un satisfactory rating for the On-site Alternative is the potential for prolonged environmental and public health risk that could result from the continued release of toxic contaminants to ground and surface waters because of potential failure of the proposed remedy. The on-site remedy does not include a liner beneath the disposal pile, thus allowing river flooding to continually reintroduce contaminants into the river. Under such circumstances, the onsite remedy would not satisfy the requirements of 40 CFR 192 and the groundwater protection mandates of the State of Utah. In addition, the river could migrate towards the pile, and the salt-bed underlying the pile could dissolve, over the life of the remedy. Such natural actions would greatly compromise the integrity of the remedy.

Letter from EPA to DOE (Feb. 8, 2005) *quoted in* Janet Wilson, *EPA Agrees Tailings Pile near Moab Shouldn't Stay*, SALT LAKE TRIBUNE, Mar. 6, 2005. *The Shiprock pile is also unlined*, as are two other radioactive tailings piles on the Navajo Nation at Tuba City, Arizona, and Mexican Hat, Utah.

Importantly, however, a site-by-site comparison of the Moab and Shiprock tailings piles misses the mark in describing the vast injustice associated with the entire legacy left over from past uranium mining and processing throughout Navajo Indian Country. It is only a microcosm of the bigger picture that includes 520 abandoned uranium mine sites, one of which contains over 1.2 million tons of contaminated materials. See USEPA, *Engineering Evaluation/Cost Analysis, Northeast Church Rock Mine Site* (May 30, 2009), available at [http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/f453d4346e384945882575cf007fd4bf/\\$FILE/EECANarrative053009final.pdf](http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/f453d4346e384945882575cf007fd4bf/$FILE/EECANarrative053009final.pdf) (waste volume estimate is 1.26 million tons).

Two well-researched books help paint the broader scope of the disproportionate suffering of the Navajo land and people. *If You Poison Us* by Peter Eichstaedt and *Yellow Dirt* by Judy Pasternak leave little room for doubt that the uranium legacy facing the Navajos represents one of the most disturbing environmental injustices of our time. (See Esther Houseman's review of *Yellow Dirt* in this newsletter.)

The real question becomes, where do we go from here in addressing these injustices? To the Navajo Nation, the first obvious step was to place a moratorium on all future uranium mining and processing on Navajo lands until the impacts of past uranium mining and processing had been remediated to the satisfaction of the Navajo Nation Council. See Dine Natural Resources Protection Act of 2005, 18 N.N.C. § 1301, et seq. (2005). As suggested above, we are, unfortunately, generations away from achieving that goal.

Other conventional approaches to any injustice in this country are legislation, litigation, lobbying for funds, and alternative dispute resolution. A full discussion of

these approaches is beyond the scope of this brief note except for a quick mention of a targeted lobbying effort.

Congressional lobbying has achieved some modest financial commitments. For instance, a joint lobbying effort by the Navajo Nation and El Paso Natural Gas (now Kinder Morgan), together with the congressional leadership of Congressman Henry Waxman and his staff produced a \$5 million appropriation in 2009 that was used to clean up a uranium site near Tuba City, Arizona, known as the Highway 160 site. *See* New World Environmental, Inc., *Navajo Nation Environmental Protection Agency Highway 160 Project Remediation Completion Report* (Dec. 28, 2011), available at <http://pbadupws.nrc.gov/docs/ML1213/ML12135A460.pdf>. This represented the first Navajo EPA-led hazardous waste site cleanup in the Navajo Nation.

The recently released Five-Year Plan report summarizing investigation and response activities at Navajo uranium sites claims that federal agencies have spent over \$100 million during the past five years on uranium-related matters in Navajo Indian Country. *See* USEPA, *Federal Actions to Address Impacts of Uranium Contamination in the Navajo Nation, Five-Year Plan Summary Report* (January 2013), available at <http://www.epa.gov/region9/superfund/navajo-nation/pdf/NavajoUraniumReport2013.pdf>. Close to \$30 million of that relates to DOE expenditures, most of which DOE was already obligated to pay prior to the initiation of the Five-Year Plan. It seems somewhat misleading to suggest that DOE should get credit for spending money they were already obligated to spend.

