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Survey of Indian Issues in the State of New Mexico Relating to Uranium Mining and Milling

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SURVEY OF INDIAN ISSUES IN THE STATE OF NEW MEXICO
RELATING TO URANIUM MINING AND MILLING

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ABSTRACT

Estimates of Indian uranium resources range from 11 to 50% of the U. S. total resources. About 17% of New Mexico's reserves are known to be on Indian lands. New Mexico has produced almost half of the nation's uranium supply; over half of the known reserves are located within the state. However, the state has virtually no jurisdiction over development of Indian uranium. As a result, economic and environmental impacts on the state are beyond its control. The lack of state and federal control over these impacts is influencing how the Indians allow development to proceed. The impacts of Indian uranium development also influence state control of non-Indian reserves. To the extent that these controls affect the availability of uranium concentrate, DOE needs to understand the issues involved. This issue paper identifies some of the related problems for both the Indians and the state and explores the reasons behind them.

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EXECUTIVE SUMMARY

Increased production of the United States' energy resources is creating many political issues. One of these is the effect of the development of Indian energy resources on tribal movements toward greater political and economic self-determination. Tribal efforts to gain full control of the development of the resources in their possession and of the benefits derived from development activities are resulting in conflicts with the state and the industry which may delay the production of uranium in New Mexico.

The relationship between the U. S. Government and Indian tribes has evolved through a number of stages. The Federal Government is currently the trustee to the Indian tribes. This arrangement removes the external powers of a tribal government. However, tribal governments still retain the powers of internal self-government. Current tribal efforts are toward fully exercising this power. Tribal governments possess legal powers similar to those of state and local governments and are the fourth government element in the United States federal system. In testing these powers, some tribes have gone to court to renegotiate terms and benefits of mineral lease sales, as well as to assert their authority to levy taxes.

States do not have legal prerogatives to intervene in Indian activities or Indian-federal interactions. Litigation concerning state jurisdiction over Indian lands has provided a clear body of case law denying independent authority to

the states. Nonetheless, states can be affected by activities on Indian land.

Current and projected increases in New Mexico uranium development present this potential. New Mexico historically produced 46% of the nation's uranium and currently possesses 52% of its \$50/lb reserves. Indian uranium is a prime development target in the state. Assertion of tribal control over development activity could affect New Mexico's economy and environment, as well as the traditional role of uranium production in the state. Indian uranium is important to New Mexico for three reasons:

- Indian uranium comprises almost one-third of the state's production and at least one-sixth of the reserves.
- As much as 30% of New Mexico's uranium revenue is derived from Indian uranium.
- Indian lands and the impacts of uranium production on them are not under state jurisdiction.

The Navajo Tribe is taking the lead in asserting Indian sovereignty. The tribe has enacted a possessory interest tax on leases and a business activity tax. Both taxes are intended to regulate energy development and increase tribal revenue. (A recently adopted sulfur emissions regulation shows the intent of the tribe to protect its environment; the associated penalty fee will also provide additional revenue.) Although New Mexico tribes have not challenged the state's energy-mineral severance taxes, the Crow Tribe's challenge to the Montana tax is being watched with interest.

Tribal lands in New Mexico which are leased for uranium activities exceed 700,000 acres. Some Navajos have joined with an environmental group in an attempt to have the courts force a halt to further uranium development in New Mexico and in Wyoming. The suit demands that national, regional and local environmental impact statements be written for all uranium development. If the Indians win, cessation of new uranium development activity would deal a severe economic blow to northwestern New Mexico.

The state has virtually no authority to control the impacts resulting from uranium development on Indian lands. However, because of the pattern of land ownership in the region, these activities also impact non-Indians. Similarly, none of the uranium mills is situated on Indian land, but most are adjacent to or surrounded by Indian land. This situation has made it difficult for either the state or the tribal government to control or mitigate the impacts of uranium mining and milling.

This issue paper presents an overview of uranium production issues in New Mexico. It is very important for the U.S. Department of Energy to understand the problems associated with Indian uranium development. However, a comprehensive review and analysis of current litigation related to Indian self-government is beyond the scope of this paper. Such an analysis is nonetheless necessary for a complete grasp of the issues. The cases considered should include those related to Indian sovereignty, resource use and control, taxation powers,

and authority to regulate the environment. In addition, the DOE should maintain continued awareness of Indian initiatives in these areas.

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I. INTRODUCTION

American Indians have observed and participated in the development of uranium in the United States from the industry's beginning. Some of the first mines were located on the Navajo Reservation in the Shiprock area of northwestern New Mexico and in the adjacent area of Arizona. Kerr-McGee opened a uranium mill in Shiprock in 1954, and leased most of the Navajo mines through the Bureau of Indian Affairs. Those mines and the mill operated until 1968, when they were abandoned. The tailings pile is located on Navajo tribal lands. Anaconda discovered the Laguna Pueblo deposits, and developed the open-pit Jackpile Mine, the nation's largest producing mine. Potential uranium reserves are reported on the reservations of the Jemez, Acoma, Nambe, Pojoaque, Zuni, San Felipe, Santo Domingo, and Zia Indians in New Mexico, and the Hopi in Arizona. Exxon has leased acreage on the Wind River Reservation in Wyoming, and development is underway on the Spokane and Colville reservations in Washington. ERDA estimated in 1974 that Indian uranium provided 9% of the world's supply.¹ The Department of Energy estimates that 11% of all U. S. \$30/lb uranium reserves are on Indian lands. About three-fourths of this Indian uranium is in New Mexico. As a result of these facts, New Mexico's Indians are beginning to recognize the importance of their resources both to themselves and to the nation.

Recent Indian assertiveness is motivated in part by the desire for sovereignty, but also by desires to protect the

environment, control the use of resources, improve reservation communities, increase Indian employment, and increase tribal revenues. Furthermore, the tribes are endeavoring to preserve their unique cultural values. Indian tribes are employing several institutional tools to achieve their goals: rejecting some industrial sites, imposing taxes, renegotiating mineral leases, withholding right-of-way permits, and obtaining Class I air quality designations. The Navajo, Crow, and Northern Cheyenne have gone to court for higher royalties in their coal leases. The Council of Energy Resource Tribes (CERT) was created to help the tribes obtain more favorable new mineral leases, to help renegotiate poor leases, and to determine what resources the tribes own. The Navajo are also now using right-of-way permits as leverage to renegotiate coal leases.

