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TRIBAL RESOURCES: FEDERAL TRUST RESPONSIBILITY: UNITED STATES ENERGY DEVELOPMENT VERSUS TRUST RESPONSIBILITIES TO INDIAN TRIBES

*Winifred T. Gross**

The relationship between the United States and the Indians has a long history that requires some elucidation in order to understand the trust and sovereignty issues that are crucial today as energy resource development takes place on Indian lands. The history of the relationship between the United States and the Indian tribes that inhabit the continental United States has developed from formal international agreements and sets of policies and from informal actions by both entities. The entities have vied with each other not only for their very lives but for the property and resource wealth of the continent.¹

Initially, the federal government dealt formally with Indian tribes primarily through treaties that normally contained mutual pledges of peace and friendship, as well as Indian cessions of land in return for goods and services with a certain land area reserved for the Indians for their continued use. This policy of forming treaties with Indian tribes resulted in some 389 treaties and ended in 1872 with the passage of the following act:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty law fully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.²

According to the "law of nature and the law of nations,"³ the

* First-place Winner, 1982 Writing Competition.

1. See generally *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), which contains a lengthy historical discussion involving Indian fishing rights and Indian legal issues in general; AMERICAN INDIAN POLICY REVIEW COMM'N TASK FORCE ONE, 94TH CONG., 2D SESS., REPORT ON TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP, INCLUDING TREATY REVIEW 71-84 (Comm. Print 1976) [hereinafter cited as TRUST REPORT]; Washburn, *The Historical Context of American Indian Legal Problems*, in AMERICAN INDIANS AND THE LAW 12 (L. Rosen ed. 1976) [hereinafter cited as ROSEN]. Mr. Washburn is Director of the Office of American Studies at the Smithsonian Institution.

2. 25 U.S.C. § 71.

3. TRUST REPORT, *supra* note 1, at 103.

various Indian nations were thought to have more land than they were entitled to:

Those nations (such as the ancient Germany, and some modern Tartars), who inhabit fertile countries, but disdain to cultivate their lands, and choose rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be exterminated as savage and pernicious beasts. There are others, who, to avoid labour, choose to live only by hunting, and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But, at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner.⁴

The land acquisitions by the United States made through treaties with Indian tribes were negotiated in accord with its beliefs at the time as to what was a moral and ethical way in which others could be deprived of land. From the earliest years of New World exploration, the great scientists, philosophers, theologians, politicians, academicians, and legal scholars of Europe concurred in a view that "discovery" permitted a just claim and right to property in the Americas.⁵

The historical perspectives contained in the *Report on Trust Responsibilities and the Federal-Indian Relationship*, the final report to the American Indian Policy Review Commission, appear to be accurate and in accord with other sources of authority.⁶ *The Report on Trust Responsibilities* was one of eleven Task Force study areas established by the American Indian Policy Review Commission.⁷

In his article on the Indian Policy Review Commission, Lloyd Meeds, a United States congressman from Washington and vice-

4. *Id.* From E. Vattel, LAW OF NATIONS § 81 (1760). Vattel was a legal and philosophical writer in the latter eighteenth century whose writings were relied upon by the first presidents and justices of the United States, as described by TRUST REPORT, at 99.

5. See generally TRUST REPORT, § V, "European Roots of Federal-Indian Law," at 87-112.

6. *Id.* See generally P. GATES, THE RAPE OF INDIAN LANDS (1979); ROSEN, *supra* note 1; *Jurisdiction on Indian Reservations, Hearings on S. 1181, S. 1722, and S. 2832 Before the Select Comm. on Indian Affairs*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Jurisdiction Hearings*].

7. The Commission was created by congressional act on Jan. 2, 1975, Pub. L. No. 95-580, 88 Stat. 1910.

chairman of the Commission, emphasized the importance of the Commission in terms of its advisory function to congressional decision making.⁸ He pointed out that the unique relationship between the federal government and the Indians "has never been exactly defined."⁹ Aware that past commissions and investigations by Congress have resulted in major policy legislation, Congressman Meeds concluded: "The structure of the Commission, the caliber of the Commission members and task force personnel, and the broad spectrum of the study all present the Congress with a unique opportunity to base American Indian policy squarely on solidly-based, factual conclusions."¹⁰

Clashing Values and Opposing Systems

Both the policy and the methods of Indian land acquisition were justified in terms of natural law, religious-moral belief systems, and historical imperatives. The Northwest Ordinance of 1787, said to be the "first important law of the United States on Indian relations,"¹¹ made the following statement committing the United States to a policy that excluded at least outright taking as a land acquisition approach: "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress. . . ."¹² In addition to its comments concerning the method of land acquisition, the same ordinance committed the United States to a policy that described a protective relationship with Indians: "but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."¹³ A "corollary or necessary right" of Indian people was therein recognized that "imposed strict limitations upon claims made by discovery."¹⁴ According to the *Trust Report*: "Although just claims for acquired lands from the Indian Tribes was [sic] validated by the Doctrine of Discovery,

8. ROSEN, *supra* note 1, at 9.

9. *Id.*

10. *Id.*

11. TRUST REPORT, *supra* note 1, at 90, quoting Felix Cohen. See Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942).

12. TRUST REPORT, *supra* note 1, at 90, quoting Cohen.

13. *Id.*

14. *Id.* at 15.

that doctrine mandates that Indians should be maintained with a sufficiency of land to satisfy their duties and obligations to themselves—including their future development and security, or future well-being.”¹⁵

“Colonization” was described as a “qualified right,” and “the Indian nations were vested with the rights of mankind to the limits of their just land needs.”¹⁶ “A nation could not alienate or dispossess itself of territories essential to its own security and survival, its perpetuation and future well-being.”¹⁷ Thus, Indian nations had the amount of land they could occupy reduced, but they were allowed to continue living as nations on the North American continent within another nation, the United States.

The current relationship between American Indians and the United States is unique because Indians are American citizens, yet “reservation Indians are not subject to the Federal Constitution or to the taxes and regulatory controls of the states in which they live and vote.”¹⁸

Although many tribes have formulated their own constitutions and established their own courts, reservation governments are not recognized as fully sovereign entities. And although reservation Indians are characterized at times as wards of the federal government, no consistent standard of responsibility has been established to define and delimit the plenary power of Congress over the entire range of Indian affairs.¹⁹

The treaties that were recognized by the Act of 1871 “remain operative today, except to the extent that they have been modified by subsequent Congressional enactments.”²⁰ Congress has, however, retained the power to abrogate provisions of Indian treaties unilaterally as stated by the Supreme Court in *Lone Wolf v. Hitchcock*²¹:

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in

15. *Id.* at 17.

16. *Id.* at 103.

17. *Id.* at 15.

18. ROSEN, *supra* note 1, at 1. Rosen’s foreword contains a fine, succinct review of Indian history from a legal perspective.

19. *Id.*

20. TRUST REPORT, *supra* note 1, at 173. The treaties are regarded as supreme law of the land under article VI of the United States Constitution.

21. 187 U.S. 533 (1903).

the interest of the country, and the Indians themselves, that it should do so.²²

When treaties with Indians have been broken by the United States, the federal government has felt an obligation to pay compensation to Indian tribes.²³ The rights that were reserved for the tribes by treaty are included under the fiduciary obligations of the United States arising under the trust doctrine.

Having undertaken to protect certain rights reserved by tribes by treaty, the trustee should be obliged to treat such rights as hunting and fishing as part of the trust res. The sanctity of these rights were guaranteed in exchange for the cession of other rights and property and are entitled to vigorous protection by the trustee.²⁴

The Trust Doctrine

According to the *Trust Report*, "the United States is in the position of trustee" to Indian tribes and that is "so well established as to need little more than statement."²⁵ The trust relationship between the United States and Indian tribes was described in early law, both by the Court and Congress, to be a protective relationship to Indian tribes. It was characterized by Chief Justice Marshall in *Cherokee Nation v. Georgia*²⁶ as follows:

They may be . . . dominated domestic dependent nations . . . Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely on its kindness and its power; appeal to it for relief of their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.²⁷

22. *Id.* at 566, cited in TRUST REPORT, *supra* note 1, at 173-74.

23. See *United States v. Creek Nation*, 295 U.S. 103 (1935).

24. TRUST REPORT, *supra* note 1, at 178.

25. *Id.* at 175, citing *United States v. Sund* 1, 231 U.S. 28 (1913); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *United States v. Kagama*, 118 U.S. 375 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

26. 30 U.S. (5 Pet.) 1 (1831), cited in TRUST REPORT, *supra* note 1, at 109.

