

No. 07-9505

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EASTERN NAVAJO DINÉ AGAINST
URANIUM MINING, SOUTHWEST
RESEARCH AND INFORMATION
CENTER, MARILYN MORRIS AND
GRACE SAM,

Petitioners,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION
AND THE UNITED STATES,

Respondents.

PETITION FOR REVIEW OF A DECISION OF THE UNITED STATES
NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES

**AMICUS CURIAE OF THE NAVAJO NATION
FILED IN SUPPORT OF PETITIONERS**

NAVAJO NATION DEPARTMENT OF JUSTICE
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INTRODUCTION

This Amicus Brief is submitted on behalf of the Navajo Nation, a federally recognized Indian tribe whose territory includes parts of northeastern Arizona, northwestern New Mexico and southeastern Utah. The “Eastern Agency” of the Navajo Nation, the term coined by the Bureau of Indian Affairs, is the part of the Nation located in northwestern New Mexico and the place where the events of this case are focused.

The Navajo Nation supports and concurs with the position of its tribal members who are also members of the Eastern Navajo Dine’ Against Uranium Mining (“ENDAUM”), tribal members Grace Sam and Marilyn Morris, and the Southwest Research and Information Center (collectively Petitioners). The Nation also supports and concurs in the relief sought by Petitioners and in their position that the Nuclear Regulatory Commission’s (NRC’s) grant of the license at issue should be reversed as arbitrary, capricious and in violation of law. The Navajo Nation is grateful to Petitioners and their attorneys for their longstanding, tireless efforts in this matter.

It is hoped that this Brief, in a few short pages, will provide the Court with some insight as to the importance of the issues raised by this case to the people of the Navajo Eastern Agency in particular and the Navajo Nation in general. With

that hope in mind the Navajo Nation sets forth three simple propositions for the Court's consideration. First, the Navajo Eastern Agency continues to suffer from the legacy of uranium mining. Second, the decision of the Nuclear Regulatory Commission has already negatively impacted the Navajo Nation's ability to protect the health and environment of its people and will continue to do so in the future. Third, the Nuclear Regulatory Commission, as a Commission of the United States Government, has violated its trust responsibility to the Navajo Nation.

ARGUMENT

I. THE NAVAJO EASTERN AGENCY CONTINUES TO SUFFER FROM THE LEGACY OF URANIUM MINING.

Turning north on Highway 566 off of Interstate 40 five miles east of Gallup, one immediately passes the Church Rock community¹ and Church Rock Chapter House on the east side. The Chapter House is the gathering place for the local Navajo residents, the place where they drink coffee in the morning and often eat a

¹ The Parties agree that the Church Rock Community is an Environmental Justice Community. 97.2 percent of the population within 10 miles of Church Rock is Native American and many live in poverty. FEIS 3-179;-3-79-3-80 . This means the Nuclear Regulatory Commission's ("NRC's") actions must comply with Executive Order 1298, 59 Fed. Reg. 7629, which mandates:

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, deny persons (including populations) to the benefits of, or subjecting person (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

E.O. 1298, Sec. 2-2.

To meet this mandate, the NRC is to place "Greater emphasis ... on discussing impacts on minority and low-income populations when preparing ...[an] Environmental Impact Statement." US NRC EJ STRAT (MARCH 1995).

noon meal. The Chapter House is the site of community meetings and all chapter business. The road passes quickly through some of the most beautiful red rock bluffs the west has to offer before crossing the Rio Puerco river bed, a river that was exposed to at least 93 million gallons of radioactive contaminated waters in 1979 when a dam for a pond containing radioactive uranium mill tailings broke. Despite the operator's claim that the spill was "cleaned up", the site where the disaster occurred remains on the United States Environmental Protection Agency's ("U.S. EPA's") National Priorities List of contaminated sites. See *Eagle Picher Industries, Inc. v. U.S. EPA*, 822 F.2d 132 at 150, 152. (D.C. Cir. 1987) and *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358, 359-360 (D.N.M. 1981) The actual site of the disaster sits only a few miles from HRI's proposed mine.

Then, in the next five miles, a discerning person can look to the left, about a mile beyond the Rio Puerco crossing, and see Section 17—a site where the Navajo Nation EPA has determined that there are ongoing illegal releases of hazardous substances—and Section 8.² See attached Exhibits 1 and 2.³ The highway runs through Section 17 but misses Section 8. Larry King, mentioned in Petitioners' brief, lives nearby, his family dwellings a few hundred yards off of Highway 566, on the east side of the road.