Potentially overlapping levels of governmental regulation of land, air and water on tribal lands make industry hesitant to locate facilities there. This paper discusses some of the major sources of conflict in New Mexico.

II. DEVELOPMENT OF INDIAN ENERGY RESOURCES - THE ISSUE AREA

The growth of issues related to Indian energy resource development has arisen out of national energy needs and a concurrent tribal movement toward political and economic self-determination. The primary parties acting in this policy arena are the federal government and the several tribes holding major energy resources. However, states with resource-rich Indian land within their boundaries will be affected by the actions taken by these parties.

BACKGROUND

The root of the issues surrounding Indian energy resource development is the unique status of Indians and their lands. The relationship between Indian tribes and the United States Government has evolved through several different stages. Currently, the federal government has a legal trust responsibility for the Indians. This trust responsibility is affirmed in a series of court decisions and Congressional acts. The most notable of these are the Indian Reorganization Act of 1934, 25 U.S.C., 461-79; Cherokee Nation v. Georgia, 10 U.S. (5 Pet.) 1 (1831); and Seminole Nation v. The United States, 316 U. S. 286 (1942). As a result, Indian lands and the mineral resources existing on them are held in trust by the federal government for the Indians. This trustee role is administered through the Bureau of Indian Affairs under the direction of the Secretary of the Interior.

"Many of the problems and issues likely to arise when Indian-owned resources are developed will result primarily from the former status of Indian tribes as sovereign nations. When these tribes were incorporated into the U. S., their external powers were terminated and they were made subject to the legislative power of the U. S. However, except as modified by treaty or the express provisions of federal government, the tribes still possess the powers of local self-government."²

Among the Indian tribes, dissatisfaction has been growing over the exercise of this federal trust responsibility. Increasing political sophistication and the desire for greater economic self-determination is causing tribes to react against the federal trustee role which they feel has grown to include management of most Indian activities. From the tribal standpoint, this expansion infringes upon their rights of local self-government. Tribes are now seeking to gain control of the many decision-making powers currently exercised by the federal government through the Bureau of Indian Affairs, its Commissioner and the Secretary of the Interior. The issue of tribal sovereignty is the subject of a continuing debate between the tribes, Indian interest groups and the Federal Government.

The handling of mineral leasing on Indian lands by the Department of Interior is a primary point of contention in the self-determination drive. The Omnibus Mineral Leasing Act of 1934 (52 Stat. 347, 25 U.S.C.A ss 396a, et seq. 1963) "authorizes the leasing of unallotted or tribal and ceded lands for mining purposes. Under this Act, the tribal council or other authorized spokesman for the tribe may, with the approval of the Secretary of the Interior, enter into a lease not to exceed 10 years and so long thereafter as minerals are produced in

paying quantities.'"² The Indian Department Appropriations Act of 1909 (35 Stat. 785, 25 U.S.C.A., 396 (1963)), and its implementing regulations in Title 25, Code of Federal Regulations, Part 171, authorizes the mineral leasing of allotted lands under similar procedures and regulations.³

The prevalent Indian viewpoint now is that tribal approval of past leases was given without clear understanding of the types of agreements into which the tribes were entering. "Leased and lost" is a phrase reflecting Indian sentiment over tribal benefits from past mineral leasing. Although the Bureau of Indian Affairs has been required to have tribal approval before a lease sale could be authorized by the Secretary of the Interior, in the past tribes did not undertake an independent examination of lease terms. They relied upon BIA evaluations instead. This lack of independent examination, poor knowledge of tribal mineral reserves, and lack of tribal understanding of the economics of mineral development has been recognized as the problem with leases negotiated in the past. This void is now being filled as mineral-rich tribes are recruiting their own expertise and pressuring the federal government to inventory tribal mineral holdings pursuant to its trustee role.

Some tribes are resorting to legal proceedings to renegotiate lease terms to increase their profitability. Cases in point are the successful Navajo fight to renegotiate an Arizona coal lease with El Paso Natural Gas and Consolidation Coal, Northern Cheyenne actions to renegotiate two coal

leases on their land in Southern Montana, and a class action suit brought by the Jicarilla Apaches against the Secretary of the Interior and a number of lessees in attempt to cancel 100 mineral leases on their land.

Other arrangements besides leasing are being explored by the tribes. The Navajo-Exxon contract is an example of a new type of arrangement. The Navajo-Exxon agreement is a joint venture in uranium exploration and development on Navajo tribal land in northwest New Mexico. This arrangement has been controversial because it was negotiated without prior approval of the Secretary of the Interior. In 1972, the Navajos dealt directly with Exxon, after having utilized a competitive bidding process in which Exxon offered the most favorable terms. Although the Navajo method deviated from prescribed procedure, it was subsequently approved by the Secretary making it valid and binding.

This independent action reflects Navajo determination to control and fully benefit from the development of their uranium resources. The Navajo tribe has also been active in assisting other tribes to benefit from energy resource production; the Navajo Tribal Chairman is the current chairman of CERT. As the largest and most politically experienced tribe, the Navajos are blazing trails which can be expected to set precedents for other energy resource tribes. The Indian tribes are now aware that careful management of non-renewable energy resources can provide a long-term economic benefit. They are beginning to develop that management capability.

NEW MEXICO AND INDIAN URANIUM

In response to projected national energy needs, New Mexico is experiencing a resurgence of demand for its uranium reserves. New Mexico is the leading uranium producing state and has the largest reserves. Until recently, the fact that much of these reserves were located on Indian lands did not attract special attention. However, current lease sales and exploration activities indicate that much future development activity will take place on Indian land.

Formerly, the location of uranium development on Indian land had not presented the state with difficulties. The state's position has been one of an interested, although essentially passive, party. Uranium has offered New Mexico an industry providing employment and revenue at a time when incentives for other types of industrial development have been limited. Now, the political environment surrounding Indian uranium development is becoming more volatile. New Mexico is facing uncertainties about how it may be affected by this issue in the future.