27. *Id.* at 17.

The United States' recognition of Indian tribes and the guarantee of their rights to hold their property and to be free in the exercise of their religion is found in treaties not only between the United States and Indian tribes but also between the United States and France, Spain, and Mexico.²⁸

According to Chief Justice Fox in *United States v. Michigan*,²⁹ the obligation of the United States to act as trustee for the Indians began with the signing of the Treaty of Ghent in 1814.³⁰ In this treaty with Great Britain, both nations agreed to restore Indian rights, possessions, and privileges to which they were entitled before 1811. The United States also agreed to secure lands from the Indians only by valid, just, and humane treaties, and it agreed to treat the Indians not as defeated enemies but as wards, fully possessed of all rights arising by virtue of original occupancy and use of the lands.³¹

The *Trust Report* queries as to the definition of the "United States" for purposes of identifying it as trustee, one of the parties in the trust relationship.³² A thorough discussion of the nature of the trust led the Task Force to conclude that the Secretary of the Interior may have the primary responsibilities of trustee, but the United States as trustee consists not only of "the federal government and all branches thereof" but also of the individual states and individual citizens.³³

The beneficiaries of the trust are described by the *Report* as Indian tribes, which are

sovereign political entities possessed of all inherent sovereign rights and powers except as such have either been surrendered by the tribe or clearly and expressly limited by the act of Congress. . . .

All tribes that have not been terminated or that have had tribal status restored after having been terminated are beneficiaries under the trust relationship. . . .

The trust relationship between the Federal Government and individuals, although less defined than that with the tribes, has nonetheless been evident over the years.³⁴

28. *Id.* at 90-91.

29. 471 F. Supp. 192 (W.D. Mich. 1979).

30. 8 Stat. 218, as cited *id.* at 205-06.

31. 471 F. Supp. 192, 206 (W.D. Mich. 1979).

32. TRUST REPORT, *supra* note 1, at 175.

33. *Id.* See also *id.*, 177, where *United States v. Camp*, 169 F. Supp. 568, 572 (1979) is cited: "The Secretary is charged not only with the duty to protect the rights and interest of the tribe, but also the rights of the individual members thereof."

34. *Id.* at 176-77.

The trust *res* is defined by the *Report* to include both real property and the income derived from that property.³⁵ The United States holds title to Indian trust lands,³⁶ “while the person or entity for whom it is held has beneficial title or the right to use the land without an absolute right to sell it.”³⁷ The *Trust Report* finds that the trust responsibility extends to both tribally held and individually allotted lands.³⁸ It defines the character and extent to such trust responsibility in the following terms:

Included within the sphere of trust land is the land and all natural resources of it. Thus, timber, water, minerals, crops, fish, wildlife and the like are all part and parcel of the trust *res* and subject to appropriate protection and standards of conduct on the part of the trustee.³⁹

The *Report of the Task Force on Indian Matters* by the Department of Justice Office of Policy and Planning, October 1975, by calling attention to the trust responsibility of the federal government, corroborates the trust definition of the *Trust Report*: “As fiduciary for the Indian people, the federal government is charged with protecting and preserving Indian land and natural resources and other related rights deriving from treaty, federal statute or case law.”⁴⁰ The trust responsibility, delegated to the Department of the Interior and the Department of Justice, is unique in that

[i]n no other area is the government charged with the fiduciary duty of representing the Private interests of a particular group.

• • •

In representing Indian tribes, the Justice Department often finds itself in an inherent conflict of interest. It must also represent numerous federal agencies, notably the Bureau of Reclamation and the Corps of Engineers, whose interests are often adverse to those of Indian tribes.⁴¹

The Trust and Conflict of Interest

As stated by President Richard M. Nixon in his “Message to

35. *Id.* at 177.

36. *Id.*

37. *Id.*

38. *Id.* The allotment system is discussed *infra* at “Allotments and Tribal Ownership of Mineral Rights.”

39. *Id.* at 178.

40. *Jurisdiction Hearings*, *supra* note 6, at 231.

41. *Id.*

Congress" July 8, 1970:

The Secretary of the Interior and the Attorney General must, at the same time, advance both the national interest in the use of land and water rights and the private interest of Indians in land which the government holds as trustee. . . . There is considerable evidence that the Indians are the losers when such situations arise.⁴²

Legislation recommended by President Nixon to provide independent legal representation to Indians was introduced in several sessions of Congress but failed to pass.⁴³

The United States may be found, in view of its trust relationship to Indian tribes and its self-interest in the development of energy resources, to be in a conflict-of-interest situation in regard to its administration of its trust duties in matters that concern energy development and related issues on Indian lands. This issue is raised in *Manygoats v. Kleppe*,⁴⁴ by Judge Breitenstein. He stated:

In the instant case the duties and responsibilities of the Secretary [of the Interior] may conflict with the interests of the Tribe. The Secretary must act in accord with the obligations imposed by NEPA. In acting upon the Navajo-Exxon agreement the Secretary, to further the national objectives declared by NEPA, must have and consider an EIS. The national interest is not necessarily coincidental with the interest of the Tribe in the benefits which the Exxon agreement provides.⁴⁵

According to *Manygoats*, when the national interest of the United States is not coincidental with the interest of the tribe, "representation of the Indians by the United States is not adequate."⁴⁶

The United States also was found to be in conflict of interest between its proprietary capacity as owner of the Santa Fe National Forest and its fiduciary duty to the Pueblo Tribe concerning water rights in *New Mexico v. Aamodt*.⁴⁷ While the lower court denied the right of the Pueblos to private counsel, the ap-

42. *Id.* at 232.

43. *Id.*

44. 558 F.2d 556 (10th Cir. 1977).

45. *Id.* at 558.

46. *Id.*

47. 537 F.2d 1102 (10th Cir. 1976).

peals court clarified that the "fiduciary duties to the Pueblos does not diminish the rights of the Pueblos to sue on their own behalf."⁴⁸ At appeal, the government conceded that there was a conflict of interest between "the proprietary interest of the United States and of the Pueblos."⁴⁹

Testimony before the U.S. Senate Committee on Indian Affairs supports allegations that the United States has failed to protect tribal reservation-linked water interests over a long period of time. The report describes the gradual usurpation of water by upstream settlers from Indian reservation farmlands under irrigation.⁵⁰

Failure of United States Trust Responsibility to Indians

There is general agreement among scholars, Congresses, and courts that agreements made between the United States and the Indian tribes have frequently been made at great disadvantage to Indians.⁵¹ It is primarily for that reason that courts have held that regarding rules of construction that are to govern contracts or agreements with Indians, "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak, defenseless people, who are wards of the nation."⁵²

In a recent Michigan case involving Indian fishing rights,⁵³ Chief Judge Fox found that "it would be unconscionable . . . to construe words in the treaty against the Indians when the facts establish that the Indians were not responsible for their selection."⁵⁴

Despite the legally and politically protective stances taken toward Indian tribes, the *Trust Report* states:

Never in its history has the United States made available the economic, or other resources necessary to satisfy the most basic

48. *Id.* at 1107.

49. *Id.* at 1106.

50. *Water for Five Central Arizona Indian Tribes for Farming Operations, Hearings on S. 905 Before the Senate Select Comm. on Indian Affairs* (1977) (see within the statement of the Gila Indian Community, at 309-68) [hereinafter cited as *Water Hearings*].

51. See generally *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); ROSEN, *supra* note 1; GATES, *supra* note 6.

52. *Choate v. Trapp*, 224 U.S. 665, 675 (1912), cited in *Antoine v. Washington*, 420 U.S. 194 (1975) (Douglas, J., concurring).

53. *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

54. *Id.* at 252.

human, individual, family, community, or national needs of Indian people. In fact, the United States has seldom allowed, or enabled, Indian tribes or individuals to secure the benefits or gains potentially available to them from the considerable land and other economic resource base still held by, or retained in the ownership of, the collective Indian Community.⁵⁵

Serious allegations have been made before congressional hearings,⁵⁶ as well as before courts,⁵⁷ to the effect that the United States has frequently violated its trust responsibilities to Indian tribes. In a statement before the Senate Committee on Indian Affairs, Senator Edward Kennedy concluded that the findings of hearings held by him relative to S. 905 were that:

[T]he Federal trustee is in fact not honoring its obligation to protect the water and other natural resources of Indians. The fundamental reason for this recurrent failure of the Federal fiduciary obligation, we found, is that the executive agencies ostensibly responsible for effectuating the trusteeship role are hopelessly compromised by pervasive conflicts of interest.⁵⁸

In the courts the liability and extent of United States fiduciary responsibilities to Indian tribes is in the process of definition. The United States' policy of rapid development of nationally located energy resources⁵⁹ has led to the current situation wherein, because of the location of valuable energy resources on Indian reservations and increased demands for water associated with energy development which impinge on the water rights attached to reservation lands, the trust doctrine as well as issues of sovereignty are being heard now in the context of energy development issues.