While the Navajo Nation continues to analyze the specifics of the report, the immediate reaction among many is that it overstates the amount spent and understates the remaining problems.

Although this note describes a situation that is bleak and worthy of righteous indignation, it is far from hopeless. There are dedicated professionals in every branch of government and every agency directly involved working to right these wrongs. EPA Region 9

in San Francisco deserves special credit along with a handful of U.S. Department of Justice attorneys, especially those directly involved in the *Tronox* litigation. DOE brought a “can do” attitude to the Highway 160 site cleanup that allowed completion of that project on time and under budget.

All weapons in the arsenal must be used. Some will work better than others depending on the particular circumstances. But one tool has not been mentioned to this point, the indomitable spirit of the Navajo people. The Highway 160 site would not have been identified and cleaned up but for the efforts of the late Arlene Luther—a long-time employee of the Navajo Nation EPA and a tenacious fighter for uranium cleanups throughout Navajo Indian Country—and a handful of Navajo Nation environmental professionals. There would be no Five-Year Plan and no \$70 million or so of ongoing work throughout the Navajo Nation but for that group of people. The task before us is to harness that spirit and allow it to work in and through the traditional Anglo approaches discussed above.

This means listening to Navajo environmental and legal experts trained in traditional Navajo practices. They speak in terms foreign to untrained ears, terms such as *k'e*, *hozho*, and *nalyeeh*, words that have no direct English translation. They mean thousands of different things in thousands of different circumstances. We very inadequately translate them into single words or phrases such as “respect,” “harmony,” and the notion of “no hard feelings.” They point to a justice system based on restorative as opposed to punitive principles, a system based on distributive justice as opposed to distributed justice. *See* Hon. Robert Yazzie, “*Life Comes from It*”: *Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (Spring 1994). The restorative/distributive model works.

The best example of the restorative/distributive model at work may be found in South Africa. How many millions of South African lives have been saved because a handful of people, such as Nelson Mandela and Bishop Desmond Tutu, believed in a restorative/distributive justice model rather than one based on a distributed/retribution-based approach? As Mike Batley has noted, “South Africa’s Truth and

Reconciliation Commission demonstrated that restorative justice can be used in a wide variety of contexts and that it is effective not only in the case of 'ordinary crime'. The ability of South African victims to forgive their perpetrators for the most atrocious crimes is a shining example to all South Africans." Mike Batley, *Restorative Justice in the South African Context*, in Institute for Security Studies, *BEYOND RETRIBUTION, PROSPECTS FOR RESTORATIVE JUSTICE IN SOUTH AFRICA* 30 (Traggy Maepa ed., 2005), available at <http://www.iss.co.za/pubs/Monographs/No111/Chap2.pdf>. The Navajo peacemaking process and Navajo traditional legal concepts can and must be incorporated into every discussion of environmental justice and environmental cleanups in Navajo Indian Country. It can energize the process and help heal the wounds.

A season of light for residents near the Moab site does not mean that there must be a season of darkness for those living around the Shiprock site. By incorporating the Navajo peacemaking process and traditional legal concepts into the discussions about the Shiprock site, we can end the winter of despair and bring a new spring of hope to this neglected project.

David A. Taylor is an attorney with the Navajo Nation Department of Justice in Window Rock, Arizona.



USEPA REPORT ON NAVAJO NATION URANIUM CLEANUP ISSUED

Ronnie P. Hawks

In October 2007 the U.S. Environmental Protection Agency (EPA), Bureau of Indian Affairs, Indian Health Service, Nuclear Regulatory Commission, and Department of Energy developed a coordinated Five-Year Plan to address uranium contamination on the Navajo Reservation, in consultation with the Navajo Nation. The agencies developed eight primary objectives under the Five-Year Plan: assessment and cleanup of contaminated structures; assessment of contaminated water sources and provision of alternative water supplies; assessment of abandoned uranium mines, emphasizing those most likely to pose environmental or health problems; cleanup of the Northeast Church Rock Mine site and other high priority abandoned mine sites; cleanup of the Tuba City Dump; cleanup of the Tuba City Highway 160 site; remediation of groundwater contamination at three former mill sites; and case control studies of health risks faced by individuals living near uranium mill sites or abandoned uranium mines. On October 18, 2012, six members of Congress requested a report summarizing the work that had been performed in pursuit of these objectives. That report was issued in January 2013. USEPA, *Federal Action to Address Impacts of Uranium Contamination in the Navajo Nation* (Jan. 2013), available at <http://www.epa.gov/region9/superfund/navajo-nation/pdf/NavajoUraniumReport2013.pdf>.

