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EIS FOR URANIUM MINING OPERATION ON INDIAN LANDS RULED ADEQUATE

ENVIRONMENTAL LAW: EIS for uranium exploration and mining lease on Indian land found to be adequate if it acknowledges possible detrimental effects, although no method or plan to control such effects is discussed. Tribe is a necessary but not indispensable party to such suit. *Manygoats v. Kleppe,* 558 F.2d 556 (10th Cir. 1977).

In January 1974 the Navajo Tribal Council approved an Agreement to grant Exxon Corp. the right to explore for and mine uranium on tribal lands. Under the terms of 25 U.S.C. § § 396(a) and 415, the Secretary of the Interior must approve any such agreement. Specifically, § 396(a) provides that unalloted lands "within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction . . . may with the approval of the Secretary of the Interior, be leased for mining purposes, by the authority of the tribal council." Section 415 provides that "any restricted Indian lands . . . may be leased by the Indian owners, with the approval of the Secretary of the Interior . . . for the development or utilization of natural resources in connection with operations under such leases" and that prior to the approval of any lease the Secretary of the Interior "shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands . . . and the effect on the environment of the uses to which the leased lands will be subject."

In addition, the Secretary is to consider an Environmental Impact Statement (EIS), as mandated by the National Environmental Policy Act (NEPA).[1] The requirement for an EIS was recognized in the earlier case of *Davis v. Morton,*[2] where it was held that the leasing of Indian lands constituted "major Federal action" under NEPA.[3]

The EIS for the Navajo-Exxon Agreement was prepared by the

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1. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(c) (1970) [hereinafter cited as NEPA].

2. 469 F.2d 593 (1972).

3. In an action against the United States for failure of the government to follow NEPA before approving a 99-year lease on an Indian reservation, the court held that the granting of such a lease constituted "major federal action" within NEPA and thus an EIS must be filed. *Id.* at 597.

BIA, and after considering it along with the pertinent regulations, Rogers C. B. Morton, then Secretary of the Interior, approved the agreement.

The lawsuit arose when 17 individuals of the Navajo Tribe sought to enjoin performance of the agreement, alleging that the EIS was inadequate. Plaintiffs were denied a preliminary injunction and the action was dismissed for nonjoinder of an indispensable party, namely the Navajo Tribe.[4] Plaintiffs appealed both the denial of the injunction and the dismissal for failure to join the tribe.

NONJOINDER OF INDISPENSABLE PARTY

The first issue considered on appeal was whether any action could be maintained without the presence of the Tribe. Attorneys for the Interior Department and Exxon argued that because the Navajo Tribe is not amenable to suit without consent, it may not be made an involuntary party to the action. The Court of Appeals agreed, citing *Cherokee Nation v. Oklahoma.*[5] However, the court felt that the more basic question was whether or not the Tribe was in fact a necessary or indispensable party as defined in Rule 19(a)(2)(i) and (b) of the Federal Rules of Civil Procedure.[6]

Plaintiffs argued that Rule 19 requirements were not determinative, citing *Heckman v. U.S.*[7] In that case the United States Attorney General, seeking to cancel conveyances of lands made by members of the Cherokee Nation, did not make the Indian grantors parties to the suit. The *Heckman* court decided that the grantors were not necessary parties, stating that there could be no more complete representation than when the United States acted on behalf of its dependents.

Declining to follow *Heckman,* the court found that financial and other benefits to the Navajo Tribe under the agreement gave the Tribe sufficient interest, independent of that of the United States, to meet the requirement of a necessary party under Rule 19(a)(2)(i).[8] They found that the duties and responsibilities of the Secretary may conflict with the interests of the Tribe, and citing *New Mexico v. Aamodt*[9] found that when there is a conflict of interests, the representation of the Indians by the United States is not adequate.

4. 558 F.2d 556, at 557.
5. 461 F.2d 674 (1972).
6. 28 U.S.C. app. (1970). The court must consider whether an absent party claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest.
7. 224 U.S. 413 (1912).
8. *Supra* note 4, at 558.
9. 537 F.2d 1102 (1976).

Having found the Tribe to be a necessary party under Rule 19(a), the court then considered whether the Tribe was an indispensable party under Rule 19(b).[10] Rule 19(b) outlines factors which must be considered in determining whether the trial court should dismiss for nonjoinder undispensability.[11]

The court relied chiefly on *Tewa Tesuque v. Morton.*[12] This 1974 class action was brought by members of the Tewa Indian Tribe seeking damages and cancellation of a 99-year lease between the Tribe and developers. In affirming the trial court's dismissal of the action on the ground that the Tribe was an indispensable party, the Court of Appeals stated:

> The Tewa's contention that the Pueblo is not an indispensable party is erroneous. An indispensable party is one whose interest will be affected by the judgment. As lessor of the lease agreement entered into with Sangre [developers], the Pueblo will certainly be affected if the lease is cancelled. Therefore, it is an indispensable party. Further, the Pueblo may not be joined without its consent or the consent of Congress in light of its quasi-sovereign status.[13]

The court distinguished the facts before them from *Tewa Tesuque.* There the plaintiffs had attacked the lease and sought cancellation of it, whereas here the relief sought was based on the inadequate EIS. A holding that the EIS was inadequate would not necessarily result in prejudice to the Tribe, and the only result would be a new EIS. The requested relief did not call for any action by or against the Tribe, and there were no tribal remedies or procedures available to plaintiffs for attack on a Federal EIS. In addition, the court found that dismissal for nonjoinder of an indispensable party in the present action would produce a situation whereby no party except the Tribe could seek review of environmental impact statements on Indian lands. Avoiding this result, they found the Tribe not to be indispensable.