Sovereignty and Taxation of Energy Resources

The extent and the definition of Indian tribes' sovereignty has become much more important to clarify because of issues that have arisen in energy development situations. A major issue involving interpretation of the extent of Indian tribal sovereignty is the right of a tribe to tax non-Indian businesses and individuals

55. TRUST REPORT, *supra* note 1, at 16.

56. *Water Hearings*, *supra* note 50, at 58.

57. *United States v. Mitchell*, 445 U.S. 535 (1980).

58. *Water Hearings*, *supra* note 50, at 48.

59. *Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1383 (10th Cir. 1980). *See also* *Northern Cheyenne v. Hollowbreast*, 425 U.S. 649 (1976).

or to tax the natural resources that leave the reservation. This issue was granted Supreme Court review in *Merrion v. Jicarilla Apache Tribe*.⁶⁰ In 1976 the tribal council ordered a severance tax placed on "any oil and natural gas severed, saved, or removed from Tribal lands."⁶¹ The court of appeals reversed the lower court's holding and found that the tribe does have the power to impose a severance tax on oil and gas that is produced by oil companies on reservation land under lease approved by the Secretary of the Interior. The court stated that the power to tax was chief among the retained powers of sovereignty, except where Congress provided otherwise.⁶²

In a related case recently decided by the Supreme Court, *Washington v. Confederated Tribes of the Colville Indian Reservation*,⁶³ the Supreme Court stated: "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."⁶⁴ The Court listed three areas in which tribal powers were divested by virtue of the overriding interests of the national government: First, engaging in foreign relations; second, alienating lands to non-Indians without federal consent; and third, prosecuting non-Indians in tribal courts which do not accord full Bill of Rights protections.⁶⁵ The *Colville* Court found that in the case of tribal taxation of cigarettes there was no overriding federal interest that would necessarily be frustrated by tribal taxation.⁶⁶ To what extent tribal taxation legislation would be allowed nevertheless remains in question in view of the lower court decision in *Jicarilla Apache*,⁶⁷ which held that tribal legislation in that instance infringed upon the national interest of maintaining the free flow of interstate trade. The tax was found to discriminate against interstate commerce and to constitute a multiple burden on commerce. That court determined that tribes are limited in taxing power by the Indian commerce

60. 455 U.S. 130 (1982).

61. 617 F.2d 537 (10th Cir. 1980).

62. *Id.* at 544.

63. 447 U.S. 134 (1980).

64. *Id.* at 152.

65. *Id.* at 153-54. See also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (stating that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").

66. *Id.* at 154.

67. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980).

clause.⁶⁸ The standard to be used in applying that clause is whether tax legislation by a tribe infringes upon the national interest in maintaining the free flow of interstate trade.⁶⁹ Although the *Colville* Court found no such problem with the existence of both state and tribal taxation on cigarettes, it must be anticipated that such a double tax burden on energy resources could be found to conflict with the national interest in energy self-sufficiency and, thereby, fail the test in *Oliphant v. Suquamish Indian Tribe*,⁷⁰ another recent Supreme Court decision involving tribal sovereignty. The *Oliphant* Court found that "the exercise of separate power [of tribes] is constrained so as not to conflict with the interest of this overriding sovereignty."⁷¹

The Parameters of Energy Resource Development on Indian Lands

According to Peter MacDonald, chairman of the Council of Energy Resource Tribes (CERT), Indian tribes own 15% of the United States coal reserves, half of the uranium reserves, and 4% of petroleum reserves.⁷² How these resources are to be developed, to what extent they will be developed, and who will develop them are still unresolved questions.

Substantial controversy already exists with respect to the present development of some of these resources. Indian tribes are protesting the amount of royalties that have been agreed to in contracts that are Bureau of Indian Affairs (BIA) approved (if not, in fact, propagated). A second area of controversy involves the effects of natural resource development on the reservation environment. Already, resource development has caused water, air and land pollution, land degradation, and "boomtown" consequences when workers are brought onto the reservation to work on large mining and power plant projects. Additional controversy exists concerning the allocation of funds due the Indians from the mineral sales with respect to:

68. U.S. CONST. art. I, § 8, cl. 3.

69. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

70. 435 U.S. 191 (1978).

71. *Id.*

72. Fife, *Peter MacDonald Offers CERT Energy to Carter*, 5 AM. INDIAN J. 21 (Aug. 1979). CERT is an organization of twenty-five Indian tribes who hold energy resources. It receives federal funding and is dedicated to taking an active role on behalf of Indian tribes in the development of their natural resources. CERT's effort toward adequate self-representation in energy matters is demonstrated by its 1979 hiring of a former deputy minister for oil and economic development from Iran as chief economist on their Denver staff. *Id.* at 18.

1. The existence of a tribe as such.
2. Definition of tribal membership.
3. Jurisdictional rights of tribal versus state governments.
4. The nature of the tribal government itself.
5. Questions concerning maintaining reservation land in its natural state versus resource development.
6. Environmental protection demands versus desires for profits.
7. Taxation rights of Indian tribes.⁷³

Allotments and Tribal Ownership of Mineral Rights

Part of the problem that occurs with the development of mineral resources on Indian reservations arises from the effect of the unique forms of the land allotment system on reservations. When reservations were initially preserved for Indian tribes, the land was assigned as a unit to the tribe. The Indian people themselves had no concept of private property ownership. The federal government, however, encouraged Indians to own land privately, believing that private ownership of land would encourage the development of modern civilization among Indians, including the development of a stable agrarian life-style and the abandonment of nomadic life-styles.⁷⁴ Accordingly, it became policy to allot individual parcels of reservation land to individual Indians. Mineral rights to that land, on the other hand, were held by the tribe.⁷⁵ Moreover, federal policies from time to time permitted and encouraged the sale of unallotted Indian reservation lands to non-Indians.

Proposals in the latter part of the nineteenth century to break up Indian reservations were motivated by a variety of factors but especially by the continual westward expansion of non-Indians who began to encroach on lands the federal government had agreed by treaty to reserve for Indian tribes. The General Allotment Act of 1887,⁷⁶ popularly known as the Dawes Act, codified a plan to break up reservations by allotting individual parcels of communally held tribal lands to Indians. Each Indian would be allotted up to 80 acres of agricultural land or 160 acres of grazing land. Remaining allotments would be sold to non-Indians, and the pro-

73. See generally, *Leases Involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation, Hearings Before the Senate Select Comm. on Indian Affairs*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Coal Leases Hearings*]. See also Note, *Indian Lands: Coal Development: Environmental/Economic Dilemma for the Modern Indian*, 4 AM. INDIAN L. REV. 279 (1976).

74. *United States v. Mitchell*, 445 U.S. 535, 544 n.5 (1980).

75. *Northern Cheyenne v. Hollowbreast*, 426 U.S. 649 (1976).

76. 24 Stat. 388.

ceeds of these sales were to assist in the educational and "civilizational" process of Indians.⁷⁷

The next major piece of Indian legislation relating to land allocation was the Indian Reorganization Act of 1934, the Wheeler-Howard Bill, which fostered tribal land ownership and tribal government. The policies set forth in this bill were those of Harold Ickes, Secretary of the Interior, and John Collier, Commissioner of Indian Affairs under Franklin D. Roosevelt, both of whom recognized that Indians were not developing into "prototypical American farmers" because their land allotments were of inadequate size and quality, their health and education facilities were inferior, and their desire to maintain tribal identities was strong.⁷⁸

Even though the Indian Reorganization Act has remained "the guiding expression of federal Indian policy,"⁷⁹ a considerable portion of reservation land remains allotted. When coal dramatically increased in value in the 1960s, heightened interest in developing this resource exposed new controversy over both the ownership of mineral rights on allotted reservation land and the methods for developing the resources of this land.⁸⁰

In some respects, this controversy has pitted the tribes against individual Indians. On the one hand, the Supreme Court in *Northern Cheyenne Tribe v. Hollowbreast* clarified that mineral rights are reserved "in perpetuity for the benefit of the Tribes."⁸¹ On the other hand, individual Indians "own" tracts of reservation land with ownership merely for the purposes of farming, grazing, and residence. Accordingly, exploration permits and leases for mining are arranged by the tribal government and the Department of the Interior, sometimes resulting in the juxtaposition of mining operations with Indian farms, pastures, and homes. Furthermore, tribes can lease mineral rights attached to the allotted land on which tribal members live and have done so sometimes without the allottee's permission or knowledge and without allottees' understanding the environmental effects of the mineral exploration, mining, and processing.⁸² In addition to conflicts of interest that may exist between tribes and the federal

77. See GATES, *supra* note 6, at 145. The dissipation of Indian lands by virtue of allotment and sales is well told therein.