With regard to assessment and cleanup of contaminated structures, EPA and the Navajo Nation EPA conducted an initial screening of 878 structures across the various mining regions of the Navajo Nation. Forty-three structures and 18 residential yards were contaminated by radioactive materials. All of the residential yards and 34 of the structures had been remediated as of January 2013. Remediation ranged from demolition of structures to soil removal, with compensation paid to families in some cases. Additional surveys were ongoing in the Cameron and Central Region mining areas, and additional cleanup work is planned for 2013.

To assess the scope of contaminated water sources, the agencies tested 240 unregulated water sources for elevated radionuclides. Uranium or radionuclides exceeded drinking water standards at 29 of these water sources. Three wells were shut down and the agencies posted signs and conducted public outreach to warn of the dangers posed by unregulated water sources. Over \$25 million has been provided for new water projects and water hauling programs to service 1825 homes. It was beyond the scope of the Five-Year Plan to determine whether uranium and radionuclide contamination was from naturally occurring sources or resulted from historical mining operations.

The agencies also assessed 520 abandoned mine claims on the Navajo Reservation. All but 47 of the sites were scanned for gamma radiation, with baseline radiation levels recorded at off-site locations in the vicinity of each site. Of the sites scanned for radiation, 403 showed radionuclide levels at more than twice background levels (considered evidence of a hazardous release), with 70 of these sites within a quarter mile of potentially inhabited structures. Radiation was more than 10 times background levels at 226 sites, with 36 of those sites within a quarter mile of potentially inhabited structures. In response, EPA is conducting Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) response actions at nine of these 36 sites. Efforts continue to warn Navajo residents of the hazards associated with these sites and to determine next steps to prevent public exposure. Based on the screening reports, more detailed assessments were completed at 45 mines to determine if the sites were eligible for the National Priorities List or EPA's emergency response program. Preliminary Assessments for the CERCLA Information System were conducted at four sites, with Preliminary Assessments ongoing in January 2013 at two other sites and a reassessment scheduled at the King Tutt Mesa mine complex in 2013.

EPA issued a cleanup plan for the Northeast Church Rock Mine site that requires removal of approximately one million cubic yards of mine waste from the site. EPA also began response actions at nine other mine areas, with cleanup of the Skyline Mine site completed

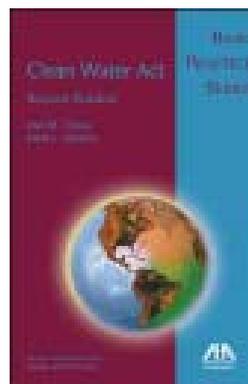
in October 2011. Site characterization and soil remediation were completed at the Tuba City Highway 160 site, with further remediation ongoing. At the Tuba City Dump site, a Remedial Investigation/Feasibility Study was started and the site was fenced to prevent public access.

With regard to groundwater remediation, the Department of Energy met the Five-Year Plan goal of continuing maintenance and monitoring of existing groundwater treatment activities at four inactive uranium milling sites. That work continues.

Evaluation of health risks faced by persons living near mill and mine sites included 22 medical screening events in 2010. At those events, 699 individuals were screened, of whom 578 identified current or past non-occupational exposure to uranium. Training on radiation-related health issues was conducted at hospitals and clinics, exposure studies were conducted and planned, and medical services were provided.

The agencies estimate that approximately \$110 million has been spent under the Five-Year Plan since 2008, although some of that money already had been allocated under preexisting commitments. The agencies have committed to a second Five-Year Plan to continue the work conducted and planned to date.