New Mexico's 104,000 Indians on 25 reservations comprise 7% of the state's population (see Table I). Indian history and culture are an integral part of New Mexico's heritage. The Indian drive for tribal sovereignty and economic self-determination is an important issue within the state. Tribal interest groups include Americans for Indian Opportunity (AIO), National Indian Youth Council (NIYC), All Indian Pueblo Council, and New Mexicans for Tribal Development. Newspaper articles appear weekly in the Albuquerque Journal, Albuquerque Tribune,

and Navajo Times pertaining to the changing attitudes of New Mexico's Indian tribes toward energy resource development on their land.

Indian uranium development in New Mexico already includes two major projects. The Navajo-Exxon joint venture covers 400,000 acres (625 square miles) of the Navajo Reservation in San Juan County in the northwest quadrant of the state. Also, the largest open-pit uranium mine in the world is located on Laguna Pueblo land. These are the two largest current endeavors. Other present and future Indian uranium activities are discussed in Part IV.

The importance of Indian uranium to New Mexico lies in two factors: (a) Indian uranium comprises a large portion of the total reserves within New Mexico and (b) Indian lands and activities upon them fall under federal, not state, jurisdiction. The overall result of the combination of these two factors is that while New Mexico and the Indian tribes are separate legal entities in the federal system, Indian and state boundaries overlap and the activities of each group affect the other.

TABLE I

Indians in New Mexico⁴

NAME	POPULATION	LAND AREA IN THOUSAND ACRES	URANIUM (U) & COAL (C) ACTIVITY	
			Present Development	Potential Development
Acoma Pueblo	2,700	246		U, C
Cochiti Pueblo	1,000	29		U
Isleta Pueblo	2,600	211		
Jemez Pueblo	2,100	89		U
Laguna Pueblo	5,100	417	U	
Sandia Pueblo	300	23		
San Felipe Pueblo	2,300	48		U
Santa Ana Pueblo	500	45		
Santa Domingo Pueblo	2,900	69		U
Zia Pueblo	600	113		U
Nambe Pueblo	300	19		
Picuris Pueblo	200	15		
Pojoaque Pueblo	100	12		
San Ilde- fonso Pueblo	400	26		

NAME	POPULATION	LAND AREA IN THOUSAND ACRES	URANIUM (U) & COAL (C) ACTIVITY	
			Present Development	Potential Development
San Juan Pueblo	1,700	12		
Santa Clara Pueblo	1,200	46		
Taos Pueblo	1,500	45		
Jicarilla Apache	2,100	742		C
Mescalero Apache	2,400	460		
Zuni Pueblo	6,300	407		C
Navajo Main Reser- vation	62,500	2,383	U, C	
Navajo Allotted	Unknown	597	U, C	
Ramah Navajo	1,600	147		U, C
Alama Navajo	1,100	63		
Canoncito Navajo	1,300	77		U
Ute Mountain	<u>1,400</u>	<u>105</u>	C	
TOTALS	104,000	6,446		

III. THE INSTITUTIONAL SETTING

The institutional and jurisdictional milieu in which Indian uranium development is taking place involves a complicated responsibility structure and considerable ambiguity. Sorting through these responsibilities to achieve a clearer understanding of what agencies play which roles poses a major challenge.

FEDERAL

It is clear that the federal government currently has primary responsibility for Indian external affairs and Indian lands. Oversight of Indian uranium development involves several federal roles. These are a) protection of Indian interests (its trustee role); b) ensuring sufficient production of U_3O_8 for nuclear power generation (national energy development mandate); c) safeguarding the nation's environment from abuse and deterioration (a responsibility created out of a substantial body of federal environmental protection law*) and d) preserving state autonomy from federal encroachment (Constitutional Law). The challenge of ensuring proper oversight is compounded by this combination of divergent, possibly conflicting roles of the U. S. Government. Table II gives a

*Including the National Environmental Policy Act (NEPA) of 1969, Environmental Quality Improvement Act (1970), Clean Air Act and Amendments (1967, 1977), Energy Supply and Environmental Coordination Act (1974), Clean Waters Act (1977), Surface Mining Control and Reclamation Act (1977), Water Resources Planning Act (1964, 1971) and the Safe Drinking Water Act (1974, 1977).

partial list of federal agencies and their subdivisions involved in uranium development activities - both Indian and non-Indian.

The Bureau of Indian Affairs within the Department of the Interior is the liaison agency between Indian tribes, other agencies, and private development companies. Although previous procedures are now being challenged by the tribes, it has been the practice that the approval and sale of all Indian mineral leases were undertaken by the Secretary of Interior. After a lease sale is completed, exploration and development, and mining plans and operations must be reviewed by the BIA and other federal agencies involved in uranium development. A single uranium development project frequently includes a number of leases, some of which may involve both Indian and non-Indian lands. One uranium mining operation could be comprised of leases on Indian, federal, state and private lands. This increases the number of authorities which are involved in the approval process.

TABLE II. Federal Agencies Overseeing Uranium Development in New Mexico⁵

U. S. Department of Interior	U. S. Equal Employment Opportunities Commission
Park Service	
Facility Engineering	U. S. Department of Justice
Geological Survey	Immigration and Naturalization Service
Fish and Wildlife Service	U. S. Occupational Safety and Health Administration
Bureau of Land Management	U. S. Mining Enforcement and Safety Administration
Bureau of Indian Affairs	U. S. Environmental Protection Agency
Bureau of Reclamation	U. S. Bureau of Mines
Indian Health Service	
Land Office	
U. S. Public Health Service	
U. S. Department of the Army	
Corps of Engineers	
U. S. Department of Agriculture	
Forest Service	
U. S. Department of Energy	
U. S. Nuclear Regulatory Commission	
U. S. Internal Revenue Service	
U. S. Department of Labor	
U. S. Securities and Exchange Commission	
U. S. Department of Transportation	

Uranium mills are the responsibility of the U. S. Nuclear Regulatory Commission, although this responsibility is delegated to the state if the state has an "agreement status" in compliance with the 1954 Atomic Energy Act. Although New Mexico is an agreement state, the question of jurisdiction on Indian lands has not arisen because at present there are no uranium mills on Indian lands. The industry has chosen to avoid the difficulties which are associated with locating processing facilities on Indian lands.