78. ROSEN, *supra* note 1, at 21.

79. *Id.* at 23.

80. *Northern Cheyenne v. Hollowbreast*, 425 U.S. 649, 652 (1976).

81. *Id.*

82. Barry, *Navajo Legal Services and Friends of the Earth Sue Six Federal Agencies*

government, there may be conflicts between tribal interests and the interests of individual tribal members.

*Legal Issues Created by Uranium Mining
on Indian Reservations*

The problems posed to an Indian community by uranium mining are similar to those faced by the rest of the country. Yet some problems are different because they are amplified for certain Indian tribes by the proximity of their homes and workplaces to the mines. The problems center around the immediate hazards of radiation to human health and the frightening possibility of increasing genetic damage from long-term radiation exposure. Because of the radioactive nature of uranium and its waste products of mining and milling, mere eyesores or unusable land are only the tip of the adverse environmental effects iceberg. Exposed piles of uranium mill tailings that accumulate around milling operations result in airborne radioactive particles,⁸³ water-borne radioactivity,⁸⁴ and direct contact exposure to those in the physical vicinity of tailings.⁸⁵ Uranium mining also affects the water supply by drawing heavily on available water and lowering the water table⁸⁶ and by polluting the immediate neighboring aquifers with chemical pollutants and radioactive seepage.⁸⁷ The health hazards of low-level radiation are now well documented although the exact effects are unknown.⁸⁸

Over Alleged Careless Uranium Mining Policies, 5 AM. INDIAN J. 6 (Feb. 1979) [hereinafter cited as *Navajo Legal Services*].

83. *Uranium Mill Tailings Control Act of 1978, Hearings on H.R. 11698, H.R. 12229 and H.R. 12938 Before the Subcomm. on Energy & Power of the Comm. on Interstate & Foreign Commerce*, 95th Cong., 2d Sess. (1978), at 165-66, 184, 330 [hereinafter cited as *Mill Tailings Hearings*]. Note also statement by Victor Gilinsky, Commissioner, U.S. Nuclear Regulatory Comm'n: "Unfortunately, the tailings are more than an eyesore. The difficulty is that the tailings generate a radioactive gas called radon. . . . Since radon is a gas it is also possible for large populations thousands of miles from a source to be exposed, albeit to an extremely low dose." *Id.* at 22.

84. *Id.* at 167, 177, 208, 335.

85. *Id.* at 175, 208, 335.

86. Barry, *What Price Energy? Hazards of the Uranium Mining in the Southwest*, 5 AM. INDIAN J. 22 (Jan. 1979). The EIS prepared by TVA, in its capacity as developer of uranium resources on Navajo lands, reported that Crownpoint, N.M., mines will cause the water table to drop 1,000 feet within a 10-mile radius of Crownpoint.

87. *See 1981 Authorization for the Office of Research & Development, Environmental Protection Agency, Hearings Before the Subcomm. on Natural Resources & Environment*, 96th Cong., 2d Sess. 9 (1980) (J. Lehr, On the Need for a Greatly Expanded EPA Ground Water Research Program, at 158).

88. *Mill Tailings Hearings*, *supra* note 83, at 251.

Commentators,⁸⁹ current case law, and congressional testimony all point to the complexity of the issues involved with the mining of uranium on Indian reservations. Certainly, some of the clash of interests stem from the severance of mineral rights from ownership of surface land rights on Indian reservations. And despite what seems to be adequate regulations, environmental impact studies, and licensing procedures, situations remain in which Indian populations are exposed to increased and increasing levels of radiation from the mining and milling of uranium. These problems are further complicated by the fact that uranium mining is profitable not only to the non-Indian companies involved in the mining operations but also to individual Indian workers and Indian tribes who have grown to depend on income from uranium mining.⁹⁰

Court challenges to uranium mining activities are found in two reported Tenth Circuit cases. Both involve challenges to the regard for environmental impact of uranium developers. The first, *Manygoats v. Kleppe*,⁹¹ decided in 1977, sought to enjoin an agreement between the Navajo Tribe and Exxon Corporation in which Exxon was given the right to explore for and mine uranium on tribal lands. In the second case, decided in 1978, Natural Resources Defense Council, Inc. (NRDC), and others sought declaratory and injunctive relief directed at the United States Nuclear Regulatory Commission (NRC) and the New Mexico Environmental Improvement Agency "prohibiting those agencies from issuing licenses for the operation of uranium mills in New Mexico without first preparing environmental impact statements."⁹² The issues raised in these two cases are illustrative of the conflicts that can exist and that involve the Indian tribes, individual Indians, uranium mining corporations, and the United States government.

Despite the approval by the Tenth Circuit of what was challenged in *Manygoats* by seventeen Navajo Tribe members as an inadequate environmental impact statement (EIS), environmental and Indian plaintiffs continue to seek performance of an EIS as a prerequisite to uranium operations in accord with the National

89. E.g., Barry, *New Mexico Pueblos Confront the Atomic Age*, 5 AM. INDIAN J. 11, 14-15 (Dec. 1979).

90. Ruffing, *Fighting the Substandard Lease*, 6 AM. INDIAN J. 2 (June 1980).

91. 558 F.2d 556 (10th Cir. 1977).

92. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978).

Environmental Policy Act of 1969 (NEPA).⁹³ Despite what seems to be settled law to the effect that the need for the EIS as required by NEPA applies to the granting of leases on Indian lands by the Secretary of the Interior,⁹⁴ according to a report in the *American Indian Journal*, the Navajo Legal Services (DNA) joined with Friends of the Earth to file a suit in Washington, D.C., on December 22, 1979, against six major federal agencies to stop approval of uranium leases that had been signed without NEPA-required EISs.⁹⁵ The suit is described as claiming that the ongoing San Juan Regional Uranium Study of the Bureau of Indian Affairs "does not meet the provisions of NEPA since it has no provisions for public hearings and has no power to enforce its recommendations."⁹⁶ The article describes currently inflicted environmental degradation created by the presence of exploration drill holes nearly every 1,000 feet, as well as grazing lands destroyed by leveling in recent explorations.⁹⁷ The Navajos represented in this suit number only 92 and are nearly all living "in traditional fashion, speaking the Navajo language, adhering to Navajo cultural beliefs, and observing practices of traditional Navajo religion."⁹⁸ The suit demands "that the federal government study and publicly describe appropriate alternatives to uranium production activities."⁹⁹ The aim of the suit, according to Peterson Zah, Director of DNA,

is not to stop uranium development but to provide people with more information, . . . information is not now being provided to the people who will be directly affected by the mining and milling of uranium. The preparation of impact statements will guarantee public discussion of the plans for national and regional uranium development.¹⁰⁰

Efforts to trace this case have not been successful. However, it is noteworthy at least for the belief it represents in the value which

93. 42 U.S.C. § 4332.

94. *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), cited in *Cady v. Morton*, 527 F.2d 786, 793 (10th Cir. 1975).

95. *Navajo Legal Services*, *supra* note 82, at 3.

96. *Id.* at 4.

97. *Id.* at 5. See also Note, *Environmental Law: Uranium Mining on the Navajo Reservation*, 7 AM. INDIAN L. REV. 115, 116 (1979), which has a similar description of land surface damage, citing testimony of Bureau of Land Management Director Woolley to this effect.

98. *Navajo Legal Services*, *supra* note 82, at 3.

99. *Id.* at 3-4.

100. *Id.* at 4.

may accrue from a proper NEPA-style environmental impact study.

The difficulty in finding successful protection of environmental interests merely in a NEPA-style EIS seems to lie at least in part in the standard set for judicial review of an EIS, which is limited to:

1. Whether the statement discusses all of the five procedural requirements of NEPA.
2. Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.
3. Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas.¹⁰¹

These standards leave room for approval even though serious environmental threats remain in a state of conflicting technical opinions.