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BOOK REVIEW: *YELLOW DIRT* BY JUDY PASTERNAK

Review by Esther Houseman

In October 2007, senior officials from five federal agencies and representatives of the Navajo tribe appeared before the House Committee on Oversight and Government Reform to testify about the devastation uranium mining brought on the Navajos' people, land, water, livestock, and crops. Chairman Henry Waxman called on officials from the Environmental Protection Agency, the Indian Health Service, the Bureau of Indian Affairs, the Nuclear Regulatory Commission, and the Department of Energy to explain why, beginning in the early 1940s, the government had encouraged the uranium industry's aggressive and reckless mining on the Navajo reservation. And why had the government turned a blind eye when scores of Navajos began to succumb to the effects of radiation poisoning?

George Arthur, a tribal council delegate, testified to the tribe's culture and connection to its land. This land, George testified, began to poison them in the "never-ending federal experiment to see how much devastation can be endured by a people and a society from exposure to radiation in the air, in the water, in mines and on the surface of the land." To ensure that his message would not be forgotten like the last 30 years of pleas for assistance and cleanup, George placed a small tub of soil from the reservation on the table and waved a radiation detector over it, allowing the clicks to fill the hearing room. The officials struggled for words when committee members demanded an explanation for their agencies' failures to ensure radiological safety for the Navajo. Committee members concluded the meeting by doing what the government (and the mining industry) had yet to do for the Navajo—apologizing for its shameful actions and vowing to "pursue this issue until we get it right."

In *Yellow Dirt*, Judy Pasternak expands upon her *Los Angeles Times* series on the disgraceful history of American uranium mining and its devastating effects on the Navajo. She introduces readers to the cast of key individuals from the mining industry, the government,

and four generations of a single Navajo family in Cane Valley, an area on the reservation where one mining corporation, Vanadium Corporation of America (VCA), mined its largest uranium lode. Superb investigative journalism and thorough exploration of the human element of this tale make *Yellow Dirt* read like a gripping suspense novel, yet it leaves readers with the unsettling reality of this dark chapter in American history.

Though Pasternak closes the book on the congressional committee's promise to "get it right" and the hopeful developments that followed, the remainder of the book is a grim tale of corporate drive for profits and the government's abject failure to protect the vulnerable and fulfill its trust responsibility to the Navajo. The book begins with a historical overview of the discovery of radioactivity and the developments that followed in quick succession: the Manhattan Project, atomic bombing of Japan, establishment of the Atomic Energy Commission (AEC), and America's drive to win the Cold War.

Pasternak tells the story of Adakai, the patriarch of the Cane Valley family, realizing what white visitors to the valley are seeking and warning his young son, Luke, to never show *ʒeesto*, or "yellow dirt," to the white men. Lured by false promises of a finder's fee, a grown Luke shows the *ʒeesto* to the white men from VCA. Luke's disobedience opened the door for aggressive mining in Cane Valley where, like mining operations across the reservation, Navajo mined in woefully unsafe working conditions. Pasternak describes how mining corporations and federal agencies ignored warnings from physicians and scientists that miners and nearby residents were being exposed to dangerously high levels of radiation that could prove harmful and even fatal. The AEC even warned its resident safety inspector, Ralph Batie, to "keep [his] mouth shut" about the "[d]efinite radiation hazards" he observed.

When demand for uranium waned in the 1960s and mines closed, mining companies abandoned mounds of tailings and buried mining equipment in shallow graves. Navajos, unaware of radioactive hazards, used mine waste and tailings to build homes and even ovens, drew water from contaminated wells, and led livestock

to drink from contaminated watering holes. Statistical evidence began to reveal an epidemic of cancer, birth defects, and what came to be called “Navajo neuropathy”—a debilitating disease marked by poor vision, stiffened and fused fingers and toes, and early death. Suits filed against mining corporations to compensate the Navajo yielded paltry sums compared to the cost of cleanup.

Pasternak’s newspaper series spurred Chairman Waxman to take the lead on finally acknowledging and addressing the Navajo suffering. After the October 2007 congressional hearing, the federal agencies devised a cleanup plan to restore the land as best as possible. Federal funding has provided alternate water sources and government construction teams to demolish and replace contaminated homes and buildings. Mine waste piles are at last moving through the Superfund process, 60 years after the first rounds of mining for the Manhattan Project.

Yellow Dirt is a must-read for anyone interested in environmental justice and the nuclear industry and regulation. This sobering retelling of decades of injustice for the Navajo will sharpen perspectives on the future of the nuclear industry.

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