Mill tailings supervision has been the focus of recent Congressional debate. It is now recognized that abandoned tailings piles, created during the initial uranium development period when the Atomic Energy Commission was the sole buyer, represent health and environmental hazards. Adequate management of tailings has been sought by the affected states. The federal Uranium Mill Tailings Radiation Control Act, passed in late 1978, distributes the costs for tailings clean-up 90% federal/10% state. The federal government will pay 100% of the clean-up costs for abandoned tailings on Indian lands.

While federal responsibilities have been outlined here, it should not be assumed that the oversight process proceeds smoothly. The management of uranium mining companies claim to be spending a large portion of their time dealing with various government agencies. Coordination of the activities of the various agencies, bureaus and commissions would serve to reduce the administrative confusion, possible duplication of effort or gaps to which such a system is vulnerable. The

complexity of federal resource administration does not enhance the outlook for national uranium production goals. This is particularly true for Indian uranium development, an issue area inherently complicated in its political and legal aspects.⁶

TRIBAL

Tribal governments are responsible for internal Indian affairs. The federal government is the only other governmental level with authority to oversee or affect Indian activities. As the legal trustee for the Indians, the federal government has interpreted its role very broadly. However, tribes are demanding greater jurisdictional latitude without federal participation. They are strongly asserting their legal rights to self-government.

The Navajo Nation tribal government consists of several units. Those involved in different capacities with uranium development include the Navajo Environmental Protection Agency, the Office of Navajo Labor Relations, the Navajo Tribal Council, Navajo Tax Commission, Office of Minerals, Division of Resources, and Land Administration Department.

In response to tribal movements toward independent jurisdiction, the federal government is in the process of relinquishing some of its previous authority to the tribes. New regulations have been drafted and partially approved by the Department of the Interior. They introduce major changes responsive to some of the expressed desires of the Indians.

These changes eliminate the current emphasis on leasing and add provisions which allow other alternatives, such as joint ventures; assign tribes the initiative in developing their resources, with or without the Secretary's (and BIA's) assistance as the tribe desires; eliminate the requirement of Secretarial approval to enter into negotiations; and require economic, environmental, and social and cultural impact assessments prior to any agreement being approved by the Secretary. However, resource development agreements will still require the Secretary's approval under the Omnibus Mineral Leasing Act.² The effects of these changes on energy resource development and federal goals for meeting energy supply demands is uncertain.

Navajo dissatisfaction with federal practices may result in slowing new uranium development if the government loses a case now before the federal district court in the District of Columbia, Peshlakai vs. Schlesinger. A group of Navajo homeowners and ranchers, joined by the Friends of the Earth and the New Mexico Navajo Ranchers Association, charge the federal government and the uranium industry with inadequate consideration of the environmental impacts of mining. The lawsuit charges that deliberate disregard of the environmental impacts of mining has been federal policy. It seeks an injunction against all new uranium projects in the San Juan (New Mexico) and South Powder River (Wyoming) basins until national, regional, and local environmental impact statements are completed and approved. It further charges that existing

environmental impact statements are inadequate and should be redone.

The lawsuit, filed in December 1978, must be resolved quickly to avoid the loss of leases which have imminent expiration dates and minimum-production requirements for renewal. Intervenors in the government's behalf include Mobil, Conoco, Phillips Uranium, Kerr-McGee, United Nuclear, Gulf and Exxon. The federal agencies named in the suit are the Departments of Energy, Interior and Agriculture, the Environmental Protection Agency, the Nuclear Regulatory Commission and the Tennessee Valley Authority.

Power of taxation is an important aspect of economic self-government that the tribes are utilizing. The litigative process seems to be favoring the tribes in tests of this right. Two Navajo taxes are currently under challenge: a possessory interest tax and a business activity tax.

Under the proposed possessory interest tax "possessory interest is the value of a lease granted by the Navajo nation." The value does not include improvements, but, rather, the value of the lease site and the value of the underlying resources such as coal, oil, gas and uranium. The Navajo Tax Commission determines the value of the possessory interest. The value, which is somewhat analogous to assessed valuation in property taxes, is used as a tax base. The tax rate to be applied will lie between 1% and 10%. As of calendar year 1978, the tax rate proposed by the Tax Commission was 3% (to be applied to the tax base). Leases valued at less than

\$100,000 are exempt. The business activity tax levies a 5 percent rate quarterly on the gross receipts of large companies doing business on the reservation. The first \$125,000 of income or 10 percent of gross Navajo receipts (whichever is greater) is exempt.

In a case recently decided in an Arizona Federal Court, U. S. District Judge William Copple ruled that the Salt River Project and the City of Los Angeles can be taxed by the Navajo Tribe for their possessory interests in the Navajo generating station at Page, Arizona.⁷ (The decision did exempt from tax the 24.3 per cent interest held by the U. S. Government.) The decision is under appeal.

Industry is clearly opposed to these taxes, which were devised primarily to provide revenue from large energy projects. In a recent public hearing of the Navajo Tax Commission, industry representatives testified, claiming heavy taxes could drive away current business, discourage future business investment, and aggravate present economic problems. Industries represented at the meeting included: General Dynamics, Arizona Public Service Company, Exxon, Mobil Oil, Gulf Oil, Standard Oil of Indiana, Chevron, Union Oil of California, Phillips Petroleum, Shell Oil and Getty Oil.⁸

The Four Corners Power Plant is located on the New Mexico portion of the Navajo reservation. Ownership of this plant is divided between the Public Service Company of New Mexico, the Arizona Public Service Company, and four other utilities. This group has filed suit in Albuquerque to prevent

the possessory tax levy on the Four Corners plant. As of May 17, 1979, a total of sixteen companies had challenged the Navajo possessory interest and business activity taxes in six suits filed by utility companies in New Mexico and Arizona, a major uranium company in New Mexico, and oil and gas companies in Utah.⁹

Along with business taxes, severance taxes are attracting the interest of tribal governments. The Crow Tribe in Montana is currently seeking to preempt state severance taxes on coal development on their reservation with the tribe's own 25 percent severance tax. The tribe claims that the state tax "violates Congress' 'exclusive authority over the regulation of commerce with Indian tribes'".¹⁰ The U. S. District Court ruled that Montana may impose its 30% severance tax on Indian coal produced by non-Indian companies. The Court said an Act of Congress would be required to allow non-Indian companies to share the tribe's immunity from state law. The tribe will appeal the ruling.