Six environmental effects were decreed inadequately covered by the EIS in *Manygoats*. These were watering, tailings seepage, permanent contamination of aquifers, factors relative to surface mining, cumulative effects of exposure to radon, and the cumulative effects of the project in conjunction with other resource developments that were then taking place or might take place in the area.¹⁰² The first three were described by the court as being "basically present in the form of conflicting scientific findings."¹⁰³ These conflicting findings were found to be sufficient since the "problems were delineated with great care and informed the Secretary, as decision-maker, of environmental consequences."¹⁰⁴ The fourth complaint relating to failure to evaluate surface mining was dismissed on the basis that "the likelihood of extensive surface mining is minimal," and "it is enough that the EIS covers the problems related to surface mining and the Secretary was advised of them when he approved the exploration features of the agreement."¹⁰⁵

The court's reasoning is criticized by a student writer for the decision failing to consider that "future depletion of the uranium to the point that extraction of the lesser minerals will necessitate

101. *Manygoats v. Kleppe*, 558 F.2d 556, 560 (10th Cir. 1977).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

surface mining.”¹⁰⁶ The text of the opinion refers to the “minimal likelihood” of “extensive surface mining,”¹⁰⁷ and this admits that there is at least *some* likelihood that surface mining will take place and that its impact is not thoroughly discussed. Yet, the fact that the EIS “covers the problems of surface mining and the Secretary was advised of them when he approved the exploration features of the agreement” are found to be sufficient to meet the standards for judicial review.¹⁰⁸

The court, in evaluating the EIS, considers as well that (1) the Exxon lease would necessarily be subject to certain federal regulations¹⁰⁹ in order to receive approval by the Secretary of the Interior; (2) federal approval of a detailed plan of operations, including environmental preservation and surface reclamation, would be needed to make the lease effective to any designated development block; and (3) “all operations must accord with an approved plan.”¹¹⁰ The court implies that the regulations must be followed in order to get signature of approval and that adequate written plans will assure that the exploration and mining operations will follow the rules and thus negate the need for a more thorough and definitive EIS. The fact that these regulations have been in existence since 1969,¹¹¹ combined with a plethora of evidence of pollution and environmental degradation,¹¹² suggests that these regulations have not in fact operated successfully to protect Indian interests in either the reclamation or the protection of land and water for present and future agricultural use.

Despite the inadequacy of the NEPA-EIS standards from the point of view of *Manygoats* plaintiffs, uranium developers nevertheless have attempted to avoid the NEPA-EIS requirement. The major corporations involved in uranium exploration and mining, for example, did appeal an order of the district court “denying their motions to intervene in action to prohibit federal and state agencies from issuing licenses for operation of uranium mills

106. Note, *supra* note 97, at 122.

107. *Manygoats v. Kleppe*, 558 F.2d 556, 560 (10th Cir. 1977).

108. *Id.*

109. The regulations referred to are 25 C.F.R. § 177.6, 177.7, 177.4(d); 30 C.F.R. § 231.10(a)(b)(c) (1965), 231.73(c) (1972).

110. *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977).

111. 34 Fed. Reg. 813 (1969).

112. *Mill Tailings Hearings*, *supra* note 83, at 436, wherein written testimony is entered as to nonradiological hazards of uranium operations. Major hazards were reported because of contamination of surface and ground waters from selenium from the ore and nitrates from the extraction process.

without first preparing environmental impact statements.”¹¹³ The Tenth Circuit reversed the lower court opinion and held that Kerr-McGee, “which is said to be one of the largest holders of uranium properties in New Mexico,”¹¹⁴ has an interest under the meaning of rule 24(a)(2) in that “a decision in favor of the plaintiffs, which is not unlikely, could have a profound effect upon Kerr-McGee.”¹¹⁵ The American Mining Congress, the Anaconda Company, Gulf Oil Corporation, and Phillips Petroleum Company all petitioned to intervene on the side of United Nuclear in this case.¹¹⁶ The interests on the side of preventing the demand for a NEPA-EIS were heavy enough to make one suspicious as to what problems such an EIS would create to warrant the dispute, if indeed the regulations of exploration and mining referred to in *Manygoats* were effective in providing environmental protections, and if the EIS standards of *Manygoats* were to be the minimum EIS standards in the industry.

Agreement State Regulation Standards

There was no environmental impact statement prepared by a federal agency in *NRDC v. NRC* because the contested uranium milling license in that case was awarded to United Nuclear Corporation to operate a uranium mill at Church Rock, New Mexico, not on the Navajo Reservation but on adjacent state land.¹¹⁷ That suit contesting the delegation of licensing power by the NRC to states that did not require environmental impact statements in licensing procedures claimed

first, that NRC’s involvement in the licensing procedure in New Mexico is, notwithstanding the delegation to the state, sufficient to constitute major federal action, whereby the impact statement is not required in connection with the granting of licenses, the New Mexico program is in conflict with section 274(d)(2) of the Atomic Energy Act of 1954, 42 U.S.C. section 2021(d)(2) (1970).¹¹⁸

113. *Natural Resources Defense Council v. United States Nuclear Reg. Comm’n*, 578 F.2d 1341, 1342 (10th Cir. 1978).

114. *Id.*

115. *Id.* at 1344.

116. *Id.* at 1341.

117. *Mill Tailings Dam Break at Church Rock, New Mexico, Oversight Hearing Before the Subcomm. on Energy & the Environment of the House Comm. on Interior & Insular Affairs*, 96th Cong., 1st Sess. (1980), at 8 [hereinafter cited as *Dam Break Hearings*].

118. *Natural Resources Defense Council*, 578 F.2d at 1342-43.

Regulation of at least half of the uranium mills has been delegated to states under a general delegation of authority from the NRC under a so-called Agreement States Program which dates from 1959. In the twenty-five states with which NRC has signed agreements, the states exercise regulatory control over uranium milling and tailings.¹¹⁹ New Mexico has been delegated authority to regulate under such an agreement since 1974 and has not required an environmental impact study as part of its uranium milling license requirements.¹²⁰ The federal government has had a policy of encouraging uranium exploration and mining to develop nuclear resources for both military and nonmilitary uses.¹²¹ Regulation of the industry was minimal and dispersed by the delegation of licensing of uranium operations to states according to agreements that demanded conformance to NRC health and environmental standards by states, but merely to the extent practicable.¹²²

Even when control of safety and environmental standards within the mines and protection of the environmental standards outside the mines have been essentially in the hands of agreement state governments, the NRC has a potential influence on health and safety regulations by virtue of its power to have them written into procurement contracts. Furthermore, the federal government was, until recently, the only buyer of uranium mined in the United States,¹²³ and the powers it derived from such procurement contracts were extensive. Nevertheless, as was dramatically related by Dr. Merril Eisenbud, Professor of Environmental Medicine and Associate Director of the Institute for Environmen-

119. *Id.* at 1342.

120. *Id.*

121. *Mill Tailings Hearings*, *supra* note 83, at 88, 92, 160.

122. Atomic Energy Act of 1954, 42 U.S.C. § 2021(d)(2). *See also Mill Tailings Hearings*, *supra* note 83, wherein there is a plethora of complaints from state officials who want the federal government to assume the costs of cleaning up mill tailings piles that accumulated during the period of time when the federal government was the sole purchaser of uranium. *See Mill Tailings Hearings*, *supra*, at 88, 92-93, 160. There is a uniformity between opinions expressed in this document and other documents relevant to uranium usage and its effects mentioned *infra* to the effect that the federal government was extremely lax in enforcing regulations in regard to uranium production to protect miners and the public from the health hazards of radioactivity, as well as other effects. These were produced by the disturbance of uranium from its natural state in the mines, as well as from its milling and later utilization. While initially mill tailings were not perceived to be harmful or a problem, they are now recognized as a major hazard and disposal problem.

123. *Mill Tailings Hearings*, *supra* note 83, at 88.

tal Studies, New York University Medical Center, and associated with the AEC since its inception in 1946 to 1958 as a member of the unit that came to be called the Health and Safety Laboratory of the Atomic Energy Commission,¹²⁴ the federal government did an "unprecedented" thing apparently in response to pressure over health protections in uranium procurement contracts. The uranium procurement function of the New York Operations Office of the Atomic Energy Commission (AEC) was withdrawn by AEC-Washington around 1949 or 1950 and placed in the Washington headquarters of the newly established Office of Raw Materials Operations.¹²⁵

When Senator Edward Kennedy, at hearings, asked Dr. Eisenbud if the AEC was responsive to these recommendations (referring to recommendations concerning the monitoring of the uranium mine environments to determine suitability to the health of miners), Dr. Eisenbud replied:

I am afraid not. There was a schism within the Atomic Energy Commission at that time. The Atomic Energy Act preempted health and safety on the part of the AEC. Once the source material, as uranium was called, was removed from its place in nature, and in the case of beryllium, if I can digress for a moment, which is not a radioactive material, but presented enormous industrial health problems, here was no obligation on the part of the AEC to investigate the cause of beryllium disease, and take responsibility for seeing to it that the standards were met.