² Sections 8 and 17 are two of the four locations in which the proposed HRI in situ leach mining would occur. This Court has determined that the Section 17 land is Indian Country. *HRI v. EPA*, 198 F.3d 1224, p. 1249 (10th Cir. 2000).

³ Exhibit 1 is a copy of a letter sent by the Navajo Nation EPA to the United Nuclear Corporation. Although a similar letter was sent to HRI, Inc. the precise copy had not been located at the time this Brief was due. Exhibit 2 is a computer generated copy of that letter.

The road continues another mile or so to the northeast, intersecting with Highway 11, the route to the Pinedale Chapter House. Here the signs of the uranium legacy are much more visible, groundwater monitoring wells, storage cells containing more than 3.5 million tons of acidic uranium mill tailings, remnants of the old uranium mill facility to the west. See attached Exhibit 3, ⁴slide presentation made by U.S. EPA Region VI on August 21, 2006.

The journey ends another mile or two along Highway 566 at the place where the highway ends, the site of the former Northeast Church Rock uranium mine, located a few hundred yards from the former Kerr-McGee uranium mine, both well marked on the venerable AAA Indian Country Map. Arriving at this location today, June 29, 2007, one sees a U.S. EPA command center, the hub where emergency cleanup efforts are being coordinated. Local Navajo families have only been able to return to their homes within the past thirty days while the federal government ponders the disposal options for remaining mounds of contaminated materials, including a contaminated artificially created hillside stretching for close to a quarter of a mile. See attached Group Exhibit 4, U.S. EPA Region IX Pollution Reports for the Northeast Church Rock site, May and June 2007.

In the last nine months the U.S. EPA has issued two Administrative Orders requiring emergency environmental response actions at the facility commonly

⁴ This document is used with permission of U.S. EPA Region VI subject to the notation that it has not been peer reviewed.

referred to as the "Northeast Church Rock Site," the area including and surrounding the above-referenced Northeast Church Rock mine located approximately five miles northeast of the Section 8 lands. See Exhibits 5 & 6. The events described in the U.S. EPA Orders and the circumstances described above underscore the arbitrary and capricious nature of any uranium related permit issued in an area where the United States agency charged with protecting human health and the environment of its citizens is still, literally, **attempting to assess the impacts from past uranium mining and issuing emergency orders calling for the relocation of residents.** Exhibits 5 & 6. There is no small degree of irony where one federal agency issues a permit for future uranium mining, accepting the claims of the mining company that human health and the environment will be protected, while another agency is spending substantial amounts of public funds trying to mitigate the devastating impact of historical mining in the same immediate area.

The consequences of past uranium mining could have been avoided but for the conscious policy decisions by regulatory agencies that allowed companies to operate under much less stringent standards than they do today. Although the regulatory framework in regard to nuclear materials has certainly progressed, the NRC has chosen to interpret its regulations, both under the Atomic Energy Act ("AEA") and the National Environmental Policy Act ("NEPA"), in a manner that

the Nation has no control over—the only protection for the aquifer that now exists is a decommissioning fund that will only provide enough money to flush the aquifer with nine pore volumes of water, an amount that has proven to be inadequate. Moreover, based on the tests upon which the surety estimate was based, even if the Navajo Nation were to fund further flushing of the aquifer, the data shows that it would be unlikely to produce any positive effect. Thus, in effect, the NRC is allowing HRI to experiment on the Navajo Nation, and in particular on a high quality and widely used aquifer, in the hope that, despite the dismal data on which the surety is based, this time nine pore volumes will work. The likely result of this experiment is that the Navajo Nation will have a contaminated aquifer with no reasonable prospect of restoration.

III. THE NUCLEAR REGULATORY COMMISSION, AS A COMMISSION OF THE UNITED STATES GOVERNMENT, HAS VIOLATED ITS TRUST RESPONSIBILITY TO THE NAVAJO NATION

Section 17 is tribal trust land, held by the United States government in trust for the Navajo Nation. See *HRI, Inc. v. United States Environmental Protection Agency*, 198 F.3d 1224 (C.A. 10th Cir. 2000) at p. 1231. The NRC is an agency of the United States government. 42 U.S.C. §2014(a). A basic Indian law principle is that the federal government has a **trust** or **special** relationship with Indian tribes.