The exercising of tribal taxation powers can directly affect the industries and states involved and indirectly affect the nation's energy and economic situation. From the industry standpoint, the establishment of, or increases in, tribal taxes may make their operations on Indian lands economically unattractive. Industry argues that double taxation from the tribes and the state represents too great a financial drain to warrant continuing their activities. This view was expressed at a recent public hearing of the Navajo Tax Commission.

These battles are now being fought in court. However, if Indian tribal taxation powers continue to be supported by court decisions, industry investment could be discouraged.

On the other hand, tribal governments appear to be firm in asserting their taxation powers. The Navajos anticipate a \$26 million annual revenue from their two new taxes. Currently, Navajo revenues from energy development do not equal those received by the states from production or severance taxes on projects located on Navajo lands. The tribes feel that an independent financial base is the key component of self-government. Industry arguments against tribal taxation structures are not finding a sympathetic audience among tribal authorities.

Another area in which the Navajo tribe is assuming jurisdiction is the control of sulfur emissions from power plants. The two largest coal-fired power plants in the nation are located on the Navajo Reservation, at Page, Arizona (Navajo Station, 2310 MWe), and at Farmington, New Mexico (Four Corners Station, 2162 MWe). A sulfur emissions tax was enacted by the tribe, with the intent of requiring 99% sulfur removal from emissions. The tax is seen as "an economic incentive for the companies to install pollution control equipment."¹¹ The Navajo plant currently has no sulfur emission control equipment and the Four Corners plant essentially has none.¹² This tax has been challenged in federal court. The challenge was dismissed in Arizona because the Secretary of the Interior had not approved the tax. A similar challenge is pending in

the New Mexico Federal Court. In order to get Interior Department approval the tribe will have to revise the sulfur emission penalty fee and allow the companies sufficient time to install pollution controls.¹¹ The fee in question escalates from \$0.15 per pound of sulfur discharged in 1978 to \$0.75 per pound in 1982, with the first 250,000 pounds discharged per quarter exempted. This action demonstrates the Tribe's determination to protect its environment through its own environmental regulations.

The Navajo Land Administration Department (LAD) and the Navajo Environmental Protection Agency can withhold approval of proposed rights-of-way and industrial sites if they find the development proposals dangerous or environmentally unsound. Rights-of-way disputes associated with haul roads and power transmission lines can significantly impede mine and mill development. In addition to the LAD approval, rights-of-way on Navajo trust land must also be approved by the affected people, the area BIA office, the Office of Labor, and the Tribal Chairman. On Navajo fee lands, the affected people, the tribal Legal Department, the Resources Advisory Committee of the Tribal Council, as well as the Chairman must approve. These multiple approvals make right-of-way negotiations with the Navajos a lengthy process.

In January, 1979, the LAD froze the issuance of all right-of-way permits, both new and renewal. All existing permits will be reviewed. The term of each permit may be shortened to five years with no automatic renewal. The tribe is using

right-of-way permits as leverage in forcing renegotiation of royalty rates in existing mineral leases. The tribe is also considering increasing permit fees, requiring stringent enforcement of Navajo hiring preference, a. requiring environmental protection as conditions for renewal of permits.

The uncertainties involved make industry hesitant to locate on Indian land. The current litigation in the federal court in New Mexico between the utilities and the Navajo Tribe will determine whether companies can be legally subject to tribal reservation air quality standards and penalties. It will also determine whether the tribe can enforce the possessory interest tax in the state, as well as whether resource extraction companies which pay the tax can pass the cost on to the utilities. The District Court in Arizona has held that the tribe does have authority to levy the possessory interest tax. Although the ruling has been appealed, the tax, along with the business activity tax, will be collected in 1979.

Other tribes are watching the Navajo's taxation efforts. The Northern Cheyenne and the Crow in Montana are planning taxation programs.

STATE

The federal system in the United States was originally conceived to be comprised of national, state and local levels. The subsequent authorization by Congress of tribal sovereignty introduced an additional element to the federal

system that produced overlapping geographical and jurisdictional boundaries between tribes and states. While this was a positive policy direction for the authority relationship between the national government and Indian tribes, it left the affected states in a potentially problematic situation. The federal-Indian relationship has evolved through a series of stages. Its final disposition does not yet appear to be at hand. From the state perspective, the vulnerability of their position in view of the changing political and energy situations may result in a defensive posture. State responses to future events involved in Indian energy resource development, primarily in the West, will merit monitoring.

States have little or no jurisdiction over Indians and Indian land. The federal government is the only governmental entity with jurisdiction aside from the tribes themselves. There have been a number of court cases dealing with the issue of state jurisdiction versus the sovereignty of Indians and Indian land within their boundaries.¹³ In these cases, the states have been unable to assert jurisdiction to any significant degree. In William v. Lee, 358 U.S. 217 (1959), the Supreme Court concluded that reservations are unique legal entities over which state governments have no powers not expressly given them by Congress.² Therefore, although Indian lands may exist within state borders, a state has no independent legal jurisdiction over those lands or the activities taking place on them.

This solid legal basis for exclusion of Indians and their land from state jurisdiction clearly leaves the tribes and Federal Government in control. But exclusion from legal involvement does not necessarily mean exclusion from other types of involvement for those states containing Indian land.

New Mexico has almost no formal participation in uranium development on Indian lands. However, through its status as an "agreement state," New Mexico does possess the authority to monitor uranium milling activities in lieu of the Nuclear Regulatory Commission. The Environmental Improvement Division is the responsible state agency. Currently, there are no uranium mills on Indian land, but should any be constructed in the future, it is not clear that the state has the authority to oversee them.

A major area of concern surrounding uranium development activities in New Mexico is safeguarding the environment from damage. The physical environment and its natural resources do not respect politically-determined land divisions. Therefore, impacts upon terrain, vegetation, animal life, air and water originating from development activities on Indian land have the potential to affect the state's ecosystems.