There were no standards in the case of beryllium. We conducted our own epidemiological studies, and established standards that have existed up until the present time, and which essentially eliminated beryllium disease in this country.

In the case of the mines, which by peculiar definition of the Atomic Energy Act were not assigned to the Atomic Energy Commission, we of course assumed that since we had been given the go ahead to study beryllium disease and establish standards, and actually write the standards into the procurement contracts, that we would do the same thing in the mines.¹²⁶

124. *Health Impact of Low-Level Radiation, 1979, Joint Hearing before the Subcomm. on Health and Scientific Research of the Comm. on Labor and Human Resources and the Comm. on the Judiciary, 96th Cong., 1st Sess. 19 (1979) [hereinafter cited as Health Impact Hearing].*

125. *Id.* at 21-22.

126. *Id.* at 20-21.

He went on to explain that the AEC would not allow these standards to be written into contracts. Instead, the AEC decided that the health and safety responsibilities for the mines should remain with the states, "who traditionally had responsibility."¹²⁷

The New York office of the AEC refused to be responsible for procurement of uranium until the mines were cleaned up. The manager of the New York office took the position

that since we were the only customer for the ore, we should see to it that the mines were ventilated so that the standards that already existed could be met. A standard for radon was actually recommended by the National Council on Radiation Protection in 1941 for a different purpose. It was not concerned with the mines at that time. But the standard existed, and we would have written that standard into the contracts, but we were not permitted to do so.¹²⁸

Another problem with state regulation, both then and now, derives from the need for technical assistance from the NRC (formerly AEC) with respect to standard setting and enforcement techniques involving laboratories, equipment, and personnel.¹²⁹

Church Rock Dam Break Exposes Regulatory Dysfunction

The inadequacy of the state agreement licensing system for regulating uranium mining and milling operations was clearly demonstrated by the collapse of a uranium mill tailings dam and the release of a large amount of mill tailings at the United Nuclear Corporation's Church Rock, New Mexico, operation. Awareness of such inadequacy had been evident in the aforementioned *NRDC* case involving the United Nuclear Corporation operation at Church Rock filed on May 3, 1977.¹³⁰ The accident occurred on July 16, 1979, causing "the largest spill of its kind in the country."¹³¹ When the United Nuclear Corporation dam broke, between 93 and 100 million gallons of contaminated liquid waste and 1,100 tons of hazardous solid waste spilled into a local arroyo and then spread contamination into a tributary of the Rio

127. *Id.* at 21. The problem with state responsibility, according to Dr. Eisenbud, lay in the complexity of the problem of dealing with radioactive and chemical effects in terms of the scientific expertise and equipment required, the lack of gear-up time, and experience available at a state level.

128. *Id.* at 21.

129. *Id.* See also *Dam Break Hearing*, *supra* note 117, generally and especially at 232.

130. Natural Resources Defense Council, 578 F.2d 1341 (10th Cir. 1978).

131. 5 AM. INDIAN J. 25, 26 (Nov. 1979).

Puerto and finally into the Rio Puerto itself, which travels through adjacent Navajo grazing lands.¹³²

There had been an environmental impact study conducted at the United Nuclear-Church Rock mining-milling operations prior to its licensure. The study was done, however, by United Nuclear itself rather than by a federal agency as required by NEPA, or by a state licensing agency, as would now be required under new NRC regulations.¹³³ This study was reviewed informally by the federal government and by the state of New Mexico. Problems that could lead to collapse of the dam were anticipated and corrective recommendations were made but not followed by the company.¹³⁴ The evidence included in the published report is generally in agreement as to the failure of United Nuclear to carry out engineering recommendations as to dam construction, maintenance, and monitoring that was especially indicated because of unstable soil conditions.¹³⁵

Was United Nuclear Corporation Negligent?

The vice-president and chief operations officer of United Nuclear Corporation claimed before the Subcommittee on Energy and the Environment that, "It is the opinion of our professional staff that there was no substantial radiological danger created by the spill, and to date all published reports of tests of humans and livestock confirm this opinion."¹³⁶ The conclusions and assessment of United Nuclear Corporation with regard to this incident are that the "tailings dam *was designed* in accordance with the best engineering practice and *met* all design criteria established by the Nuclear Regulatory Commission and the State of New Mexico."¹³⁷ A Corps of Army Engineers report, on the other hand, states that the federal design criteria were not met in the design of the dam and that the operating procedures were questionable considering the design.¹³⁸

132. *Dam Break Hearing*, *supra* note 117, at 23, 44, 87, 124, 199, 218.

133. *Id.* at 72-73. State regulations must now conform to certain specifications according to the Federal Mill Tailings Control Act of 1978 and regulations developed according to the Act's direction by the NRC. *See* 10 C.F.R. §§ 40, 150; 44 Fed. Reg. 166 (1979).

134. *Dam Break Hearing*, *supra* note 117, at 68-69, 71-73, 208-09.

135. *Id.*, and generally.

136. *Id.* at 126-27.

137. *Id.* at 127 (emphasis in original).

138. *Id.* at 208. This is but one of many official reports found in the *Dam Break Hearings* which reveal that the dam had not been built according to specifications. Other

Congress Recognizes Federal Responsibility

Congressman Morris Udall of Arizona, chairman of the Committee on Interior and Insular Affairs and the Subcommittee on Energy and the Environment, wrote to Joseph Hendrie, chairman of the Nuclear Regulatory Commission: "The shut-down of the American Atomics plant in Tucson, Arizona, and the uranium mill tailings dam break in New Mexico both indicate a lack of adequate oversight of Agreement States' licensing practice on the part of the NRC."¹³⁹ Both the NRC and the state of New Mexico have admitted to the need for change in their systems relating to the regulation of uranium mining, the deficiencies of which have been referred to in the Mill Tailings Dam Break Report.¹⁴⁰

Chairman Udall, in his opening remarks at the oversight hearings, noted:

As I think the record compiled this morning will show, no amount of statutory authority will provide protection for the public if those in charge of implementing authority fail to do so in a conscientious manner. In the case of the Church Rock tailings site, at least three and possibly more Federal and State regulatory agencies had ample opportunity to conclude that such an accident was likely to occur.¹⁴¹

Congress recognized the government's responsibility for mill tailings cleanup in the Uranium Mill Tailings Radiation Control Act of 1978.¹⁴² This tacit acknowledgment of responsibility occurred through the inclusion of regulation of mill tailings under the agreements of the Atomic Energy Act and the provision for assuming a major part of funding for cleanup of piles in the states and 100% of the price for cleanup on Indian lands.¹⁴³

The report of the oversight subcommittee hearings referring to the mill tailings dam break at Church Rock, New Mexico, document the contamination of surface and ground waters.¹⁴⁴ In fact, on August 9, 1979, the Environmental Protection Agency issued

claims in the statement by United Nuclear's spokesman are similarly refuted by both official reports and complaints by Indians and environmentally concerned persons.

139. *Id.* at 89.

140. *Id.* at 41, 89, 92, 101, 202.

141. *Id.* at 2.

142. Ausness, *High Level Radioactive Waste Management: The Nuclear Dilemma*, 1979 Wis. L. REV. 707, 720.

143. Pub. L. No. 95-604, 92 Stat. 3021 (1978); Pub. L. No. 95-604, §§ 103, 107.

144. *Dam Break Hearing*, *supra* note 117, at 77, 94-95, 115, 219-20.

an administrative order under the Clean Water Act charging United Nuclear Corporation with an unauthorized discharge in violation of the Act.¹⁴⁵ Although proper cleanup was thought by Chairman Udall to be capable of ameliorating the effects of the spill, he emphasized, "It is important to note, however, that all of the contaminated material will never be completely removed from the environment."¹⁴⁶

The effects of low-level radiation on human health are discussed in the Report of the Joint Hearing before the Subcommittee on Health and Scientific Research of the Committee on Labor and Human Resources and the Committee on the Judiciary of the United States Senate, *Health Impact of Low-Level Radiation*, 1979. The hearings focused especially on the low-level radiation effects on workers exposed during uranium mining. In response to queries as to the date at which the federal government knew that there was an increased risk of uranium miners developing at least lung cancer, Dr. Eisenbud testified that:

[T]he definitive paper that pinned down radon as the important factor in the cause of cancer in the European mines was published in 1944 by Lorenz. . . .