Cohen's Handbook of Federal Indian Law, 2005 ed., p. 418. Furthermore, during the last part of the twentieth century American courts evolved a “robust” trust doctrine and “nearly every piece of modern legislation dealing with Indian tribes” contains a statement reaffirming that relationship. *Ibid.* p. 420 The actions of **all** federal agencies, including the NRC, are subject to a general trust relationship and to the standards of care, candor and loyalty it imposes. *HRI* at p. 1245 (“all federal agencies”); *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

Attached, as Exhibit 7, is the Department of Energy (“DOE”) policy as promulgated by the Secretary of Energy. It is instructive to look at that policy vis a vis the administrative record in this case.

The cornerstone of the DOE policy is the recognition that it is the “trust responsibility of the United States to protect tribal sovereignty and self-determination, *tribal lands*, assets, resources, and treaty and other federally recognized and reserved rights.” Ex. 7 p. 1 (emphasis supplied). The policy obviously covers Section 17 as tribal trust land. But, it also covers Section 8, regardless of the ownership status of the land or whether or not it is determined to be part of a “dependent Indian community because the DOE is required to consider

effects on the Navajo Nation's lands caused by activities outside of the reservation.⁵

One of the primary ways of implementing the policy is through effective consultation that includes "prior to taking *any* action with potential impact upon American Indian and Alaska Native nations" providing for "mutually agreed protocols for timely communication..." Ex. 7 p. 2 (emphasis added); accord, Executive Order 13,084, "Consultation and Coordination with Indian Tribal Governments," 63 Fed. Reg. 27,655 (1998).

Finally, and perhaps most importantly for this case, the Department of Energy Indian Policy calls for ensuring the "integration of Indian Nations into the decision-making process." Ex. 7 p. 4. Where in the administrative record for this case is the evidence that the Navajo Nation has been consulted regarding the impact of these licenses on Navajo land in general and Section 17 in particular? Where in the administrative record for this case is the evidence that the Navajo

⁵ See, e.g., *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) ("The federal government bears a special trust obligation to protect tribal property and jurisdiction.") (citing *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935)); *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (Bureau of Land Management off-reservation leasing decision reversed for its failure to consult with the affected tribe regarding tribe's cultural, social and economic interests, as required by BLM regulation); *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (invalidating BIA personnel decision for its failure to consult with tribe as required by internal BIA policy); *Island Mountain Protectors*, 144 IBLA 168, 185 (1998) (where tribes had treaty relationship with Government, "[t]he BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety" before allowing off-reservation cyanide heap-leach mining); see also *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 n.10 (9th Cir. 2006) (leaving open this question).

Nation has been consulted at all in any manner regarding the issuance of these licenses? There has been no consultation at all.

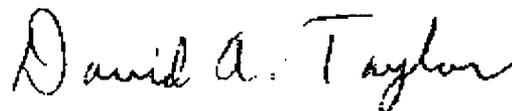
It's difficult to imagine how an agency could have possibly fulfilled its trust responsibility to an Indian Nation without consulting the Nation's representatives. The NRC has violated its trust responsibility to the Navajo Nation both procedurally, by its failure to consult meaningfully, and substantively by its sleight-of-hand relegation of non-naturally occurring uranium mining and milling wastes to "background" status to be ignored in the licensing process .

CONCLUSION

For all of the above reasons the Navajo Nation respectfully requests this Court to set aside the license issued by the United States Nuclear Regulatory Commission to Hydro Resources, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2007, a true and correct copy of the foregoing AMICUS CURIAE BRIEF OF THE NAVAJO NATION was served via United States Mail, first-class postage prepaid, addressed as follows: additional copy sent to all via electronic mail.

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Pursuant to the Emergency General Order of October 20, 2004 (c), I hereby certify follows:

- (1) all required privacy redactions (below) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and
- (2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, E-Trust Management Suite r3, most recently updated June 15, 2007, and according to the program, are free from viruses.

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I hereby certify that on this 29th day of June, 2007, a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF was served via United States Mail, first-class postage prepaid, addressed as follows: additional copy sent to all via electronic mail.

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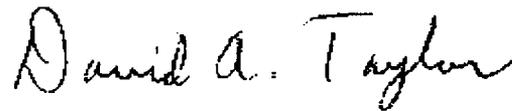
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- (2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, E-Trust Management Suite r3, most recently updated June 15, 2007, and according to the program, are free from viruses.

NAVAJO NATION
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A handwritten signature in black ink that reads "David A. Taylor". The signature is written in a cursive style with a large initial 'D' and 'T'.

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