Known environmental impacts from uranium mining and milling in New Mexico include:

A. Water quality

1. Surface water contamination
2. Ground water contamination

B. Water quantity

1. Reduction of water supply

- a. from mine dewatering
- b. from increased consumption

2. Changes in the allocation of water rights

B. Air quality

C. Radioactive emissions

D. Land use

1. Alteration of landscape

2. Land withdrawal for mill tailings and mine spoils

E. Community impacts

Since New Mexico does not have independent, environmental jurisdiction on federal or Indian lands, it is reliant on the administration of federal and tribal laws and regulations to mitigate these impacts. Therefore, the manner in which these parties administer their environmental authority is of importance to the state.

IV. SOURCES OF PROBLEMS IN NEW MEXICO

At present, the State of New Mexico's position is that of interested observer of interactions between Indian tribes and the federal government. As the situation continues to evolve between these principal parties, New Mexico's policies can be expected to evolve as well.

INDUSTRY ACTIVITY ON INDIAN LAND

Resources occur on Indian lands throughout the uranium-rich northwest quadrant of New Mexico. Indian lands include: 1) tribal or unallotted land, 2) allotted land and 3) ceded land.¹⁴

Tribal (unallotted) land is that which is held by the U. S. Government in trust for the entire tribe and subject to federal restrictions against alienation or encumbrance. This is the tribal reservation. Allotted land was created as a result of the General Allotment Act of 1887. This policy allotted land to individual Indians, although it was still held in trust by the U. S. Government for the benefit of that individual, subject to the same federal restrictions as tribal land. The allotment plan was not as successful as had been anticipated, which gave rise to the third category of ceded lands. Land reserved for Indian allotment but not utilized by individual Indians was then opened for settlement by non-Indians. The tribes, however, did retain mineral rights to these lands. An additional category of Indian land involves

federally-owned mineral rights underlying Indian surface ownership. The BIA holds that surface owner (Indian) consent is required before federal leases may be sold. The Interior Department's solicitors office is expected to rule on this question soon. All four Indian land categories are open to mineral leasing through the Secretary of the Interior.³ Uranium occurs on all these categories of Indian land in New Mexico.

The anticipated growth of the uranium industry in New Mexico in the next ten years would have great impact on Indian land. Estimates vary as to how much of the United States' uranium reserves are on Indian land. A report issued by the Americans for Indian Opportunity states that it is impossible to say with certainty how much of the nation's energy resources are owned by Indian nations because there are no comprehensive inventories available to the tribes.¹⁵ The report goes on to state that actual production of uranium on Indian lands was 25% of total U. S. production in 1976 (p. 4). There are conflicting estimates of uranium resources on Indian lands. The Executive Director of CERT, the Council of Energy Resources Tribes, claims that Indians own half of U. S. uranium resources.¹⁶ The Grand Junction Office of DOE estimates uranium reserves on Indian lands as shown in Table IIIa.

Uranium industry statistics produced by the Grand Junction Office show that New Mexico has been and will remain the nation's primary producer of yellowcake. The state has supplied 46% of all yellowcake produced in this country and has reserves* that

*53% of \$30/lb reserves and 52% of \$50/lb reserves.¹⁷

indicate it will produce over half of the future supply. As can be seen in Table IIIb, a significant portion of these reserves is located on Indian lands.

TABLE IIIa. Uranium Reserves on Indian Land¹⁷
(as % of U. S. Total)

	<u>Known</u>	<u>Probable</u>	<u>Possible</u>	<u>Speculative</u>
\$30 per lb U ₃ O ₈ forward cost	11%	8.8%	25.5%	7.7%

TABLE IIIb. Known Uranium Reserves on Indian Land¹⁸
in New Mexico

	<u>% of N.M. Total</u>	<u>N.M.% of U.S. Total</u>
\$30 forward cost	15	8
\$50 forward cost	17	9

Despite uncertainty as to exactly how much uranium exists on Indian land, present and future industry activity is very likely to be extensive. In 1976 the Department of the Interior reported that 284,600 acres of Indian tribal and allotted lands were leased for exploration and development of uranium in Northwest New Mexico. Of these 14,300 acres were Laguna Pueblo land and the rest Navajo.¹⁹ Added to this are 400,000 acres for the recently approved Navajo-Exxon exploration project. In addition, the DOI Report states that there are 62,000 acres under consideration for potential lease sales on the Canonicito Navajo reservation and 78,000 acres on Jemez and

Zia Pueblo lands in which the companies are now expressing interest.

Table IV lists the present and planned developments of the uranium industry on Indian land in northwestern New Mexico. It shows that Indian lands are involved in 17 existing and planned facilities (out of 45 for which information could be obtained). However, if one included all those facilities which are adjacent to or require access over or water rights from Indian land, Table IV would be much longer. This is because much of the adjacent land to the south and east of the Navajo Reservation has a "checkerboard" land ownership pattern. If one examines a land status map of the area, it resembles a large checkerboard with various one-mile squares assigned as follows:

1. Navajo allotted lands, i.e., lands owned by individual Navajos as opposed to lands held by the tribe in common,
2. Federal lands
 - a. Public lands under the jurisdiction of the Bureau of Land Management,
 - b. National forests, Department of Agriculture,
 - c. Military Reservation and Atomic Energy Commission Withdrawal,
 - d. National Parks and National Monuments, Department of Interior,
3. Lands held by the State of New Mexico,
4. Lands held by private individuals.

Most uranium industry activity is in this checkerboard area and may indirectly affect Indian land even if it is not located on it. The Churchrock Mill operated by United Nuclear Corporation, for example, is on private land. But,

being within the checkerboard area, it is closely surrounded by Indian land.

The New Mexico Environmental Improvement Board has adopted new regulations for uranium mills. Included is a requirement that each tailings pile be surrounded by a one-half mile buffer zone. The industry argued against the regulation, citing the checkerboard land ownership pattern. The companies will now be required to negotiate with the Indian tribe affected to ensure that the requirement will be met on any Indian land adjacent to the tailings pile. The Navajos have recently required a coal company to pay for surface use of land leased for mining. At that time the tribal representative stated that all companies negotiating for surface rights will be charged a price based on the potential value of the use to which the land is put. Thus it is conceivable that the price a uranium company has to pay for a buffer zone could be based on the value of the yellowcake produced by the mill.