It was already assumed, in the early 1950's, that there was no such thing as a safe dose of ionizing radiation, and that the relationship between dose and response should be assumed to be linear.¹⁴⁷

The report contains references and quotes throughout that substantiate the serious effects of radiation on people.¹⁴⁸ Although, as the report points out, the population of exposed persons is small enough to hinder conclusive scientific data, Senator Kennedy spoke of "a moral certainty from scientific research" as a measure to be guided by.¹⁴⁹ Senator Kennedy introduced a Public Health Service report dated March 1962, which acknowledged government awareness of the harmful health effects of uranium mining on miners, and in particular, the causal relationship between radon and lung cancer. This report stated: "The only conclusion an objective observer can reach is that someone has abdicated his responsibility."¹⁵⁰

145. *Id.* at 222.

146. *Id.* at 2.

147. *Health Impact Hearing*, *supra* note 124, at 27-28.

148. *Id.* at 29, 84, 88.

149. *Id.* at 84.

150. *Id.* at 29.

Effective Regulation Sought

The importance of uranium mining to the economies of the Navajo Tribe and the Laguna Pueblo Tribe can be surmised from the failure of these tribes to demand cancellation of mining leases despite the threat to human health and the actual damage to their environment, with the possibility of more in the future. That it was possible to demand and get lease cancellation of large coal-mining contracts on the basis of the violation of federal mining regulations on Indian lands and on the failure to develop appropriate environmental impact statements has already been shown by the Northern Cheyenne Tribe, which, "upon reconsideration of the development contemplated by the leases and permits, concluded that the financial benefits of development were outweighed by social effects of a 'boom town' atmosphere and the environmental effects of extensive strip mining."¹⁵¹ Allen Rowland, president of the Northern Cheyenne Tribal Council, stated before the Select Committee on Indian Affairs that the contested coal sale permits and leases contained "no effective environmental or restoration provisions," and the lessee was bound merely "to cooperate fully with the lessor and the Secretary."¹⁵² The leases and exploratory permits would have permitted strip mining of coal on 214,000 acres of the 433,740-acre Northern Cheyenne Reservation in Montana.¹⁵³

Additional evidence for tribal dependence on uranium mining income comes from statements made by Floyd Correa, governor of the Laguna Pueblo Tribe and vice-president of CERT, which confirm that the Laguna Pueblo Tribe is considered by him, at least, to have a vested interest in the mining of uranium and in the nuclear power industry. The tribal economy was said to rest on income from uranium resource development, and Correa points out that the priorities of the Laguna Pueblo Tribe differ from those of the Santo Domingo and Acoma Pueblo tribes.¹⁵⁴ These latter tribes have refused to allow mining on their lands and continue to live in traditional ways. They complain about the pollution and draining of their water supplies resulting from nearby uranium mining.¹⁵⁵

The Santo Domingo Pueblo Tribe has joined with neighboring

151. *Coal Leases Hearing*, *supra* note 73, at 8.

152. *Id.* at 33.

153. *Id.* at 44. News Release, from the Department of the Interior, Office of the Secretary, June 4, 1974. *See also* Note, *supra* note 73.

154. Barry, *Pueblos Confront the Atomic Age*, 5 AM. INDIAN J. 14, 15 (Dec. 1979).

155. *Id.* at 15.

non-Indian New Mexico residents to fight the mining of uranium in New Mexico.¹⁵⁶ The National Indian Youth Council similarly has been directing efforts to stop uranium mining on Indian reservations. A letter soliciting Council membership in April 1981 states, "We cannot bring back those who became the victims of the uranium mines. But we can take action not only to keep more men from going down into the mines, but also to close up the mines." These groups share the belief that uranium mining harms the natural environment, that people are affected by radioactivity where they are in the proximity of uranium mining, and that problems of waste and water contamination cannot be prevented.

Indispensable Party

Not only do Indian tribes vary in their particular goals, values, and priorities, but conflict may exist within a tribe as to the adequacy of environmental protection pertaining to energy resource development projects as well as to whether the development should occur. The *Manygoats* case offers an excellent illustration of such intratribal conflict; a small group of tribe members challenged a contract arranged by the Navajo Tribe leaders. In this instance, the court determined that it was not necessary, as appellees Kleppe and Exxon contended, to include the tribe in the suit as an indispensable party under rule 19(b) of the Federal Rules of Civil Procedure.¹⁵⁷ This decision was important because it recognized the right of individual Indians, as well as other interested parties, to challenge the adequacy of an EIS. Were the tribe to be an indispensable party to such a suit, actions of this sort would depend upon the willingness of the tribe to be sued, and such suits could be averted simply by the refusal of the tribe to come to court.¹⁵⁸

A critical distinction was made by Judge Breitenstein that separated *Manygoats* from an earlier case in which a group of Tewa Tesuque from the Pueblo of Tesuque Tribe (Pueblo) sought, among other remedies, cancellation of a lease that permitted the development of "land for residential, recreational and commercial purposes, resulting in a city of non-Indians with the projected

156. *Id.* at 16-17.

157. *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977).

158. *Id.* at 558-59. See also *Tewa Tesuque v. Morton*, 498 F.2d 240, 242 (10th Cir. 1974), which states that a tribe may not be joined without its consent or the consent of Congress because of its quasi-sovereign status.

population of about 17,000.”¹⁵⁹ The distinction was based primarily on the difference between the remedies sought by the two sets of plaintiffs. The *Manygoats* plaintiffs sought to “enjoin the performance of the agreement,”¹⁶⁰ while the *Tewa* sought cancellation of the contract. The *Tewa* court analyzed the four criteria for consideration under rule 19(b) of the Federal Rules of Civil Procedure and concluded that the Pueblo Tribe would indeed be prejudiced by a judgment in its absence because “if the lease is cancelled it would lose its rental income to be derived therefrom, together with employment opportunities for its members.”¹⁶¹ Since a holding that an EIS is inadequate does not necessarily result in prejudice to the tribe because of cancellation of its contract and only to the demand that a new EIS be considered, the EIS challenge and petition for injunction could proceed without joining the tribe.¹⁶² If *Manygoats* remains good law in the Tenth Circuit, then, at least there, it would appear that a challenge to EIS adequacy in Indian lease cases would stand when asserted by other than the tribe, without joinder of the tribe, if injunction is prayed for rather than lease cancellation.

Uranium Mining Approvals—A Violation of Trust?

Assuming that a case could be made establishing that uranium production creates levels of radioactive polluting effects that are dangerous to persons in the vicinity of mining, milling, and exploration operations, as well as to the natural environment, what then would be the responsibility of the federal government in its trust relationship to the Indian tribes and individuals so affected in their persons and in their property? The answer to that question of trust responsibility parameters was raised in the case of leases of rights to strip mine coal on the Northern Cheyenne Indian Reservation and was avoided by congressional action that provided for cancellation of the disputed leases and compensation for the lessees.

Trust Responsibility for Mineral Leases

In his opening remarks on March 28, 1980, before the Select Committee on Indian Affairs, the chairman, Senator John Mel-

159. *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974).

160. *Manygoats v. Kleppe*, 558 F.2d 556, 557 (10th Cir. 1977).

161. *Tewa Tesuque*, 498 F.2d at 242; *Manygoats*, 558 F.2d at 558.

162. *Manygoats*, 558 F.2d at 559.

cher, then hearing testimony on S. 2126 relative to leases involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation stated:

We can talk about what was legal and what was done in those particular years, but I just do not believe that that type of royalty is adequate at all, and I think there really is a very valid point—in my judgment at least there is a valid point—on whether the trust responsibility of the Secretary was properly carried out regarding that point.¹⁶³

When the Northern Cheyenne Tribe became aware of the inadequacy of the leases as to both royalties and environmental protections, including violations of 25 C.F.R. § 177—the regulations mentioned in *Manygoats* that govern mining on Indian reservation lands, they petitioned Rogers Morton, then Secretary of the Interior, in March 1973 to “withdraw his approval of all existing permits and leases.”¹⁶⁴ The Secretary issued a written statement on June 4, 1974, which essentially declared a moratorium on lease development until environmental impact statements were prepared by the Department of the Interior. These were deemed necessary by the Secretary because approval of the mining plans was considered “a significant Federal action which would substantially affect the environment.”¹⁶⁵ He made the following statement of policy: “As trustee, I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subordinate these interests to anyone’s desires to develop the natural resources on that reservation.”¹⁶⁶

It is of note that this statement of Secretary Morton could require a very narrow interpretation if the Court’s recent *United States v. Mitchell* decision is to be harmonized with it.¹⁶⁷

Trust Responsibility for Forest Management on Allotted Lands

The Supreme Court in its *Mitchell* opinion found the United States government immune from suit for mismanagement of timber on allotted land.¹⁶⁸ The Court referred back to the

163. *Coal Leases Hearing*, *supra* note 73, at 1.