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10. 19(b) states that: "if a person as described in subdivision (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should be dismissed, the absent party being thus regarded as indispensable." 28 U.S.C. app. Rule 19(b) (1970).

11. These factors are:
    1) The extent to which a judgment rendered in the party's absence might be prejudicial to him or those already parties.
    2) The extent to which, by protective provisions in the judgment the prejudice can be lessened or avoided.
    3) Whether a judgment rendered in the person's absence will be adequate.
    4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

12. *Id.* 498 F.2d 240 (1974).

13. *Id.* at 242.

ADEQUACY OF EIS

The court next reviewed the denial of the preliminary injunction, which sought to halt performance of the lease agreement because of the alleged inadequacy of the EIS. In doing so it looked first to the terms of the agreement for which the EIS was written. It was pointed out that the agreement provides for compliance with government regulations requiring the filing of further mining and exploration plans.[14] The agreement also provides that should Exxon elect to make the lease effective it must take whatever action may become necessary to protect the public health and environment and to meet the requirements of federal and state air and water pollution controls.[15] Operations may be suspended or restricted if they threaten damage to the environment.[16] The court used the existence of these regulations to emphasize the many methods that are available for protecting the public health and environment aside from those of NEPA.[17] In finding the Exxon EIS sufficient, the court relied on *National Helium Corp. v. Morton,*[18] where it was held that an EIS is not judicially reviewable on its merits. The *National Helium* court limited the extent of review of an EIS 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.[19]

The court in the instant case also declared that the "rule of reason," as defined in *Sierra Club v. Stamm,*[20] must be applied in a judicial testing.

14. *See* 25 C.F.R. § 177.6 (1977) and 30 C.F.R. § 231.10(a) & (b) (1977).
15. *See* 30 C.F.R. § § 231.4 and 231.73 (1977).
16. *See* 30 C.F.R. § 231.73(c) (1977) and 25 C.F.R. § 177.4(d) (1977).
17. NEPA states that any EIS must consider:
   (i) the environmental impact of the proposed action,
   (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
   (iii) alternatives to the proposed action,
   (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
   (v) any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.

NEPA, *supra* note 1.

18. 486 F.2d 995 (1973).
19. *Id.* at 1002-03.
20. 507 F.2d 788, 793 (1974): "[J]udicial review of an impact statement is limited to a determination of whether the statement is a 'good faith, objective, and reasonable' presenta-

Having said this, the court briefly considered plaintiffs' objections to the EIS. They dismissed several objections by stating that even when plaintiffs have contradicting scientific evidence, the court will not allow a battle of experts, and will instead follow the opinion of the government's experts. In dismissing another objection relating to surface mining, the court stated, "It is enough that the EIS covers the problems related to surface mining and the Secretary was advised of them. . . ."[21] Similarly, concerning the emission of the inert radioactive gas, radon, the court said that the recognition of the problem in the EIS was sufficient. Finally, answering plaintiffs' contention that the EIS does not adequately discuss the cumulative effect of the project, the court stated, "It is enough that the EIS mentions and discusses foreseeable problems."[22] The result of all this is a finding that the EIS is a "comprehensive, good faith, objective and reasonable presentation" of the areas required by NEPA.

The decision of this case may be useful in allowing members of an Indian Tribe into court to contest an EIS, but it has no effect on *Tewa Tesuque* in that tribal members cannot have an agreement itself invalidated without joinder of the Tribe. And simply being able to get into court will do little good, for the holding encourages a lenient standard of judicial review to be used for an EIS, although technically the decision relates only to the denial of a preliminary injunction and not to the final substantive validity of the EIS.

Not only did the court allow the EIS to make a mere mention of problems and to use contradicted expert opinion, but it also improperly considered regulations as a means of justifying the project. The EIS and other factors the Secretary is to consider are the only criteria that should be used to allow a project to commence. The regulations concerning mining should be considered only after approval of the project and should not be considered with the EIS. The EIS must be able to stand alone.

Because the court refuses to "second-guess" the experts who write environmental statements and because they consider mining regulations at an inappropriate point, the question becomes whether the courts are even the proper forum in which to decide if an EIS is adequate.

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tion of the subject areas mandated by NEPA . . . in thus testing the sufficiency of a final environmental statement, the courts should not engage in 'second guessing' the experts who have prepared the statement."

21. *Supra* note 4, at 560.
22. *Id.* at 561.