Almost all of the new uranium projects planned in the state are in remote areas where the few communities are small and isolated. These communities cannot accommodate the rapid growth that would be required to meet the schedules of all of these energy projects. Although the state established a Community Assistance Council in 1976 to make grants to impacted communities, the State Constitution prohibits aid to Indian communities under federal jurisdiction. Problems of financing and developing community facilities and housing on Indian lands will impede the achievement of Indian employment goals which the tribes

have made a condition for maintaining leases. These problems have no satisfactory solutions at present. There are no existing mechanisms to solve them in the near future.

The Debate within the Navajo Tribe over preservation of cultural values versus economic development could affect new energy projects, both on and near Indian lands. These concerns are being raised about the proposed New Mexico Generating Station at Bisti, the tribe's own proposed generating project west of Crownpoint, as well as coal and uranium mining on and near the reservation. Approval by the Tribal Council is needed for these projects, but may not be given until these issues are resolved.

TABLE IV. Uranium Industry Activity on Indian Land²⁰

<u>Company</u>	<u>Facility</u>	<u>Location</u>	<u>No. Employees</u>	<u>Status</u>
Anaconda	Jackpile-Paguate open pit mine	Laguna Pueblo near village of Paguate	422	Operational
	North Jackpile open pit mine	Laguna Pueblo		Under development Overburden being stripped
	P-10 mine underground	Laguna Pueblo	182	Operational
	PW 2/3	Laguna Pueblo		New Registration 2/17/78*
Conoco	Bernabe Under-ground Mine	Laguna Pueblo		Planning Stage
	Crownpoint Underground Mine	Crownpoint Navajo Tribal		Planning Stage
	Borrego Pass Mine	Navajo Unallotted Land		Planning Stage
Exxon	400,000 acre lease for exploration	Navajo Reservation		Approved 1978
Gulf Mineral Resources	Mariano Lake Mine	Navajo Allotment		New Registration 7/27/78
Kerr-McGee	Churchrock #I Mine	9 miles NE of Churchrock Navajo Land	323	Operational

TABLE IV (cont'd)

<u>Company</u>	<u>Facility</u>	<u>Location</u>	<u>No. Employees</u>	<u>Status</u>
	Churchrock #II and Ili Mines	9 miles NE of Churchrock Navajo Land		Planning stage
Phillips	Nose Rock #1 Underground Mine	12 miles NE of Crownpoint Navajo Tribal Land		Under development shaft sinking Surface Rights - Navajo Mineral Rights - Santa Fe RR
	Nose Rock #2 Underground Mine	Near Crownpoint on State Land		Under developemnt
Pioneer Nuclear	Narrow Canyon Underground Mine	Near Crownpoint Navajo Land		Planned
United Nuclear	Northwest Churchrock Underground Mine	NE of Gallup Navajo Land	531	Operational Navajo Surface Rights Santa Fe RR Mineral Rights
	Old Churchrock Underground Mine	16 miles NE Gallup, Navajo Land		New Registration 7/14/78 Navajo Surface Rights Santa Fe RR Mineral Rights
Western Nuclear	Ruby #1 Under- ground Mine	Smith Lake Navajo Land	67	Operational Surface Rights Navajo Mineral Rights-Western Nuclear

*The state of New Mexico requires that a mine be registered when the company is ready to sink a shaft, or strip the overburden.

IMPACTS OF TRIBAL INITIATIVES

The outcome of recent legal cases could affect New Mexico's revenue. Currently, the state levies its taxes on all non-Indian energy companies active in New Mexico regardless of the location of their operations. It is the ownership of the company, not the ownership of the land, that determines state taxation practice.

As uranium production increases, New Mexico's severance tax is becoming an important revenue source. An increase in the uranium severance tax rate was instituted after lengthy debates in the 1977 New Mexico legislature. The new effective total tax rate is 4.5 percent. The former rate was 1.62 percent. As a result of this increase, from the period of June 1977 to June 30, 1978, revenue from that one tax brought in \$15,276,765.²¹ This amount was greater than had been forecast by state economists when the new rate was originally set. Uranium severance tax revenues still rank behind those of oil and gas. However, the tax rate for oil and gas is higher, and the gap will narrow as uranium production increases and production of the two fossil fuels drops.

Uranium mined on Indian land in the state comprises about 30 percent of the total production in New Mexico.²² If the state should lose the authority to tax uranium mined on Indian land, its revenues would certainly suffer. The Crow Tribe's challenge of Montana's right to collect severance taxes on coal produced on tribal lands could raise that issue. Should the

federal appellate court decide the tribe has authority to levy their own severance tax in lieu of the state's, the possibility would have to be taken seriously. In New Mexico, if the Navajo and Laguna tribes decided to pursue this course, New Mexico would lose almost one-third of its uranium severance tax income. These two tribes do not now levy their own severance taxes, so double taxation is not an issue in New Mexico as it is in Montana. This could change, or the tribes could simply oppose the state's authority to levy taxes on uranium from their land.

Another possibility that could affect New Mexico's taxation practices would be increasing Indian ownership in energy operations. Indian ownership in any extractive company might prevent leviance of the state's severance tax on that operation partially or wholly. In a 1977 New Mexico case, the court held that a non-Indian corporation in which the tribe holds an interest cannot be taxed by the state.²³ The federal court in the Montana case did not rule on whether the tribe could avoid the state tax by being its own mine operator. The Navajo-Exxon venture falls into this category. The Indian-land severance tax issue could have important repercussions for New Mexico.

Water rights are also an area of controversy between Indians and the State of New Mexico. The N.M. State Engineer has jurisdiction over all water - both surface and groundwater - within the state. However, Indians, under the Winters Doctrine, have rights to ground and surface water under and

on their lands. Industry has been caught in the middle, being placed in the position of having to decide which side to deal with. Non-Indian mineral operators apply to the State Engineer for water permits. The State Engineer will not honor applications for water rights made to the Indians and the Indians have filed water rights impairment protests against applications made to the State Engineer.