164. *Id.* at 41.

165. *Id.* at 44-45.

166. *Id.* at 37.

167. *United States v. Mitchell*, 445 U.S. 535 (1980).

168. *Id.* at 546.

General Allotment Act and found it to have created only a limited trust relationship.¹⁶⁹ It distinguished between the control of the use of the land with accompanying liability for money damages for breaches of fiduciary duty and the agreed-upon fiduciary duty of the United States to prevent alienation of the land and to ensure that the allottee would be immune from state taxation. The Court held that the General Allotment Act "cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands."¹⁷⁰

Justice Marshall, speaking for the Court, suggested that there is a distinction between what the obligations of the United States are in relation to allotted lands versus tribally owned lands with respect to forest management responsibilities.¹⁷¹ Such a distinction as to federal government trust responsibility does not seem to be made, though, when it comes to Indian reservation water rights.

The landmark case, *Arizona v. California*,¹⁷² does not distinguish between the allotted and unallotted reservation land when the United States acts in its fiduciary capacity on behalf of Indian reservation water rights to the Colorado River. The reservations are referred to as a unified concept throughout the case, and the Master's conclusion as to the measurement method for qualification of reserved waters supports such a unified concept: "He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."¹⁷³ The United States, in this case, is apparently representing Indian reservations' water rights as a whole in its fiduciary capacity; this approach is used as well in the decision of the Court with respect to federal fiduciary responsibility in Indian water rights that was asserted in *Colorado River Water Conservation District v. United States*.¹⁷⁴

The minority opinion in *Mitchell* considered that the majority had taken "too narrow a view of the fiduciary duty established by the Act. . . ."¹⁷⁵ Justice White pointed out quite reasonably that:

169. *Id.* at 543; Indian General Allotment Act, 24 Stat. 388, 25 U.S.C. § 331-358.

170. *United States v. Mitchell*, 445 U.S. 535, 546 (1980).

171. *Id.* at 546.

172. 373 U.S. 546, 574 (1963).

173. *Id.* at 578.

174. 424 U.S. 800 (1976).

175. *Mitchell*, 445 U.S. at 549.

The timber lands of the Quinault Reservation cannot, as a practical matter, be managed by the Indian allottees. In such a case where management functions must necessarily be performed by the Government, it seems most consistent with the scheme of the Act that the United States was to assume fiduciary obligations in the performance of its management functions.¹⁷⁶

Such a unified approach to trust responsibilities in relation to forest management on Indian reservations may, in fact, be found in the claims of *Mitchell* respondents that were not considered by the Court because they had not been raised in the Court of Claims.¹⁷⁷ The majority merely found that such trust responsibilities could not be found to arise out of the General Allotment Act.¹⁷⁸ The *Mitchell* Court also refers to specific legislation and precedent relative to timber sale and management on Indian lands upon which the determination of liability for timber management responsibilities may rest.¹⁷⁹

Given the reasoning of Justice Brennan's majority opinion in *Northern Cheyenne Tribe v. Hollowbreast*,¹⁸⁰ it would seem likely that the Court would find that the government has a fiduciary liability to Indian tribes with respect to the development and management at least of mineral resources on all reservation lands despite the *Mitchell* ruling. *Northern Cheyenne* established that allottees did not possess vested rights in the mineral deposits of their allotted lands, but that the Northern Cheyenne Allotment Act,¹⁸¹ pursuant to the federal policy expressed in the General Allotment Act of 1887,¹⁸² did provide that such rights be reserved for the tribe. This reservation of whatever minerals are found to exist is made according to section 3 of the Northern Cheyenne Act, upon which the question for decision in *Northern Cheyenne* turns.¹⁸³ Section 3 stipulates that such minerals¹⁸⁴ "are hereby reserved for the benefit of the tribe and may be leased under such rules and regulations as the Secretary of the Interior may

176. *Id.*

177. *Id.* at 547.

178. *Id.* at 546.

179. *Id.* at 545.

180. 425 U.S. 649 (1976).

181. Act of June 3, 1926, 44 Stat. 690.

182. 24 Stat. 388.

183. *Northern Cheyenne v. Hollowbreast*, 425 U.S. 649, 651 (1976).

184. Timber, coal or other minerals, including oil, gas, and other natural deposits are mentioned in the 1926 Act.

prescribe.”¹⁸⁵ The same article further provided that “the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.”¹⁸⁶ Thus, mineral rights are severed from the rights to the use of the surface estate for purposes of agriculture and grazing, granted to individuals under the allotment acts, and their leasing and administration is said to be made contingent upon the administration of the federal government for the benefit of the tribe.

Conclusions

The trust responsibilities of the federal government were not at issue in *Northern Cheyenne*. However, it can be reasoned that the federal government must have trust responsibility with respect to administration of mineral rights on Northern Cheyenne Indian lands if such rights on both allotted and unallotted lands are reserved for the benefit of the tribe under the aegis of the Secretary of the Interior or Congress, according to the Northern Cheyenne Allotment Act. *Northern Cheyenne* can be readily distinguished from *Mitchell* in that the determination of the Court rested on different allotment statutes. *Mitchell* merely eliminates the General Allotment Act of 1887 as a basis for federal liability as to timber management on the Quinault Reservation. The Court specifically limits its opinion to the issues actually litigated in the lower court and at no time refers to its *Northern Cheyenne* ruling or its reference therein to the statute specific to the creation of the Northern Cheyenne Reservation.

It would thus seem reasonable to expect that *Mitchell* would not eliminate the possibility of suit against the federal government for violation of its trust responsibilities to a specific Indian tribe were there at least to be found wording in the statutes, treaties, or executive orders relative to the creation of a specific tribal reservation similar to that of the Northern Cheyenne Allotment Act. The *Mitchell* reading of the General Allotment Act determines that “the allottee, and not the United States, was to manage the land.”¹⁸⁷ It would seem to be clearly established that the Secretary of the Interior is acting in fiduciary capacity relative to Indians when approving leases on Indian lands for exploration

185. 44 Stat. 691.

186. *Id.*

187. *Mitchell*, 445 U.S. at 543.

and development of mineral rights.¹⁸⁸ Section 396a, 25 U.S.C. requires that the Secretary approve leases for mining on unallotted lands within an Indian reservation,¹⁸⁹ while section 415, 25 U.S.C. imposes a similar requirement on leases for the development of natural resources.¹⁹⁰

The majority in *Mitchell* did not reach the question as to whether the United States had waived its sovereign immunity relative to its fiduciary duties under the General Allotment Act. The minority opinion, however, concluded that the government has indeed consented to liability.¹⁹¹ According to Justice White, such liability "follows naturally from the existence of a trust and of fiduciary duties."¹⁹² He listed four factors on which this conclusion was based:

1. It is hornbook law that the trustee is accountable in damages for breaches of trust. See Restatement sections 205-212; Bogert section 862; Scott section 205.
2. Moreover, it would interfere with, if not defeat the purpose of the Act, if the allottees were to be remitted to a suit for prospective, equitable relief in the protection of their rights.
3. Absent a retrospective damage remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust.
4. Finally, it is noteworthy that the Department of the Interior, which as the agency charged with administering the Act is entitled to considerable deference in its interpretation of the statute [citations omitted], apparently disagrees with the position taken by the Solicitor General in this litigation and believes that a money damages remedy should be permitted.¹⁹³

It follows from the preceding that, in view of its trust relationship to Indian tribes and its self-interest in the development of energy resources, the United States may be found to be in a

188. See *Cady v. Morton*, 527 F.2d 786, 791 (9th Cir. 1975); *Manygoats*, 558 F.2d at 538.

189. *Manygoats*, 558 F.2d at 557.

190. *Id.*

191. *Mitchell*, 445 U.S. at 550. The court is divided 5-3 with Chief Justice Burger not participating.

192. *Id.*

193. *Id.*

conflict-of-interest situation with regard to the administration of its trust duties in matters that concern energy development and related issues on Indian lands. Such a conflict of interest, when found, may result in a determination that Indian interests require separate counsel when litigated, and the federal government may be found to be financially liable for damages that are found to result from its failure to meet fiduciary obligations.

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