The Navajo Tribe is currently challenging the state's control over groundwater near the reservation. Public Service Company of New Mexico (PNM) has applied to the State Engineer for a water appropriation from the San Juan Basin as a back-up supply source for the New Mexico Generating Station. The Navajo Tribe has protested PNM's application on the grounds that it would interfere with their groundwater supply on the reservation. The decision on this protest could set an important precedent for Indian water rights cases. The Winters Doctrine could possibly be used in a court challenge of off-reservation groundwater use interfering with reservation water supplies.²⁴

The regulation of mine dewatering and the use of discharged mine water has become an important resource use issue in New Mexico. The uranium companies in the northwestern corner of the state are discharging large quantities of water that they pump from their mines in order to gain access to the ore. Legislation has been proposed in both the 33rd and 34th Legislatures that would regulate mine water. Under these regulations, the uranium companies would have to show that they were not impairing anyone else's water rights before they

could dewater. This would shift the burden of proof from other water users to the mining companies. The water would also have to be put to a beneficial use, and the laws are ambiguous on whether or not pumping water to gain access to uranium ore is a beneficial use. On this point, industry argues that mine dewatering does not give them rights to the water, and therefore they should not have to claim a beneficial use for it. However, in anticipation of regulation, the uranium companies have applied for rights to over 113,000 acre feet per year. Although no law has been adopted yet, the Legislature has recognized the need to resolve the problem. The affected Indian tribes believe that regulation is needed, but argue that the State should have no jurisdiction; they have therefore opposed the legislation considered. They have also protested over 100,000 acre feet of the water rights applications. In August 1979 the Navajo Tribal Chairman announced a moratorium on all new uranium development on the reservation, citing water contamination and mine dewatering as the bases for the decision.

One of the uses that has been proposed for mine water is power plant cooling. PNM has also negotiated with Phillips Uranium Company to use the water from a Phillips mine for their proposed New Mexico Generating Station. Phillips has prior rights to 2,500 acre feet per annum from the San Juan Basin for the purpose of exploration and mineral resource development. In December 1976, Phillips requested an additional appropriation of 50,000 acre feet per annum from underground mines and deep artesian wells to be diverted and consumed for mineral exploration, shaft

sinking, project construction, mining, milling, other industrial uses, agricultural use, land reclamation and domestic uses.

In February 1979, the State Engineer advised Phillips that their request had been denied for the reason that the proposed appropriation would "impair existing rights," primarily those of the Navajo Community of Crownpoint. This action did not affect Phillips plans to dewater -- it affected only the diversion and consumption of the water. This is because the state has not established jurisdiction over dewatering.

The water table at Crownpoint will drop 1000 feet within the next 20 years from mine dewatering, according to the U. S. Geological Survey; impacts of the pumping on ground and surface water levels may continue to be seen for as long as 200 years after pumping stops.²⁵ In late April 1979, a conference of mining companies, federal agencies and the Navajo Tribe convened to discuss the issue of Crownpoint's water supply. The Navajo position was that the companies should compensate the tribe for all water used or wasted during mining operations and for any residual impact of aquifer depletion. The BIA position required assurance of an adequate and permanent water supply of equal quality to the current supply. Five energy companies agreed in principal to investigate supplementing the water supply. Phillips Uranium Company agreed to negotiate an agreement to assure an adequate potable water supply to Crownpoint, if all water rights which provide water for Crownpoint are waived.²⁶ In October, 1979, Phillips' request was granted, but limited to 32,250 acre-feet per year. The State

Engineer also stipulated that if the water table in the Crownpoint area drops 400 feet, the firm's water rights will be terminated prior to the end of the 32.5-year period for which it was granted. Phillips has appealed the decision.

V. CONCLUSIONS

Although nearly one-third of uranium production in New Mexico is taking place on Indian lands, the state has virtually no jurisdiction over the resulting impacts. The state does tax Indian uranium extraction, but impending judicial decisions in other states could ultimately limit its authority. Other Indian initiatives to regulate and tax development could strongly impact the industry as well as the state. In turn, state decisions regulating the industry's use of water could adversely impact Indian water resources.

There are many current court cases filed by or against Indian tribes throughout the nation which may set precedents that would change the manner in which the industry may operate. Some cases may restrict the authority of the states to regulate resource use or to tax mineral extraction. The Department of Energy should endeavor to determine the implications of these cases for uranium production. This issue paper presents an overview of some of the issues and cases. A comprehensive review and analysis of current litigation related to Indian sovereignty, resource use and control, taxation powers, and environmental jurisdiction should be undertaken. In addition, the DOE should maintain continual awareness of initiatives taken by individual energy resource tribes, CERT, or other Indian organizations in order to assess the influence of Indian self-government on energy production goals.

APPENDIX

The Department of Interior has initiated a study of uranium development in the San Juan Basin. Background information on the study is included here. Part of the study involves researching development activities and impacts on Indian land. The San Juan Basin occupies most of the northwest quadrant of New Mexico, and contains almost all of New Mexico's known uranium resources. It contains the New Mexico portion of the Navajo Reservation, Navajo allotted lands, and fee lands, as well as lands belonging to other Indian tribes.

SAN JUAN BASIN REGIONAL URANIUM STUDY (SJBRUS) BACKGROUND INFORMATION²⁷

The SJBRUS, an information gathering effort by the Department of Interior, analyzed the effects of all future uranium development in the San Juan Basin and Grants Mineral Belt. The study has focused on the impacts of uranium development activity (exploration, mining, milling, construction and reclamation) on the natural and human environment over a time frame from the present to the turn of the century.

The Study addressed the need perceived by Interior Department to understand the cumulative effects of possible large scale uranium development activity for the preparation of future site specific environmental impact statements. All development activity on state, federal, tribal and private lands was considered.

The study area is defined geologically by the Jurassic outcrop of the Morrison formation. This area encompasses southern Colorado, the southeast corner of Utah, and the northwest quadrant of New Mexico. Within this area, the team focused on the sub-regions that hold the most potential for large scale uranium development.

The study task force was composed of natural and social scientists, private consultants and employees of the Bureau of Indian Affairs, U. S. Geological Survey, Bureau of Mines, Mining Engineering and Safety Administration, Bureau of Land Management, Fish and Wildlife Service, National Park Service, and Bureau of Outdoor Recreation. The Bureau of Indian Affairs was the lead agency because of its trust responsibilities for Indian lands.

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